Volume I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 439

UNITED STATES, APPELLANT,

vs.

THE BORDEN COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED SEPTEMBER 22, 1961
PROBABLE JURISDICTION NOTED DECEMBER 4, 1961

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IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 947

Equitable Relief Sought

UNITED STATES OF AMERICA, Plaintiff,

v.

THE BORDEN COMPANY; BOWMAN DAIRY COMPANY; AMERICAN PROCESSING AND SALES COMPANY; BELMONT DAIRY COMPANY; BELOIT DAIRY COMPANY; CAPITAL DAIRY COMPANY; HUNDING DAIRY COMPANY; MEADOWMOOR DAIRIES, INC.; RIDGEVIEW FARMS DAIRY, INC.; WESTERN UNITED DAIRY CO., Defendants

COMPLAINT—Filed June 18, 1951

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled, "An Act To supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, against the defendants named herein in order to prevent and restrain continuing violations by them of Sections 1 and 2 of the Sherman Act and of Section 2(a) of the Clayton Act as amended.

[fol. 3] 2. All defendants transact business within the

Eastern Division of the Northern District of Illinois and are found therein.

II

Description of Defendants

3. The following corporations are hereby named defendants herein. Each is engaged in the business of purchasing, pro... distributing, and selling fluid milk to wholesale customers and other purchasers in the Chicago area and its vicinity.

(a) The Borden Company is a corporation organized and existing under the laws of the State of New Jersey, with offices and principal place of business in New York, New York. It is hereinafter referred to as "Borden."

(b) Bowman Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Bowman."

(c) Belmont Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago. It is a wholly owned subsidiary of Borden. It is hereinafter referred to as "Belmont."

(d) Ridgeview Farms Dairy, Inc. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is a wholly owned subsidiary of Bowman. It is hereinafter referred to as "Ridgeview."

[fol. 4] (e) Beloit Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Beloit."

(f) Capitol Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Capitol."

(g) American Processing and Sales Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. Its name, prior to some time in 1943, was Hawthorn-Mellody Farms Dairy, Inc. It is hereinafter referred to as "Hawthorn."

(h) Hunding Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Hunding."

(i) Meadowmoor Dairies, Inc. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Meadowmoor."

(j) Western United Dairy Co. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Western United."

[fol. 5] 4. Wherever in this complaint it is alleged that any corporate defendant did any act or thing, such allegation shall be deemed to mean that such act was performed by the officers, agents, or employees of said corporate defendant.

III

Definitions

5. As used in this complaint, the term "fluid milk" means cow's milk sold in fresh fluid form, whether as milk or as cream, or intermixtures thereof.

6. As used in this complaint, the term "distributor" means a person, firm, corporation, or cooperative engaged in the business of purchasing, pasteurizing, processing, bottling, and selling fluid milk.

7. As used in this complaint, the term "vendor" means a person, firm, or corporation engaged in the business of buying fluid milk from a distributor for resale to wholesale customers or others.

8. As used herein, the term "wholesale customers" means those customers for fluid milk who buy from a distributor or from a vendor for resale to consumers.

9. As used herein, the term "store wholesale customer" means a customer for fluid milk who buys from a distributor or from a vendor for resale to consumers for consumption off the premises of the store wholesale customer.

10. As used herein, the term "public institutions" means the following federal, county, and municipal institutions within the Chicago area and its vicinity.

Federal Institutions

The United States Marine Hospital, Chicago, Illinois;

The United States Veterans Administration Hospital, Hines, Illinois;

[fol. 6] The United States Navy installations at Great Lakes, Illinois and at Navy Pier, Chicago, Illinois, and at Navy Reserve Armory, Chicago, Illinois;

The United States Army installations at Fort Sheridan, Illinois, and at Vaughan General Hospital, Hines, Illinois, and the United States Army, Quartermaster Market Center, Chicago, Illinois;

County Institutions

The Cook County Jail, The Cook County Juvenile Detention Home, and The Cook County Hospital, all of Chicago, Illinois;

The Cook County Oak Forest Infirmary, Blue Island, Illinois;

Municipal Institutions

The Municipal Tuberculosis Sanitarium, Chicago, Illinois

11. As used in this complaint, the words "Chicago area" mean the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

IV

Nature of Trade and Commerce and the position of the Defendants in the Industry

12. The Chicago area has a population of over 4,000,000 persons and is one of the largest milk consuming markets in the United States. Thus, in 1950, over a half billion quarts of fluid milk were distributed and sold in the Chicago area, with approximately 60 per cent of such fluid milk having been produced in the States of Wisconsin, Indiana, and Michigan, and the remainder being produced in Illinois.

13. The defendants ship into the Chicago area or purchase from others substantial quantities of fluid milk produced by dairy farmers located in Wisconsin, Michigan, and Indiana. This milk, in the course of a continuous flow [fol. 7] of interstate trade and commerce, passes through the bottling and pasteurizing plants of the defendants, is commingled with milk produced in Illinois, and is sold by the defendants to wholesale customers, public institutions, and others in the Chicago area. Approximately 60 per cent of the commingled fluid milk thus sold by the defendants come from dairy farmers located in States other than Illinois.

14. Fluid milk is by its nature perishable. It cannot be stored and must reach the consumer within a short time after production. Sales to consumers within the city of Chicago are required, by city ordinances, to be made within a limited number of hours after the milk is delivered by a dairy farmer to a receiving station. The purchase and receipt of said fluid milk in states other than Illinois, its transportation into the State of Illinois, its pasteurizing, processing, and bottling, and its sale and distribution to wholesale customers and public institutions in the Chicago area and its vicinity by distributors, including defendant distributors, has constituted, and does constitute, interstate trade and commerce in fluid milk between states other than Illinois and the State of Illinois.

15. Total wholesale and retail sales of fluid milk in the Chicago area in 1950 by all distributors were in excess of 148 million dollars. The defendants sold approximately 65 per cent of this total.

16. Total sales of fluid milk in 1950 by all distributors to wholesale customers and public institutions in the Chicago area were in excess of 80 million dollars, of which the defendant distributors sold in excess of 80 per cent of the total.

17. The dominant distributors of fluid milk to wholesale customers and public institutions in the Chicago area are defendants Bowman and Borden. The combined sales of Bowman, Borden, and their respective wholly owned subsidiaries, Ridgeview and Belmont, to said wholesale cus-
[fol. 8] tomers and public institutions amounted to more than 50 million dollars, or approximately 60 per cent of the total of such sales by all distributors in the Chicago area.

18. In 1950 Bowman had sales to wholesale customers and public institutions in the Chicago area of approximately 30 million dollars of fluid milk. In addition, Bowman's wholly-owned subsidiary Ridgeview had sales of fluid milk in 1950 of approximately $1,900,000, of which almost all were to wholesale customers. The combined sales of Bowman and Ridgeview to wholesale customers and public institution in 1950 amounted to approximately 38 per cent of the total of such sales by all distributors in the Chicago area.

19. In 1950 Borden had sales to wholesale customers and public institutions in the Chicago area of approximately 17 million dollars of fluid milk. In addition, Borden's wholly-owned subsidiary Belmont had sales in 1950 of fluid milk of approximately 900 thousand dollars, of which almost all were to wholesale customers. The combined sales of fluid milk by Borden and Belmont to wholesale customers and public institutions in 1950 amounted to approximately 22 per cent of the total of all such sales by all distributors in the Chicago area.

20. Defendants Beloit, Capitol, Hawthorn, Hunding, Meadowmoor, and Western United had combined sales to wholesale customers and public institutions in the Chicago area of approximately 18 million dollars in 1950, which amounted to approximately 23 per cent of the total of such sales by all distributors. The largest of the aforesaid defendants had sales to wholesale customers and public institutions in the Chicago area not in excess of 6 per cent of the total of such sales by all distributors.

21. There are, in addition to the ten defendants, approximately thirty other milk distributors in the Chicago [fol. 9] area whose combined sales of fluid milk to wholesale customers and public institutions were not in excess of 20 per cent of the total of such sales by all distributors. The largest of such non-defendant distributors had sales to wholesale customers not in excess of 5 per cent of the total of such sales by all distributors.

22. A significant factor in the growth of Bowman and Borden to their present dominant position in the distribution and sale of fluid milk in the Chicago area has been the policies followed by both companies in purchasing and absorbing the businesses and customer outlets of competitive distributors. During the period from January 1, 1928 to January 1, 1940, Bowman and Borden acquired by purchase approximately 44 distributors of fluid milk who had previously sold in competition with Bowman and Borden in the Chicago area.

23. Bowman acquired, during the 1928 to 1940 period, the following competing distributors for which it paid, in aggregate, approximately $5,400,000:

Date of Acquisition	Name of Distributor
January 4, 1928	Bolas Condensed Milk Co.
February 3, 1928	Ira J. Mix Dairy Co.
March 30, 1928	Frank P. Merkle Dairy Co.
February 28, 1929	Murphy-Ward Dairy Co.
June 30, 1929	Forest Glen National Milk Co.
July 2, 1929	A. Johnson & Co.
July 2, 1929	John Wenzel
July 8, 1929	George T. Sampson
July 31, 1929	Eich Dairy Co.
October 1, 1930	Herbert Oehlerking
October 13, 1935	Yore Bros. Dairy Co.
February 2, 1936	Averill Milk Products Co.
[fol. 10] June 19, 1936	Maple Brook Farms
May 1, 1937	Mohawk Dairy Co.
February 11, 1938	Natoma Farm
November 1, 1939	Ratcliffe Bros. Creamery Co.

24. During the same 1928 to 1940 period, Borden acquired the following competing distributors for which it paid, in aggregate, approximately $20,000,000, in cash or stock (market value) of Borden, or both:

Date of Acquisition	Name of Distributor
1928	Koenig Dairy Co., Inc.
1928	J. M. Barron & Sons
1928	Wieland Dairy Co.
1928	A. J. Olson Co.
1928	Christiansen Bros. Dairy Co.
1928	Greenview Farm Dairy Co.
1928	J. D. Broxham Dairy Co.
1928	Clover Leaf Milk Co.
1929	Des Plaines Dairy Co.
1929	Galloway West Co.
1929	Hammond Dairy Co.
1929	Central Dairy Products Co.
1929	Arlington Heights Dairy Co.
1929	Borgen's Dairy Co.
1929	Irving Park Dairy Co.
1929	Logan Square Dairy Co.
1929	Rascher Dairy Co.
1929	Benson Dairy Co.
1929	C. Carlsen Dairy Co.
1929	Hohefelder Dairy Co.
[fol. 11] 1929	Winnetka Sanitary Dairy Co.
1930	Curran & Fox Dairy Co.
1930	Begel Bros. Dairy Co.
1930	Rabe Dairy, Inc.
1931	Marley Dairy, Inc.
1932	Crown Dairy Products Co.
1936	Swiss Dairy Co.
1937	Park Manor Milk Products Co.

25. As hereinafter more fully alleged in paragraphs 35 through 40, Bowman and Borden, during the period from January 1, 1940 to the date of the filing of this complaint, have continued to acquire the businesses and customer out-

lets of distributors who previously sold fluid milk in competition with Bowman and Borden.

V

Offenses Charged

A. Violations of Sections 1 and 2 of the Sherman Act

26. From about 1940 and continuing to the date of the filing of this complaint, the defendants have been and are now engaged in a combination and conspiracy to restrain and to monopolize, and have monopolized, the aforesaid interstate trade and commerce in the sale of fluid milk to wholesale customers and public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.

27. The aforesaid combination and conspiracy has consisted of a continuing understanding and concert of action among the defendants, the substantial terms of which have been:

(a) That each defendant refrain from competing for the fluid milk business of the wholesale customers of another defendant;

[fol. 12] (b) That each defendant offer inducements such as discriminatory prices, rebates, discounts, lump sum cash payments, interest-free loans, or the furnishing of store equipment or other gratuities to wholesale customers of non-defendant distributors of fluid milk to cause said customers to discontinue their purchases of fluid milk from said non-defendant distributors and to purchase fluid milk from the defendant offering such inducement;

(c) That each defendant induce its store wholesale customers to agree to maintain the retail prices "suggested" by the defendants;

(d) That the defendants Bowman and Borden maintain and enhance their dominant market position by acquiring the businesses, including customer outlets, of competing distributors;

(e) That defendants Bowman and Borden organize and operate "fighting companies" in order to suppress and destroy the competition of non-defendant distributors;

(f) That the defendants collusively allocate and share among themselves the business of selling fluid milk to public institutions;

(g) That the defendants agree upon, fix, and maintain prices for the sale of fluid milk to public institutions by submitting prearranged, bogus, and collusive bids for the sale of fluid milk to such institutions.

28. During the period of time covered by this complaint and for the purpose of monopolizing and of forming and [fol. 13] executing the aforesaid combination and conspiracy to restrain and monopolize the said interstate trade and commerce, the defendants, by common understanding and concert of action, have done, among others, the following acts and things:

Allocation of Wholesale Customers

29. During the period of time covered by this conspiracy, defendants Bowman, Borden, Ridgeview, Belmont, Beloit, Capitol, Hunding, Meadowmoor, and Western United have, by agreement and understanding among themselves, refrained from competing for the fluid milk business of each other's wholesale customers. During 1940 and 1941, Hawthorn was not a party to such agreement and understanding but engaged in active solicitation of the fluid milk business of the wholesale customers served by the other defendant distributors. Bowman, Ridgeview, and others of the defendants retaliated against Hawthorn by a concentrated and selective solicitation aimed at the wholesale customers served by Hawthorn and offered such customers fluid milk at preferential and "cut" prices. As a result of such "price war," Hawthorn's fluid milk business was rendered unprofitable and Hawthorn was forced to enter into negotiations with Bowman and the other defendants to obtain a termination of hostilities. Such negotiations resulted in Hawthorn's becoming a participant in the combination and

conspiracy. Hawthorn agreed to refrain from attempting to secure the fluid milk business of wholesale customers served by one or more of the defendant distributors, and in return, the other defendants agreed to refrain from attempting to secure the fluid milk business of wholesale customers served by Hawthorn.

"Stop Buying"

30. The defendants have concertedly engaged in the practice known in the industry of "stop buying." In doing this, the defendants, by agreement and understanding among themselves, have solicited the fluid milk business [fol. 14] of wholesale customers of non-defendant distributors with offers of various secret inducements involving discriminatory prices, rebates, discounts, interest-free loans, free store equipment, and substantial lump sum cash payments and other gratuities. These discriminatory and preferential inducements have been given on the condition that the wholesale customer agree to purchase his requirements of fluid milk exclusively from the defendant offering the inducement and refrain from purchasing fluid milk from any distributor other than said defendant and, in respect to store wholesale customers, on the further understanding that the store wholesale customer agree not to reduce his prices to consumers below those store prices which all of the defendants "suggest" to their store wholesale customers. The defendants have policed the operations of their store wholesale customers to detect any sales of milk to consumers at prices below those suggested by the defendants.

31. A variation of the stop buying practice exists with reference to so-called "split stops," i.e., those wholesale customers who follow the practice of purchasing their fluid milk requirements from more than one distributor. Where one of the distributors is a defendant and the other is a non-defendant, other defendants have limited their stop buying activities to that portion of the business handled by the non-defendant and have not attempted to secure the remaining portion of the business handled by a defendant.

32. The defendants Bowman and Borden have utilized

secret codes to record the lump sum cash payments made in connection with their stop buying activities and have systematically destroyed other records which would disclose the identities of wholesale customers receiving cash payments and the amounts paid to such customers.

33. The defendants have implemented their understanding not to compete for each other's wholesale customers by adoption of rules, instructions, and practices governing solicitation of wholesale customers by defendants' respective contact men or solicitors. Defendants have instructed [fol. 15] and ordered their respective solicitors not to solicit the wholesale customers of another defendant. In respect to store wholesale customers, defendants have instructed their respective solicitors that when such a customer of one of the defendants has ceased doing business and has reopened within 30 days under either new or old management and the store fixtures have not been removed from the premises, none of the defendants, except the defendant previously selling the customer, may attempt to secure the patronage of said customer. Pursuant to the aforementioned instructions, solicitors of the defendants have refrained from soliciting wholesale customers of another defendant and have declined to serve such customers, inventing various fictitious and untrue excuses for declining such business.

34. Defendants have arranged a system of trading the business of dissatisfied wholesale customers where the defendant formerly supplying such customer has been unable to retain the customer's patronage. Such trading has been arranged by the defendants to prevent such customers from giving their patronage to non-defendant distributors.

Bowman and Borden Acquisitions

35. As part of the conspiracy to allocate among themselves wholesale milk customers in the Chicago area, the defendants have recognized each defendant's right to acquire and retain the exclusive patronage of the customers of a distributor whose business has been purchased by one of the defendants.

36. Assisted by this understanding, Bowman has acquired, since January 1, 1940, by purchase, the business,

physical assets, and customer outlets of the following competing distributors operating in the Chicago area and its vicinity:

Date of Acquisition	Name of Distributor
July 10, 1940	Honey Hill Creamery Co. (retail business only)
October 13, 1941	Westbrook Farms Dairy, Inc.
April 1, 1942	Austin Dairy
[fol. 16] July 1, 1942	Harding Bros. and Williams
December 27, 1942	Sefcik Dairy Co.
June, 7, 1943	Royal Dairy Company
June 10, 1943	Wencel's Dairy Products
October 1, 1943	Clearing Dairy Company
December 23, 1943	Reiter Dairy
June 30, 1944	Nieman Dairy
July 19, 1944	Lemont Dairy
December 28, 1945	Algrim Dairy
June 1, 1946	Round Lake Creamery Co.
June 30, 1946	Voss Dairy Co.
December 8, 1946	Capitol Dairy Company (retail business only)
January 3, 1947	M. G. Rudzinski

37. Assisted by the aforesaid understanding, Borden has acquired, since January 1, 1940, by purchase, the business, physical assets, and customer outlets of the following competing distributors operating in the Chicago area and its vicinity:

Date of Acquisition	Name of Distributor
April 20, 1940	Belmont Farm Products, Inc.
September 25, 1940	C. W. Spivey
June 14, 1941	Sunderman Farm & Dairy Products, Inc.
1942	Modern Dairy
March 16, 1943	La Grange Dairy
August 1, 1943	Mandel Bros. Dairy
August 15, 1943	Cornell Dairy
December 28, 1943	Marquette Dairy Company, Inc.

Date of Acquisition	Name of Distributor
December 30, 1943	Pure Dairy Products Company
February 1, 1944	P. F. Demarais Dairy
February 16, 1944	A. Demarais & Son
October 27, 1944	Brucer Dairy
February 1, 1945	Snow White Dairy Company
[fol. 17] December 1, 1945	City Sanitary Milk Company
March 1, 1946	Forest Glen Dairy Company
April 16, 1947	Devine's Dairy

38. In a number of the said acquisitions, the defendant acquiring the distributor, by the contract of purchase, has conditioned payment for the business and assets of said distributor upon the retention by the defendant of the existing volume of milk sales of the purchased distributor. The purposes of defendants Bowman and Borden in making such acquisitions were, in many instances, to obtain the seller's share of the Chicago area fluid milk market and to eliminate distributors whose price cutting policies threatened the defendants' scheme of customer allocation and price stabilization. The purchase price paid by either defendant Bowman or defendant Borden in the acquisition of a distributor was, in many cases, influenced by the extent to which the distributor offered price competition or threatened the defendants' customer allocations.

39. In making acquisitions of distributors, defendants Bowman and Borden regularly have required the seller to execute a covenant not to engage in the fluid milk business in competition with the defendant purchaser. In addition, for the purpose of assuring the transfer and retention of the customers formerly served by the acquired distributor, defendants Bowman and Borden, in a number of instances, have provided in the terms of purchase for the employment by the purchaser of the manager or owner of the seller.

40. A number of the distributors so acquired by defendants Bowman and Borden were companies whose customers were principally vendors. In such acquisitions, the other defendants recognized the right of the defendant purchaser to supply exclusively such vendors.

The Operation of "Fighting" Companies

41. Bowman and Borden have each organized and operated a "fighting company" in order to suppress and destroy the competition of non-defendant distributors.

[fol. 18] 42. In or about November 1939, Bowman purchased the business of a distributor known as Ratcliffe Bros. Creamery Co. and in February or March 1940 transferred the assets of said company to its newly organized subsidiary, defendant Ridgeview Farms Dairy, Inc. Bowman concealed its ownership of Ridgeview from other milk distributors with the exception of other defendant distributors who were given assurances that Ridgeview would not be permitted to compete with them. Pursuant to the directions of Bowman, Ridgeview has embarked on predatory price cutting and stop buying for the purpose of injuring or destroying non-defendant distributors who sold fluid milk at reduced prices in multi-quart containers or who solicited the patronage of Bowman customers.

43. Borden organized, in or about April 1940, its wholly-owned subsidiary, defendant Belmont Dairy Company. Borden concealed its ownership of Belmont from other milk distributors with the exception of other defendant distributors who were given assurances that Belmont would not be permitted to compete with them. Pursuant to the directions of Borden, Belmont has embarked on predatory price cutting and stop buying for the purpose of injuring or destroying independent distributors who sold fluid milk at reduced prices in multi-quart containers or who solicited the patronage of Borden customers.

Collusive Bids to Public Institutions

44. The defendants have allocated or attempted to allocate among themselves the sales of fluid milk to public institutions in the Chicago area and its vicinity by means of a scheme involving the use of prearranged, bogus and collusive bids. The defendants have submitted such bids in making sales of fluid milk to the following institutions: Chicago Municipal Tuberculosis Sanitarium, the Cook County Jail, the Cook County Juvenile Detention Home, and the Cook County Hospital, all in Chicago, Illinois, to the Cook County Oak Forest Infirmary, Blue Island,

[fol. 19] Illinois, to the United States Marine Hospital, Chicago, Illinois, to the United States Veterans Administration Hospital, Hines, Illinois, to the United States Navy for delivery to the Naval Hospital, Great Lakes, Illinois, for delivery at the Naval Training Station, Great Lakes, Illinois, for delivery at the Naval Training School, Navy Pier, Chicago, Illinois (until the closing of that installation in 1946), and for delivery at Navy Training School, Naval Reserve Armory, Chicago, Illinois, and to the United States Army for delivery at Ft. Sheridan, Ft. Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois (prior to the time such hospital was merged with the United States Veterans Administration Hospital at Hines, Illinois), and to the United States Army for delivery during the years 1943 and 1944 to various Army and Navy Camps and installations located in the Southern section of the United States whose purchases of fluid milk were made through the United States Army, Quartermaster Market Center, Chicago, Illinois.

Reprisals

45. In order to discourage and prevent other distributors of fluid milk from disrupting the prearranged allocation of the aforementioned institutional business, the defendants have threatened reprisals and have engaged in reprisals against distributors who have submitted bids to one or more of the above-mentioned public institutions. Such reprisals have usually taken the form of an intensified stop buying program directed at the wholesale customers of the interloping distributors.

B. Violations of Section 2(a) of the Clayton Act as Amended

46. Beginning in or about January 1941, and continuing up to the date of the filing of this complaint, each of the defendants has sold and is continuing to sell for resale fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality, and the effect of such discrimination [fol. 20] may have been and may continue to be to substantially lessen competition or tend to create a monopoly

in the sale of fluid milk to wholesale purchasers in the Chicago area or to injure, destroy or prevent competition between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended (38 Stat. 730, 49 Stat. 1526, 15 U.S.C. Sec. 13(a)). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.

47. The aforesaid discriminations in price have been granted, often secretly, in the form of preferential prices, discounts, rebates, lump sum cash payments, installment cash sums, and interest-free loans.

VI

Effects of the Monopolization and the Combination and Conspiracy

48. The combination and conspiracy to restrain and to monopolize, and the monopolization of, interstate trade and commerce in the distribution and sale of fluid milk has had the following effects:

(a) The defendants Borden and Bowman have achieved and maintained effective monopoly control over the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area by inducing the other defendants to participate in and maintain the collusive allocation of wholesale customers and public institutions, by organizing and operating "fighting" companies, by eliminating competition through stop buying, by allocating wholesale customers and public institutions and by absorbing competing distributors;

(b) Competing non-defendant distributors have been eliminated from the business of distributing and selling fluid milk to wholesale customers and public institutions;

[fol. 21] (c) Non-defendant distributors have been intimidated by the defendants' predatory acts and

practices from competing for the business of selling fluid milk to wholesale purchasers and public institutions;

(d) Competition in the distribution and sale of fluid milk to wholesale customers and public institutions has been restrained and suppressed;

(e) The business of selling fluid milk to public institutions has been allocated among the defendants and said public institutions have been deprived of the benefits of competitive bidding.

[fol. 22] Prayer

Wherefore, plaintiff prays:

1. That the combination and conspiracy to restrain and to monopolize the interstate trade and commerce, hereinabove alleged, be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants be adjudged and decreed to have monopolized the interstate trade and commerce, hereinabove alleged, in violation of Section 2 of the Sherman Act.

3. That the discriminations in price for fluid milk of like grade and quality, which each of the defendants has granted to certain of its wholesale customers and not to other of its wholesale customers, be adjudged and decreed to be in violation of Section 2(a) of the Clayton Act, as amended.

4. That the defendants, individually and collectively, be perpetually enjoined and restrained from continuing the aforesaid discriminations and from carrying out, directly or indirectly, the combination and conspiracy to restrain and to monopolize, and the monopolization of trade and commerce, as hereinbefore alleged, or any similar discrimination, or any combination or conspiracy having a similar purpose or effect.

5. That the defendant Borden be required to dispose of its entire interest in defendant Belmont to parties who are not named as defendants in this case, and who are not owned or controlled by, or affiliated with, any defendant herein or the successor of any defendant.

6. That the Court require defendant Borden to submit

a plan for the divestiture of such of its plants, facilities and other assets, used by the Chicago Milk Division of defendant Borden, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area.

[fol. 23] 7. That the defendant Bowman be required to dispose of its entire interest in defendant Ridgeview to parties who are not named as defendants in this case, and who are not owned or controlled by, or affiliated with, any defendant herein or the successor of any defendant.

8. That the Court require defendant Bowman to submit a plan for the divestiture of such of its plants, facilities and other assets, used by defendant Bowman, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area.

9. That the agreements, understandings, arrangements and practices of the defendants, hereinabove alleged, be ordered terminated and cancelled and each of the defendants be perpetually enjoined from entering into or participating in any agreement or plan to do or cause to be done any of the acts and practices herein alleged to have been agreed upon and done by defendants in furtherance of the aforesaid combination and conspiracy.

10. That defendants, jointly and severally, be perpetually enjoined from, in any manner, offering or giving to any existing or prospective wholesale customer any preferential or discriminatory price, discount, rebate, lump sum cash payment, installment cash sum, interest free loan or other gratuity.

11. That each of the defendants be required to submit, as part of any bid for the sale of fluid milk to any public institution or any other institution purchasing fluid milk by means of competitive bids, an affidavit of the officer or agent signing the bid on behalf of the defendant certifying that such bid has been compiled and submitted without consultation, agreement, understanding or collusion on the part of the defendant with any other distributor of fluid milk.

[fol. 24] 12. That the plaintiff have such other further,

general and different relief as the nature of the case may require and as the Court may deem proper in the premises.

13. That the plaintiff recover its taxable costs.

/s/ J. Howard McGrath, Attorney General. /s/ H. G. Morison, Assistant Attorney General. /s/ Otto Kerner, Jr., United States Attorney.

/s/ Willis L. Hotchkiss, /s/ E. Houston Harsha, /s/ Paul V. Ford, /s/ Harry H. Faris, /s/ James E. Mann, /s/ Dorothy M. Hunt, /s/ Charles W. Houchins, Attorneys for the United States, Suite 820, 208 S. LaSalle Street, Chicago 4, Illinois, CEntral 6-6886.

[fol. 24a] [File endorsement omitted]

[fols. 25-28] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ANSWER OF THE BORDEN COMPANY TO COMPLAINT—Filed September 19, 1952

Now comes the defendant, The Borden Company (hereinafter referred to as "Borden"), and answers the Complaint as follows:

1. Borden denies that it is violating or has been violating Sections 1 or 2 of the Sherman Act or Section 2(a) of the Clayton Act, as amended.

* * * * * * *

[fol. 29] 50. Borden alleges that the larger quantity discounts which it granted to certain customers were based on cost savings, resulting from the different methods or quantities in which it sold or delivered milk and cream to said customers, as compared to its other customers, within the meaning of the first proviso of Section 2(a) of the Clayton Act, as amended.

51. Borden alleges that the larger quantity discounts which it granted to certain customers were made in good faith to meet equally low prices of a competitor or competitors or the services or facilities furnished by a competitor or competitors, within the meaning of the proviso of Section 2(b) of the Clayton Act, as amended.

* * * * * * *

[fol. 30] Howard Neitzert, /s/ Edwin Clark Davis, /s/ Walter J. Cummings, Jr., /s/ Joseph A. Greaves, Attorneys for Defendant, The Borden Company.

Sidley, Austin, Burgess & Smith, of Counsel.

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[fol. 31] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ANSWER OF BOWMAN DAIRY COMPANY TO COMPLAINT—Filed September 19, 1952

Now comes the defendant, Bowman Dairy Company (hereinafter referred to as "Bowman"), and in answer to the Complaint heretofore filed in the above entitled action, says:

1. Bowman denies that it is violating or has been violating Sections 1 or 2 of the Sherman Act or Section 2(a) of the Clayton Act, as amended.

2. Bowman admits that it transacts business within the Eastern Division of the Northern District of Illinois, but Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 2 of the Complaint.

3. Bowman admits that its corporate name is "Bowman Dairy Company"; that its State of incorporation is Illinois;

that its principal place of business is Chicago, Illinois; and that it is engaged in the business of purchasing, processing, distributing and selling fluid milk in the City of Chicago and certain suburbs thereof. Bowman admits that Ridgeview Farms Dairy, Inc., is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois, and that it is a wholly owned subsidiary of Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 3 of the Complaint.

[fol. 32] 4. Bowman is without sufficient knowledge to form a belief as to the truth or veracity of the allegations contained in Paragraph 4 of the Complaint and requests strict proof thereof.

5. thru 11. Since Paragraphs 5 thru 11 of the Complaint contain plaintiff's definitions of the terms and phrases used in the Complaint, Bowman makes no answers to said paragraphs.

12. Bowman admits that the Chicago area, as defined in Paragraph 11 of the Complaint, has a population of over 4,000,000 persons and is one of the large milk consuming markets in the United States. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 12.

13. Bowman admits that it purchases fluid milk in Wisconsin and Indiana and ships it into Illinois. Bowman alleges that it commingles this Wisconsin and Indiana fluid milk with Illinois milk in the Chicago area before it is pasteurized, standardized, packaged and sold. Bowman alleges that approximately one-half of the commingled milk originates in Wisconsin and Indiana, and that the Wisconsin and Indiana milk is not purchased to fill prior orders of its customers. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 13.

14. Bowman denies each and every allegation of Paragraph 14.

15. thru 17. Bowman is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 15, 16 and 17, but Bowman denies that it is a "dominant" distributor of fluid milk to wholesale

customers and public institutions in the Chicago area, as alleged in Paragraph 17.

18. Bowman denies that its 1950 sales of fluid milk to wholesale customers and public institutions in the Chicago area approximated $30,000,000.00. Bowman admits that Bowman's wholly owned subsidiary had sales of fluid milk in 1950 of approximately $1,900,000.00, which were largely to wholesale customers. Bowman is without knowledge or [fol. 33] information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 18.

19. thru 21. Bowman is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 19, 20 and 21.

22. Bowman admits that it has purchased certain Chicago area distributors. Bowman denies that it occupies a dominant position in the distribution and sale of fluid milk in the Chicago area. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 22.

23. Bowman admits that from 1928 to 1939 it acquired the stock or assets of the distributors listed in Paragraph 23, but denies that it paid $5,400,000.00 therefor.

24. Bowman is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24.

25. For its answer to Paragraph 25 of the Complaint, Bowman refers to Paragraphs 35 through 40 of this Answer.

26. thru 35. Bowman denies each and every allegation of Paragraphs 26 through 35 insofar as they apply to Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraphs.

36. Bowman admits that it has purchased the stock or assets of the distributors listed in Paragraph 36, but denies each and every other allegation of Paragraph 36.

37. Bowman is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 37.

38. Bowman denies each and every allegation of Paragraph 38 insofar as they apply to Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 38.

[fol. 34] 39. Bowman admits that when it has acquired the stock or assets of distributors, it has sometimes obtained from the seller a covenant not to compete and has sometimes employed the manager or owner of the seller. Bowman denies each and every other allegation of Paragraph 39 insofar as they apply to Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 39.

40. Bowman admits that some of the distributors whose stock or assets is acquired were companies whose customers were principally vendors. Bowman denies each and every other allegations of Paragraph 40 insofar as they apply to Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 40.

41. Bowman denies each and every allegation of Paragraph 41 insofar as they apply to Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 41.

42. Bowman admits that it purchased Ratcliffe Bros. Creamery Co. in 1940, and that Ridgeview Farms Dairy, Inc. is a wholly owned subsidiary of Bowman. Bowman denies each and every other allegation of Paragraph 42.

43. Bowman is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 43.

44. thru 48. Bowman denies each and every allegation of Paragraphs 44 through 48 insofar as they apply to Bowman. Bowman is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraphs.

49. Bowman alleges that its acts and omissions referred to in the Complaint were reasonable business practices and were not in violation of or prohibited by any act or law referred to in the Complaint.

[fol. 35] 50. Bowman alleges that the larger quantity discounts which it granted to certain customers were based on cost savings, resulting from the different methods or quantities in which it sold or delivered milk and cream to said customers, as compared to its other customers, within the meaning of the first proviso of Section 2(a) of the Clayton Act, as amended.

51. Bowman alleges that the larger quantity discounts which it granted to certain customers were made in good faith to meet equally low prices of a competitor or competitors or the services or facilities furnished by a competitor or competitors, within the meaning of the proviso of Section 2(b) of the Clayton Act, as amended.

52. Bowman alleges that the plaintiff did not commence this action for an injunction and other equitable relief until June 18, 1951, and therefore has been guilty of such laches as ought to and does bar this action.

53. The Complaint fails to state a claim against Bowman upon which relief can be granted.

L. Edward Hart, Jr., Leo F. Tierney, Charles O. Parker, Attorneys for the defendant, Bowman Dairy Company.

Montgomery, Hart, Pritchard & Herriott Mayer, Meyer, Austrian & Platt, Of Counsel.

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[fols. 35a-178] [File endorsement omitted]

[fol. 179] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA, Appellant

v.

THE BORDEN COMPANY, et al.

On Appeal From the United States District Court for the Northern District of Illinois.

OPINION, MAY 17, 1954—Filed in District Court June 23, 1954

Mr. Justice Clark delivered the opinion of the Court.

The United States instituted this civil proceeding against ten Chicago dairies,[1] charging conspiracy to restrain and monopolize the sale of fluid milk to wholesale customers and others in the Chicago area, in violation of the Sherman Act, and price discrimination, in violation of the Clayton Act. Prior to trial a consent decree was entered against five of the smaller defendant companies, enjoining continuation of the conduct charged in the complaint. At the close of the Government's case against the remaining five defendants,[2] the District Court dismissed the complaint in its entirety. It held that, as to the alleged violations of §§ 1 and 2 of the Sherman Act, the evidence failed to establish the existence of a conspiracy or combination; and that, though there was proof of price discrimination violative of § 2(a) of the Clayton Act by four of the defendants,[3] a prior decree in a private antitrust action brought by a competitor dairy company

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[1] The Borden Company, Bowman Dairy Company, Belmont Dairy Company, Ridgeview Farms Dairy, Beloit Dairy Company, Capitol Dairy Company, American Processing and Sales Company, Hunding Dairy Company, Meadowmoor Dairies and Western United Dairy Company.

[2] Borden, Bowman, Belmont, Ridgeview and Beloit.

[3] Borden, Bowman, Belmont and Ridgeview.

enjoined the conduct in question and made it "useless" to award the Government an injunction. The Govern- [fol. 180] ment then appealed directly to this Court under 15 U. S. C. § 29, and we noted probable jurisdiction, 346 U.S. 914.

Three of the four questions presented on this appeal deal with rulings by the district judge that certain evidence was inadmissible.[4] The Government does not challenge the court's conclusion that on the record conspiracy was not shown, but it insists that error in these rulings precluded establishment of the conspiracy. After hearing argument and considering as much of the record as is before us, including the Government's offers of proof, we are of the opinion that, even assuming error in each of the challenged rulings, it does not appear that admission of the evidence in question would have been sufficient to change the conclusion that the Government had not established a case under the Sherman Act; hence the rulings cannot be said to have affected substantial rights of the parties within the meaning of 28 U. S. C. § 2111.[5]

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[4] The trial court refused to allow the Government to use for impeachment of a hostile witness a deposition taken in another case; to introduce in evidence certain tape recordings made for use in the prior case; and to introduce testimony as to a conversation with a deceased agent of one of the defendants.

[5] "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Fed. Rules Civ. Proc., 61: "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Since on this basis we affirm the judgment of dismissal [fol. 181] as to the Sherman Act allegations, it is unnecessary to discuss the propriety or impropriety of the several rulings.

The fourth question challenges the basis of the District Court's refusal to grant the Government injunctive relief against price discrimination by four of the defendants.[6] The district judge found that Government evidence tended to prove that these defendant companies have sold at prices which discriminate between purchasers of milk of like grade and quality. This, he said, would give defendants the burden of establishing that the discriminations fall within statutory exceptions, were it not that under a consent decree entered against defendants in a private suit in 1952 by another judge of the same court,[7] they already are enjoined from performing all acts specified by the Government in its prayer for relief. In the opinion of the district judge.

> "A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government: and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the [fol. 182] most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations."

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[6] See note 3, *supra*. Since the Government does not question the correctness of the judgment of dismissal of its claim under § 2(a) of the Clayton Act against Beloit, the fifth defendant, it is not before us.

[7] *Dean Milk Co.* v. *American Processing & Sales Co.*, U. S. D. C. N. D. Ill. E. D., No. 49 C 1159, Dec. 3, 1952.

Accordingly the court dismissed that part of the complaint which alleged violations of § 2(a) of the Clayton Act. Thus it appears that the Government was refused an injunction solely because of the existence of the prior decree entered against defendants in the course of a private action. We think that refusal on this basis constituted an abuse of discretion.

Section 15 of the Clayton Act, 15 U. S. C. § 25, charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violation of certain of the antitrust laws, including price discrimination. Under § 16 of the Act, 15 U. S. C. § 26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff. *Beegle* v. *Thomson*, 138 F. 2d 875, 881 (1943). The private-injunction action, like the treble-damage action under § 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 694-695 (1948). ". . . [T]he scheme of the statute is sharply [fol. 183] to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *United States* v. *Bendix Home Appliances*, 10 F. R. D. 73, 77 (S. D. N. Y. 1949). In short, the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree.

To hold that a private decree renders unnecessary an

injunction to which the Government is otherwise entitled is to ignore the prime object of civil decrees secured by the Government—the continuing protection of the public, by means of contempt proceedings, against a recurrence of antitrust violations. Should a private decree be violated, the Government would have no right to bring contempt proceedings to enforce compliance; it might succeed in intervening in the private action but only at the court's discretion. The private plaintiff might find it to his advantage to refrain from seeking enforcement of a violated decree; for example, where the defendant's violation operated primarily against plaintiff's competitors. Or the plaintiff might agree to modification of the decree, again looking only to his own interest. In any of these events it is likely that the public interest would not be adequately protected by the mere existence of the private decree. It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry. Yet the effect of the decision below is to place on a private litigant the burden of policing a major part of the milk industry in Chicago, a task beyond its ability, even assuming it to be consistently so inclined.

We agree with appellees that the statute confers on the Government no absolute right to an injunction upon [fol. 184] a showing of past violation of the antitrust laws by defendants. As we said in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953):

> "... the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it."

The Government contends that it has "an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit."

But we cannot say that the existence of the private decree warrants *no* consideration by the chancellor in assessing the likelihood of recurring illegal activity. We hold only that in view of the difference in the respective interests sought to be vindicated by the Government and the private litigant, the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree.

The judgment of dismissal as to the Sherman Act allegations is affirmed; as to the Clayton Act allegations the case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with this opinion.

Mr. Justice Black and Mr. Justice Jackson took no part in the consideration or decision of this case.

[fol. 185] IN THE SUPREME COURT OF THE UNITED STATES

MANDATE—Filed in District Court June 23, 1954

United States of America, ss:

The President of the United States of America,

To the Honorable the Judges of the United States District Court for the Northern District of Illinois.

Greeting:

Whereas, lately in the United States District Court for the Northern District of Illinois, before you, or some of you, in a cause between United States of America, Plaintiff, and The Borden Company et al., Defendants, No. 51 C 947, wherein the judgment of the said District Court dismissing the complaint was duly entered in said cause on the 17th day of June, A.D. 1953;

[fol. 186] as by the inspection of the transcript of the record of the said District court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears. And [fol. 187] whereas, in the present term of October, in

the year of our Lord one thousand nine hundred and fifty-three, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is ordered and adjudged by this Court as follows: The judgement of the District Court dismissing the complaint as to the Sherman Act allegations is affirmed. That part of the judgment dismissing the complaint as to alleged violations of Sec. 2(a) of the Clayton Act is reversed, except as to the Beloit Dairy Company. The case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with the opinion of this Court.

May 17, 1954.

[fol. 188] You, therefore, are hereby commanded that such further consideration be had, and such further proceedings as may be necessary, in accordance with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Earl Warren, Chief Justice of the United States, the twenty-second day of June, in the year of our Lord one thousand nine hundred and fifty-four.

Harold B. Willey, Clerk of the Supreme Court of the United States. By Hugh W. Barr, Deputy.

[File endorsement omitted.]

[fol. 189] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION OF THE BORDEN COMPANY, ET AL, TO SET DATE FOR CONSIDERATION OF ACTION TO BE TAKEN PURSUANT TO OPINION AND MANDATE OF SUPREME COURT—Filed June 28, 1954.

Defendants The Borden Company and Belmont Dairy Company, by their attorneys Sidley, Austin, Burgess & Smith, move the Court to set a date for consideration of action to be taken pursuant to the opinion in this cause of the Supreme Court of the United States rendered on May 17, 1954, and the mandate issued by that Court on June 22, 1954.

Respectfully submitted, /s./ Stuart S. Ball, /s./ H. Blair White, Attorneys for defendants, The Borden Company and Belmont Dairy Company.

Of Counsel, Sidley, Austin, Burgess & Smith, 11 So. La Salle Street, Chicago 3, Illinois, STate 2-5400.

[fol. 189a] [File endorsement omitted.]

[fol. 190] In United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

[Title omitted]

Transcript of Proceedings of July 1, 1954

Transcript of proceedings had at the hearing of the above-entitled case before the Hon. William J. Campbell, one of the Judges of said Court, in his Courtroom, U.S. Courthouse, Chicago, Illinois, on July 1, 1954, at 2:00 o'clock p.m.

Present:

Mr. Earl A. Jinkinson and Mr. Thomas Rothwell, appeared on behalf of the government;

Messrs. Sidley, Austin, Burgess & Smith, By Mr. Stuart S. Ball, and Mr. H. Blair White, appeared on behalf of the Borden Company and Belmont Diary Company;

[fol. 191] Messrs. Montgomery, Hart, Pritchard & Herriott, By Mr. John Paul Stevens, appeared on behalf of Bowman Dairy Company, and Ridgeview Farms Dairy, Inc.,

Mr. Leo F. Tierney, appeared on behalf of Beloit Dairy Company.

[fol. 192] The Clerk: No. 51 C 947, United States vs Borden Company et al. for consideration of action to be taken pursuant to mandate of the United States Supreme Court.

The Court: I do not know if it is by design or otherwise that this matter appears with the psychopathic case now on the calendar of the court.

Mr. Jinkinson: Your Honor, I might give away a trade secret. Mr. Ball just said to me it sounds like an anti-trust case. I said it sounds like an anti-trust defense.

The Court: Well, I am glad you brought the motion in. I have been waiting to talk to all of you anyway. Before I hear from either one of you would you mind hearing me for a little while?

Mr. Jinkinson: Yes, your Honor.

The Court: Will you sit down here and hear a few observations of mine and then I will hear anything else you have to say.

Mr. Stevens: May I explain, your Honor, Mr. Hart couldn't be here. He is on trial before Judge Barry.

The Court: Oh, thank you. Very well. You represent him.

Mr. Stevens: Yes.

STATEMENT BY THE COURT

The Court: Well, we are in receipt of a formidable looking mandate from the Supreme Court of the United States, [fol. 193] and an opinion.

The motion now pending before me asks, in effect, that I give some indication of the manner in which I think this litigation should be ended. Before I do so, I wish to assure all counsel that my remarks are not intended to reflect any views on the merits either of the remaining segment of the government's case or of any defenses which may be asserted by the defendants. My remarks are made within the framework of the opinion of the Supreme Court, and they are intended only to suggest, in response to the pending motion, some direction for the remaining proceedings in this court.

I am sure it is unnecessary to recount the history of this case, and I shall refer only to those portions of the record which shed some light on the matter still before me. I am now concerned solely with the government's charges brought under Section 2(a) of the Clayton Act, as amended. Those charges, and the charges brought under Sections 1 and 2 of the Sherman Act, were dismissed at the conclusion of the government's case. The Supreme Court affirmed the dismissal of the Sherman Act allegations, but remanded the Clayton Act allegations to this court for further con- [fol. 193a] sideration. To clarify any misunderstanding as to the reasons which impelled me to enter that part of the order of dismissal which related to the Clayton Act allegations, I cite the following portions of my Memorandum of March 30, 1953:

First, at pp. 2872-2873 of the record:

> "It is the opinion of the court that the government has shown that Bowman and Borden each has, in past years, discriminated among its purchasers. The evi-

dence relevant to such discriminations is conflicting, and there is much material in the record which tends to show that Bowman and Borden each has some available affirmative defenses. However, at this stage of the case, the court cannot pass on the merits of those defenses. Ordinarily, then this court would hold that Bowman and Borden each has the burden of establishing that the alleged discriminations come within the scope of certain statutory exceptions.

"There is one factor which compels this court to hold that neither Bowman nor Borden need assume that burden. That factor is the decree which was entered by another judge of this court in the case of [fol. 194] *Dean Milk Co.* v. *American Processing and Sales Co., et al* . . . ."

Next, at p. 2878, of the record:

"A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the government's prayer for injunctive relief insofar as the Clayton Act is concerned."

And finally, at p. 2877 of the record:

"As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.

[fol. 195] "For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted."

As the language of my Memorandum indicates, it was my opinion that the terms of the Dean decree, standing alone, barred the government's claim for injunctive relief as a matter of law. That is not to say that I could not have enumerated other circumstances which might have prompted a dismissal of the government's charges; for example, as I remarked somewhat incidentally in my Memorandum, most of the violations shown at the trial were years old, and I might have expressly held that the relative absence of current violations was one significant reason for dismissing the government's charges. I did not do so, for it was then my opinion that if the government's claim were not barred by the existence of the Dean decree, it would be my duty, even sitting as a chancellor, to proceed forthwith to hear the defendant's case. In short, I did not then consider all the circumstances of this case, and then decide whether or not the government had shown the need for equitable relief.

[fol. 195a] Two months after my Memorandum was announced the Supreme Court decided the case of *United States* v. *W. T. Grant Co.*, 345 U.S. 629. The decision handed down on May 25, 1953. That case was concerned with the breadth of a district court's discretion to enjoin interlocking corporate directorates, which are proscribed by Section 8 of the Clayton Act. And, it seems to me, the *Grant* Case defined the chancellor's discretion as it had never been defined before. Most, if not all prior decisions tested the validity of some affirmative act by the trial court. Usually, the question presented was whether or not the trial court acted properly in granting the government's request for injunctive relief after the discontinuance of the violations; and the usual answer was the trial court might, in its discretion, grant the relief despite the discontinuance. An illustrative case is *Swift & Co.* v. *United States*, 276 U.S. 311, decided in 1928, where it was said: ". . . a suit for an injunction deals primarily, not with past violations, but with threatened future ones. . ." In all the prior cases, the courts were concerned with that which the judge might do, rather than that which he might refuse to do. In *Grant*, however, the district court had refused to grant injunctive relief, and the Supreme Court decided that the refusal was [fol. 196] not an abuse of discretion. That decision was

reconciled with the *Swift* case, and others, which hold that the discontinuance of violations does not in itself disarm the chancellor. These are the words of the *Grant* decision, and I recite them fully, for they will undoubtedly aid my future consideration of this case:

> "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct."

Citing authorities.

> "The purpose of an injunction is to prevent future violations,——"

Citing the Swift Case, 276 U.S. 311, 326.

> "and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's discretion is based on all the circumstances; his discretion is necessarily broad and a strong [fol. 196a] showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

The Supreme Court's opinion in the instant case re-affirms the language of the *Grant* Case, but states that my dismissal of the government's charges *solely* because of the existence of the Dean decree was an abuse of discretion. It was also stated, however, that the existence of that decree is a factor which might, and perhaps should be considered, along with all other factors, after remand. I refer now to this part of the Court's opinion, which will be found at page 520, 347 U.S.:

> ". . . we cannot say that the existence of the private decree warrants *no* consideration by the chancellor in assessing the likelihood of recurring illegal activity. We hold only that, in view of the difference in the respective interests sought to be vindicated by the Gov-

> ernment and the private litigant, the district judge abused his discretion in refusing the Government an [fol. 197] injunction solely because of the existence of the private decree."

I have had some difficulty in reconciling this statement of the Supreme Court with the views expressed in the *Grant* Case. It seems to me that the *Grant* opinion points to the only relevant question presented here: Did the dismissal of the Clayton Act allegations because of the existence of the private decree, *when viewed in the light of all other circumstances*, constitute an abuse of discretion? As I read the *Grant* opinion, an "abuse of discretion" is defined as a dismissal of the government's charges despite a probability of recurring illegal activity. Why, then, should the decision in this case have been grounded on "the difference in the respective interests sought to be vindicated by the Government and the private litigant"? Certainly, the interests are not the same, but what has that to do with the probability or improbability of recurring illegal activity?

These questions are troublesome, for they raise some doubt as to the role which the Dean decree should play in my future consideration of this case; and the questions are not easily answered by my reading of the Supreme Court's opinion. Thus, the opinion states:

> [fol. 198] "In short, the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree."

Then a later passage states:

> "The government contends that it has 'an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private anti-trust suit.' But we cannot say that the existence of the private decree warrants *no* consideration. . . ."

It seems to me that the latter statement accurately expresses the opinion of the court, since it is in keeping with the views expressed in the *Grant* opinion. Accordingly, it is my opinion that when I redetermine whether or not the

government has shown a need for equitable relief, I may still accord to the Dean decree such weight as I think it deserves.

The Supreme Court concluded its opinion with the remand of this segment of the case "for further consideration and such further proceedings as may be necessary." The term "further consideration" means but one thing to me—I am [fol. 199] to consider the need for injunctive relief, or, to use the language of the Supreme Court, I am to assess the "likelihood of recurring illegal activity," using as my guides the various circumstances which the record of this case reveals. I cannot state at this time what the relevant considerations will be: That is a matter which I should like to have argued. It may well be that some relevant considerations are suggested by the *Grant* case, if the defendants here, like those in *Grant*, have in fact discontinued the alleged violations. And, as I indicated earlier, the existence of the Dean decree remains as a factor which I must consider. It is therefore my first suggestion to counsel in response to your pending motion that the record of this case be carefully reexamined, to determine whether or not the government has shown the need for equitable relief.

It is my second suggestion that the record of this case be substantially reduced, so that it contains only those matters which are relevant to the issues still before me. You will recall, I am sure, that all government charges, those under Sections 1 and 2 of the Sherman Act, and those under Section 2(a) of the Clayton Act, were joined in one count of one complaint, and that the government's evidence to support both types of charges was necessarily intermingled. [fol. 200] I recognize that in many instances, particularly those of "stop buying," the same evidence was relied upon to substantiate charges under both statutes, but that evidence of that nature must remain in the record. Perhaps, after the task is completed, the record will be almost as lengthy as it is now. I think it would be worthwhile, however, for all parties to designate the exact portions of the record which they intend to use during any further proceedings in this court. The greater burden will of course be placed on the government, which must decide which segment of its case will remain before me when I reconsider the need for injunctive relief. The government must also

decide whether or not it shall ask leave to reopen its case for the presentation of additional evidence, and I shall require that that decision be made within a short time.

As a third suggestion, I recommend that all parties seriously reconsider the possibility of a consent decree. As I indicated in my Memorandum of March 30, 1953, indeed, as the defendants argued before the Supreme Court, the terms of the Dean decree prohibit each defendant from performing any of the unlawful acts described in the government's complaint. It would seem, therefore, that counsel for each defendant would be well-advised to appraise any affirmative [fol. 201] defense he intends to assert, and to consider the high costs of this litigation. An analysis of that type might well persuade all parties to formulate a mutually acceptable decree. I recommend, at the very least, that counsel for the government and the defendants exchange views on this subject within the near future.

My fourth and final suggestion is directed to government counsel. It is simply a recommendation that the government re-examine its own case to determine whether or not, in its present opinion, the public interest justifies continued prosecution of these Clayton Act charges. I think it is fair to state that at every step in this litigation, the Clayton Act allegations were overshadowed by the charges brought under the Sherman Act. If space devoted in the complaint is at all indicative of the relative importance of the two types of charges, it should be noted that the complaint is devoted almost entirely to the government's case under the Sherman Act. The sole reference to alleged violations of the Clayton Act is found in two paragraphs of Section V of the complaint, which Section itself contains 22 paragraphs. The Clayton Act allegations were seldom, if ever discussed at the many conferences which preceded the trial, [fol. 202] and they certainly attracted little attention at the trial, even during oral argument. I do not suggest that I believe that the Clayton Act allegations are groundless or insignificant. I merely suggest that the government counsel forget the mechanics of litigation for the moment, and realistically survey their position, as counsel for defendants have already been asked to do on their part.

GOVERNMENT ORDERED TO DESIGNATE AND SUBMIT PORTIONS OF RECORD ON WHICH IT INTENDS TO RELY ETC., AND DEFENDANTS TO ALSO DESIGNATE.

In accordance with the views herein expressed, the government is ordered to designate those portions of the record upon which it intends to rely during future proceedings in this court, and to submit said record, so designated, to this court and to the defendants on or before September 1, 1954. The defendants are ordered to designate any additional portions of the record upon which they intend to rely, and to submit said additions to the court and to the government on or before September 17, 1954. On September 17, 1954, at the regular motions call, a date will be set for the argument, which I have heretofore requested in this Memorandum.

The same constitutes a ruling on the pending motion. Are there any suggestions or observations, gentlemen?

Mr. Jinkinson: Would your Honor like us to submit the record or the designation of that portion of the record? [fol. 203] The Court: No. As I said in the Memorandum, you may well designate the whole record, because it is so intermingled.

Mr. Jinkinson: The mechanics of it, your Honor, do you want the record or just page so and so?

The Court: Oh, oh, I think that you should designate the pages. That is enough, rather than do any copying.

Mr. Jinkinson: Say page so and so.

The Court: Yes. Because I have the record and so have you. It would seem unnecessary.

Mr. Jinkinson: It would mean our typing it all.

The Court: Yes. It is unnecessary clerical work and I think the defendants ought to likewise.

Now, I should also observe, —excuse me for interrupting you. I should also observe that I am conducting emergency court here the last two weeks of July and therefore will be sitting the last two weeks of July, from July 19 to the 30th, inclusive.

Now, I have made four suggestions and issued an order on one of the suggestions. It may well be that after discussing this among yourselves and after re-reading what I

have had to say here and the Reporter can write it up for you, and you can read it over——

[fol. 203a] Mr. Jinkinson: We want a copy of it.

Mr. Ball: Yes. We do too.

The Court: That you may desire, some or all of you may desire to act on some one of the other three suggestions I have made. If so, I will be available during those two weeks in the summer. Otherwise, I shall be available in the Fall. If you would like to discuss it informally after you have gone over my observations, and if you would like all of you to come in and without the Court Reporter have an informal discussion in chambers, after you review my various suggestions, I will be happy to see you any time during those two weeks. The intervening two weeks will give you time enough to read it over and consult with your clients.

Mr. Ball: I have one point of clarification. I assume in gathering the evidence in the record, and in designating it with relation to the Robinson-Patman Act violations, that you have in mind only that relating to Bowman, Borden, Ridgeview and Belmont?

The Court: Yes. Well, the other one is out.

Mr. Tierney: Yes, I was wondering.

The Court: You ought to stay around though.

Mr. Tierney: I am sorry I can't stay with you.

Mr. Jinkinson: Shall we tell him to go and s—— more, your Honor?

[fol. 204] Mr. Tierney: If I prepare some sort of an order for judgment on the mandate, which will amount to an affirmance of your opinion at such and such a date and a dismissal of the complaint, that will be all right?

The Court: Oh, yes. Submit it to the government for approval as to form and bring it in on one of those two weeks I am sitting in July. Certainly. We hate to lose you around here, Mr. Tierney.

Mr. Jinkinson: We do miss him.

Mr. Tierney: I am sorry I will have to leave.

The Court: Yes.

Mr. Jinkinson: One thing I will ask you about, I assume we can have, your Honor, until some time this Fall? I mean maybe the 17th of September for us to make a decision on whether or not we want to reopen it?

The Court: Oh, yes, yes. As far as that is concerned but I want your designation of record on September 1.

Mr. Jinkinson: I am just thinking about our motion to reopen if we want to.

The Court: We still have a piece of this case on the calendar and I want to get rid of it. I have a lot of other cases. Then you can decide what you are going to do and of course whether or not you will be permitted to reopen [fol. 205] is a matter in the discretion of the court.

Mr. Jinkinson: I agree. It is whether or not we want to make the motion.

The Court: Surely. I want you to have sufficient time to consider it and certainly by September 17, after their designation is filed, and you have to answer theirs, that is time enough.

Mr. Jinkinson: All right, thank you.

The Court: Very well, thank you gentlemen.

(Which were all of the Proceedings had at the Hearing of the above entitled cause.)

[fol. 206] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 206a] [File endorsement omitted.]

[fol. 207] In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 51 C 947

[Titled omitted]

Plaintiff's Motion to Open the Record for the Taking of Further Evidence—Filed January 11, 1955

Plaintiff, United States of America, moves the Court for an order reopening the record in this case to permit additional evidence to be offered by the United States. In support of this motion, plaintiff submits the following:

1. Plaintiff presented evidence in support of its complaint commencing on March 4, 1953. Plaintiff rested its case on March 23, 1953.

2. The Court, after hearing argument on defendants' motions to dismiss, rendered its opinion in the form of a memorandum on March 30, 1953, granting defendants' motions to dismiss. On June 17, 1953, the Court entered its Findings of Fact, Conclusions of Law, and Judgment thereon dismissing plaintiff's complaint.

3. Finding of Fact No. 36 recited that plaintiff had offered evidence tending to prove that defendants Borden, Bowman, Ridgeview, and Belmont had engaged in price discriminations in the sale of fluid milk to wholesale customers. Finding of Fact No. 37 recited certain injunctive provisions of the final decree in the case of *Dean Milk Company* v. *American Processing and Sales Company, Inc., et al.*, No. 49 C 1159, entered on December 3, 1952, which decree enjoined further price discriminations by said defendants. [fol. 208] Finding of Fact No. 38 recited that said defendants were now effectively enjoined from further price discriminations. The Conclusion of Law stated, among other things, that the *Dean* decree assures that there will be no new violations and that this Court would not grant the injunctive relief sought by plaintiff.

4. On June 29, 1953, defendants Bowman and Ridgeview filed a motion to amend Findings of Fact No. 36 and No. 38 and to add an additional conclusion of law. The motion of said defendants was in part based upon the opinion of the United States Supreme Court in the case of *United States*

v. W. T. *Grant Co. et al.*, 345 U.S. 629 (May 25, 1953), to the effect that the necessity for injunctive relief is primarily determined by the existence of some cognizable danger of recurring violations. On July 2, 1953, the Court denied this motion of defendants Bowman and Ridgeview.

5. On October 2, 1953, plaintiff filed its petition for appeal to the Supreme Court of the United States and, on the same date, an order was entered allowing such appeal. On May 17, 1954, the Supreme Court rendered its opinion affirming the act of this Court in dismissing the Sherman Act charges of the complaint and reversing the act of this Court dismissing the Clayton Act charges of the complaint against defendants Borden, Bowman, Ridgeview, and Belmont. On June 23, 1954, the mandate of the Supreme Court was filed in this Court, remanding the case to this Court for further consideration and such further proceedings as may be necessary.

6. The sole remaining issue in these proceedings is whether there is need for injunctive relief with respect to the defendants' price discrimination transactions. The need for such injunctive relief may be more positively established by an affirmative showing on the part of the plaintiff that there is a cognizable danger of future violations. This is a factual rather than a legal question, to be resolved by a consideration of evidence rather than of law.

[fol. 209] 7. Plaintiff alleges and represents that the decree in the *Dean* case has not been effective in preventing further price discriminations on the part of these defendants, Borden, Bowman, Ridgeview, and Belmont.

8. Plaintiff alleges and represents that these defendants, Borden, Bowman, Ridgeview, and Belmont, have engaged in discriminations in price between different wholesale purchasers of fluid milk of like grade and quality subsequent to the entry of the *Dean* decree, and that said defendants threaten to and will continue to engage in such price discriminations unless an injunction is entered in this case, which injunction could be enforced by this Court on the petition of the plaintiff.

Earl A. Jinkinson, Special Assistant to the Attorney General. Thomas A. Rothwell, Trial Attorney, Room 404 United States Courthouse, Chicago 4, Illinois, HArrison 7-4700.

[fols. 209a-264] [File endorsement omitted]

[fol. 265] In United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America, Plaintiff,

vs.

The Borden Company, et al., Defendants

Memorandum and Order—April 18, 1955

Campbell, District Judge:

On May 17, 1954, the United States Supreme Court decided that this court must consider the need for a decree restraining the alleged violations of the Clayton Act, despite the existence of a prior decree—the "Dean decree"—which now restrains those same violations. As the Supreme Court stated, "the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree." The Court therefore remanded that part of this cause which relates to the Clayton Act allegations for "further consideration, and such further proceedings as may be necessary."

On July 1, 1954, at the first of the pretrial conferences held to define the remaining issues, this court carefully construed the term "further consideration." The court was then and is now of the opinion that under the decisions of the Supreme Court in United States vs. W. T. Grant Co., 345 U. S. 629 (1953) and in the instant case, the term "further consideration" as used in the mandate can mean but one thing: this court is under a duty to assess the "likelihood of recurring illegal activity", using as its guides the various circumstances which the record of this case reveals. Clearly, as the court stated at the July conference, one such circumstance which must be considered is the existence of the Dean decree and its effect upon the milk industry in Chicago. The Supreme Court itself has stated: "we cannot say that the existence of the private decree warrants no consideration

. . ." In fairness to the Government, therefor, this court suggested at the pretrial conferences that Government counsel consider the merits of introducing additional evidence to show whether or not, particularly in the light of the Dean decree, there is need for an additional decree. Two years have now passed since any evidence was heard by the court, and during those years, additional evidence bearing upon the effectiveness of the Dean decree might have been gathered by the Government.

The Government has now moved to open the record for the taking of further evidence, and submits in support of its motion that the defendants violated the Clayton Act since the entry of the Dean decree and since the trial in this court. The Government represents in its briefs that it has learned from private complainants and from its own investigators that such violations have occurred. Certainly, if evidence of recent violations is in the possession of the Government, it should be presented to the court before the court decides whether or not the Government has established the need for a decree. After all, in this equity proceeding, evidence of the old violations, such as those now contained in this record, is relevant only to the extent that it sheds [fol. 266] light on the present and future state of the market. In the words of Justice Jackson, speaking for the Court in United States vs. Oregon Medical Society, 343 U. S. 326, 333 (1952):

> "All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form it is to undo existing conditions, because otherwise they are likely to continue. In a forward-looking action such as this, an examination of 'a great amount of archeology' is justified only when it illuminates or explains the present and predicts the shape of things to come."

Since any evidence of current violations will be particularly relevant to a determination of the likelihood of future violations, the Government's motion to reopen the record for the presentation of such evidence will be granted. The court

wishes to make clear, however, that the Government will not be permitted to use a further hearing as a means of reinforcing and redeveloping the present record. The Government has designated those portions of the present record upon which it intends to rely during further proceedings, and that designation will guide the court in ruling upon the admissibility of any evidence offered by Government. In short, the Government may introduce only evidence of new violations, if any, which bear upon the effectiveness of the Dean decree.

The Government has also moved for leave to engage in further discovery. The purpose of such discovery, to use the language of the Government's brief, is to separate the wheat from the chaff. The Government represents that it has adequate knowledge of current violations of the Clayton Act, but that it must examine prospective witnesses under oath in order to prepare a concise summary of its evidence for presentation to the Court. If this were a typical lawsuit awaiting a first trial, the Government's argument would be persuasive; but this suit is years old, and, if all that the Government alleges be true, there is a pressing need for a final decree. As counsel well know, the usual discovery process is protracted and time-consuming, and, if permitted here, will certainly delay the entry of a judgment. Since the only suggested purpose of discovery is to eliminate irrelevant testimony at the trial, and since discovery, if permitted, would unduly prolong these proceedings, the Government's motion for leave to engage in discovery will be denied.

The only remaining matter before the court is the motion of the State of Wisconsin for leave to file a brief *amicus curiae*. The State of Wisconsin submits three points in support of its motion: (1) The questions raised by this litigation "are of great importance" to its citizens; (2) More dairy products are produced in Wisconsin than in any other state, and a large amount of Wisconsin dairy products is sold in the Chicago area; and (3) "Certain trade practices" in the Chicago area have an adverse effect upon the State of Wisconsin and a substantial number of its citizens. Thus, any argument made by the State of Wisconsin would be premised upon the effect of "certain trade practices." Such argument is premature, for the court has not yet drafted its findings with respect to any alleged trade prac-

tices. If and when the court finds that any trade practices of the defendants adversely affect the State of Wisconsin, it will entertain suggestions by that State for the preparation of an appropriate decree. At this pre-trial stage, such suggestions are improper, and the motion of the State of Wisconsin will be denied.

For the reason stated, the Government's motion to open the record for the taking of further evidence is granted and same will be heard May 16, 1955; the Government's motion [fols. 267-276] for leave to engage in discovery is denied; and the motion of the State of Wisconsin for leave to file a brief *amicus curiae* is denied.

Campbell, Judge.

April 18, 1955.

[fol. 277] [File endorsement omitted.]

[fol. 278] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

[Title omitted]

Transcript of Proceedings of September 26, 1955

Transcript of proceedings had at the pretrial conference in the above-entitled cause before Hon. William J. Campbell, one of the Judges of said Court, in his jury room, U.S. Court House, Chicago, Illinois, commencing on Monday, September 26, 1955, at two o'clock P.M.

PRESENT:

Mr. Earl A. Jinkinson, Mr. Bertram Long and Mr. Thomas Kerr, on behalf of the Government;

Mr. Edward L. Hart, Jr. and Mr. John P. Stevens, on behalf of Defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

[fol. 279] Mr. Stuart S. Ball, Mr. Blair C. White and Mr. Joseph Greaves on behalf of Defendants The Borden Company and Belmont Dairy Company.

[fol. 280] STATEMENT BY COURT AS TO PROCEDURE AND COLLOQUY THEREON

The Court: Who wants to speak first, if anyone?

I thought my memorandum of April 18, 1955, pretty well summed up the situation as far as I am concerned.

As I see it, if we are going ahead without any consent decree, which I understand is the situation, I am willing to—as I thought I pointed out at the time this decree—I will hear argument one way or the other.

As I see the issue at the present time, I am willing to hear any evidence of violations of the Clayton Act, first, that may have occurred since the entry of my formal order, and up to the date of the commencement of this hearing.

I will then hear the defenses of the defendants, affirmative and otherwise, statutory and otherwise, on all matters that the defense may care to advance.

As I indicated in my prior memorandum, there are several matters on which I think the defense probably from the cross examination that I heard of the Government witnesses has an explanation pursuant to the provisions of the Statute.

Then I will close the taking of proofs and take the remaining issue on briefs.

That is my disposition as to procedure.

[fol. 281] I would like to dispose of it without any other hearing. Of course, I thought I ruled on it in my memorandum of April 18th: the possibility of reconsidering the evidence on the basis that it is now in, and permitting the defense to go ahead with whatever affirmative proof which is set up in their answer. There are two or three paragraphs devoted to it in the answers of the defendants.

I think although I have ruled against the Government on further discovery, and have also ruled that the Government designate the portions of the record now before the Court on which it intends to rely, that I should permit the Government the proof of any acts of the defendants that may have occurred between the time of my last decree and the present date of hearing.

All of this, of course, is to be taken into consideration more particularly in the light of the Supreme Court's decree in this case and in the Grant case.

That is about my summation. I will hear from either one of you. I am open to persuasion otherwise.

Mr. Ball: May I raise a question or two of suggestion, if your Honor please?

The Court: Certainly, Mr. Ball.

Mr. Ball: One of the propositions that has really seemed [fol. 282] to us to be controlling would be whether the Government in following up their offer of proof would establish enough of the recent violations to suggest that the record be re-opened to require the defense to be put in.

In other words, the issue as it seemed to us was whether there is substantial evidence that the Government can produce that the Dean decree has not been effective.

It seemed to me that one of the issues that we want to be sure of after the end of the Government's presentation next week is the question of whether that quantum that they introduce at that time disposes of that issue. I thought

probably we ought to dispose of that before we go into what might be an considerably lengthy discussion of the defense.

The Court: Since this is a pre-trial conference and our guards are to some extent down, let me ask you this: About how long would the defense want, you and Mr. Hart, in the presentation of such testimony as you may have, that you were prepared to go ahead with when I took the case away from you after the last hearing?

How long or how much time would you want to present the defense that you had at that time, accumulative against the Clayton Act charges, against whatever may arise if [fol. 283] the Government proceeds to prove some more current violations? What is your best guess? How long would it take?

Mr. Ball: Well, assuming——

The Court: I am getting at the practical end of this first.

What is your guess?

Mr. Ball: Ed, would you like to speak first, or should I?

Mr. Hart: You go ahead. You started.

Mr. Ball: My own feeling is, looking at the evidence alone that was in the record, while there was no mention of that evidence to——

The Court: Don't argue it now.

Mr. Ball: I am not arguing it. The type of issue that is raised even by that small amount might require, for example, very extensive evidence bearing upon costs and so forth.

Now, the form in which that would be presented, I think, is a problem that we cannot resolve. I cannot anticipate what kind of cross examination or other matters might arise on that. But, I would think it might very well take, judging from what I know about the evidence, two or three weeks to put that in.

What do you feel?

Mr. Jinkinson: You had better base that on a thorough [fol. 284] and searching cross examination.

Mr. Ball: That is what I am assuming.

Mr. Hart: About two or three months.

The Court: Of course, we probably could get a great

deal of this cost evidence on pre-trial order as we did the last time, couldn't we?

Mr. Ball: Now, the difficulty—well, we did not attempt to get any of the cost evidence in.

The Court: Of course not, but I say we got similar evidence required by the Government as to sales, contracts, and so forth, in by pre-trial order. I should think what cost evidence you want in so far as it is merely a reflection of your records is concerned, couldn't we get it in by stipulation in a pre-trial conference?

Mr. Ball: I think you will appreciate that we will try to do that, but we have to get one thing clear on that. It is again what might be in the way of this added evidence that would require cost problems as of an entirely different date.

The Court: That you might know of. On that I would be disposed after hearing what the Government has to offer, and as I have already indicated in my memorandum, I think they should be given in equity an opportunity to prove anything that they may be able to prove since the [fol. 285] date of this formal decree and the date of the commencement of this hearing. After we hear what they have, if anything, and this takes you by surprise and you need additional time for preparation, I could give it to you at that time with the admonition by the Court that as much of as can be stipulated to I would expect to be stipulated by the Government, so we save actual days in court. Then I will set a trial date after that to go ahead with the rest.

My thought is to take in what evidence has to be gotten in here, and then proceed on briefs, which I think will give me time to work nights and week-ends and still keep up with by trial calendar. I am disposed to give you whatever additional time may be needed after we have the Government's presentation. When the Government rests, then I will expect you and Mr. Hart to tell me what your problems are in meeting the new evidence. Perhaps you can go ahead with meeting what is in the original record at that time, if you want to, or do it in one bite at the cherry, if you rather wait until later. Since we are sitting without a jury, there is no reason why I cannot accommodate counsel for both sides in this matter, and then we will set the time for briefs.

How is the Government's feelings? I understand you

have gotten quite a few cases referred to your division [fol. 286] out here.

Mr. Jinkinson: Yes, we have.

Mr. Ball: There is one phrase that the Court used that bothers me a little bit.

The Court: Well, please don't worry about my unhappy choice of phrases. I mean, that is something I have been cursed with all these years. Even the Supreme Court does not understand my phraseology at times.

Mr. Hart: There is one phrase that the Court uses it seems to me very frequently that bothers me and that is "motion denied."

The Court: Mr. Ball, what is the phrase?

Mr. Ball: When the Court says you would be inclined to let the Government go ahead with anything that they had.

The Court: Relative to the Clayton Act violations.

Mr. Ball: What I think you mean by that is bearing on: One, the type of proof that was in the original case; two, the question of the effectiveness of the Dean decree.

The Court: As to the effectiveness of the Dean decree, I think that is a matter for me to decide after I hear whatever they have to offer.

As to violations, I think they are restricted only by their complaint.

[fol. 287] Mr. Jinkinson: That is right.

The Court: And, also, they are restricted by the dates that I have arbitrarily given them.

In other words, I will still hold them to their allegations in the complaint with reference to the Clayton Act violations. As I recall, they are quite meager, but general.

Secondly, I will also hold them to the dates. They must be within the framework of the complaint, and within the dates from the time of the entry of judgment in the former trial, and prior to the commencement of the trial in this particular instance.

That is what I intended to convey. If there is any misunderstanding, does this straighten it out?

Mr. Jinkinson: It straightens out the Government as to that.

Mr. Hart: How about the offer of proof? Are they restricted in any way on that?

The Court: You mean that they filed in connection with the motion I decided some time ago?

Mr. Hart: Yes.

The Court: No. I would not restrict them.

In other words, what I think I ought to send to the Supreme Court for its future review in this case if I decide in favor of the defendants—I assume that if I decide in favor of the Government, there will be no appeal, because [fol. 288] defendants always agree with these things, knowing the wisdom of this Court.

The Government has that yet to learn.

What I would like to say is that I think in order that the Supreme Court on a future look at this thing may have a complete picture of the situation as it exists today.

As I remember Justice Clark's opinion, he means, from what he says, the chancellor to assess the immediate danger, if any, or the immediate need of the Government to an injunction as of the time of hearing.

Now, that should not be restricted, either by the filing of a formal offer of proof at an earlier date or by the evidence that was received in support of the Government's Clayton Act contentions at the earlier trial. It should be what is the situation today. If I remember Justice Clark's opinion correctly, that is what he wants.

Now, for me to say, and I think the Justice left the door open for me to say it, for me to say, "I have given the evidence further consideration. I will not permit the Government to introduce any other evidence. I will now permit the defendants to go ahead and make presentation of the affirmative defense that they set up in their previous answer [fols. 289-450] without regard to what has happened between then and now," would be merely to invite a further direction by the Supreme Court to a further review of the whole situation.

What I would like to give the Supreme Court is this—for what it may be worth, my evaluation of the situation as of the date of the hearing with reference to the Clayton Act violations.

Do I make myself clear?

Mr. Jinkinson: I think that is exactly what the Government was going to contend for.

The Court: You mean I have ruled for you without your argument?

Mr. Jinkinson: There is only one thing that bothers me. That is, Mr. Ball's statement about substantial evidence. I don't know what he means by "substantial evidence." I don't know what he means.

The Court: Let me ask you. What have you got? What are you going to offer? I will not allow you to rehash what you already have in the record.

Mr. Jinkinson: We understand what you told us. We are not going to attempt to introduce any evidence other than in 1955—what happened in 1955.

• • • • • • •

[fol. 451] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 947

[Title omitted]

SUPPLEMENTAL PRE-TRIAL ORDER—November 4, 1955

The Court having directed the attorneys for the parties to appear before it for a pre-trial conference and the Court having set September 26, 1955 as the date for said conference; the Court having met with counsel for the parties on said September 26 and from time to time thereafter, and the plaintiff and the defendant Bowman Dairy Company having come to certain agreements, in the course of said conferences,

It is ordered:

1. This order is a supplement to the Pre-Trial Order entered in this cause on March 4, 1953;

2. This order only pertains to the plaintiff and the defendant The Bowman Dairy Company;

3. The introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff and the Bowman Dairy Company that the evidence sought to be introduced is immaterial or ir-

[fol. 452] relevant, and the same reservation and objection

shall apply to all stipulations, agreements, and admissions of fact contained in this order;

4. That this supplemental pre-trial order and all matters herein referred to and all admissions of fact and agreements with respect to the trial of this action shall be used for no other purpose than the trial of this action and are made solely for the purposes of this trial.

Agreements of Fact Between Plaintiff and the Bowman Dairy Company

1. For purposes of this cause, fluid milk as defined in the Pre-Trial Order of March 4, 1953 may be converted into points in the following manner:

1 qt. of Milk	equals 1 point
1 qt. Sta-Slim	equals 1 point
1 qt. Skim Milk	equals 1 point
1 qt. Buttermilk	equals 1 point
1 qt. Dari-Rich	equals 1 point
1 qt. Chocolate Milk	equals 1 point
1 qt. Strawberry Milk	equals 1 point
½ gal. Milk	equals 2 points
1 gal. jug Milk	equals 4 points
1 pt. Half and Half	equals 1 point
½ pt. Cream	equals 1 point
1 qt. Cream	equals 4 points

[fol. 453] Further, the following other types or kinds of dairy products may be converted into points thus:

1 qt. Eggnog	equals 2 points
½ pt. Whipping Cream	equals 1 point
1 can Quick-Whip	equals 1 point
1 pt. Sour Cream	equals 2 points
½ pt. Sour Cream	equals 1 point
1 qt. Energee	equals 2 points
½ pt. Yogurt	equals 1 point
1 pkg. Cottage Cheese, whether plain, chives, or pineapple	equals 1 point

2. That the "Bowman Dairy Company Resale Store Discount Schedule" effective June 1, 1954, marked for identification as Exhibit 1, along with an amendment effective August 25, 1954, marked for identification as Exhibit 2, may be offered in evidence without further proof or authentication.

3. That Exhibit 1 was used as the basis for computing discounts upon all sales of fluid milk by the Bowman Dairy Company to independently owned store customers in the Chicago area during the period June 1, 1954 through

August 24, 1954 and that Exhibit 1, as supplemented by Exhibit 2, was used as the basis for computing discounts upon all sales of fluid milk by the Bowman Dairy Company to independently owned store customers during the period August 25, 1954 through August 23, 1955, as illustrated by the March 1955 sales to, and the March 1955 discounts [fol. 454] paid to, the independently owned store customers listed in Schedules I and II attached hereto.

4. That the letter from Bowman to the Great Atlantic & Pacific Tea Company dated May 28, 1954, marked for identification as Exhibit 3, may be offered in evidence without further proof or authentication, and that the rate stated therein was used as the basis for computing discounts upon all sales of fluid milk by Bowman to the Great Atlantic & Pacific Tea Company and delivered by Bowman to A & P's retail stores in the Chicago area during the period June 1, 1954 through August 22, 1955, as referred to on Schedules I and II attached hereto.

5. That the letter from Bowman to The Kroger Co. dated May 28, 1954, marked for identification as Exhibit 4, may be offered in evidence without further proof or authentication, and that the rate stated therein was used as the basis for computing discounts upon all sales of fluid milk by Bowman to The Kroger Co. and delivered by Bowman to Kroger's retail stores in the Chicago area during the period June 1, 1954 through August 23, 1955, as referred to on Schedules I and II attached hereto.

6. That during March 1955, Bowman sold fluid milk to the wholesale customers named on Schedules I and II attached hereto, as well as many other wholesale customers, at the same unit selling prices, and that during the following month Bowman paid the wholesale customers named on Schedules I and II attached hereto the discounts upon the March 1955 business shown on the schedules.

[fol. 455] 7. That all of the wholesale fluid milk customers listed on Schedule I attached hereto were regularly served on the same milk route during the month of March 1955.

8. That all of the wholesale fluid milk customers listed on Schedule II attached hereto were regularly served on the same milk route during the month of March 1955.

9. That the attached schedules entitled "Bowman Store Customers on Route No. 129 for March 1955" and "Bowman Store Customers on Route No. 1471 for March 1955," also marked as Schedules I and II, may be offered in evidence as statements of the facts appearing on said schedules without further proof or authentication.

10. That the classes and units of fluid milk referred to in Schedules I and II atached hereto are uniform in chemical and physical properties as between said customers.

11. That the customers listed on Schedules I and II are not all of the customers regularly served by Bowman on its Routes 129 and 1471.

[fol. 456] 12. That the prices charged by Bowman for quarts, half gallons and gallons of milk to the Great Atlantic & Pacific Tea Company, The Kroger Co., Goldblatt Bros. and independently owned store customers in the Chicago area during the month of September 1955 were as follows:

(a) A & P	9/1-9/18	9/19-9/30	
Quarts	17	16.69	
Half Gallons	33	32.46	
Gallons	62	62	
(b) Kroger	9/1-9/11	9/12-9/18	9/19-9/30
Quarts	19.32	17	16.69
Half Gallons	37.50	33	32.46
Gallons	70.46	62	62
(c) Goldblatt's	9/1-9/25	9/26-9/30	
Quarts	18	18.5	
Half Gallons	35	36	
Gallons	67	69	
(d) Independents	9/1-9/25	9/26-9/30	
Quarts	18	18.5	
Half Gallons	35	36	
Gallons	67	69	

and that these prices were charged for the milk delivered by Bowman during September to the stores listed on Schedules I and II atached hereto.

[fol. 457] 13. That the discounts paid by the Bowman Dairy Company to the Great Atlantic & Pacific Tea Company, The Kroger Co., Goldblatt Bros., and independently owned store customers on account of their respective purchases of fluid milk during the month of September 1955, were as follows:

(a) A & P	9/1 to 9/30		No discount
(b) Kroger	9/1 to 9/11		11%
	9/12 to 9/30		No discount
(c) Goldblatt's	9/1 to 9/18		3½%
	9/19 to 9/25		5%
	9/26 to 9/30		7½%
(d) Independents	9/1 to 9/25		No discount
	9/26 to 9/30	Under 25 points per day	No discount
		25-49 points per day	2%
		50-149 points per day	3%
		150-249 points per day	4%
		Over 250 points per day	5%

and that discounts in accordance with the listing above were paid for the milk delivered by Bowman during September to The Kroger Co., Goldblatt Bros. and to the independent stores listed on Schedules I and II attached hereto.

[fol. 458] 14. That the attached chart entitled "Bowman Downtown Chicago Accounts—March 1955," Schedule III, may be offered in evidence as a statement of the facts appearing on said schedule without further proof or authentication.

15. That the classes and units of fluid milk referred to in each column of Schedule III may be sold and delivered in different types and sizes of containers, but said classes and units of fluid milk are uniform in chemical and physical properties as between the customers referred to in Schedule III.

16. The locations of the places of business of the Bowman wholesale customers referred to or reported on Schedules I, II and III are marked on a copy of Gorand's 1951 Edition Street Map of Chicago and Suburbs, which map, marked for identification as Exhibit 5, may be received in evidence without further proof or authentication.

Enter:

Campbell, United States District Judge.

[fol. 459] SCHEDULE I

Bowman Store Customers on Route 129 for March 1955

Bowman Wholesale Store Customer	Average Daily Converted Points	Total Dollar Volume Per Month	Per Cent Discount	Amount of Discount Paid
Reuther - Grocery 524 West 71st Street	108.3	$ 602.11	6.16%	$37.09
Union Food Shop 646 West 69th Street	111.7	638.45	6.22%	39.71
A & P (#258) 6702 Wentworth Avenue	360.3	2,006.53	[1]	[1]
Charlie's Market 427 West 69th Street	202.8	1,137.39	7.35%	83.60
Kroger 7260 Wentworth Avenue	208.4	1,196.09	[2]	[2]

[1] A discount of 11% (See Exhibit 3) was paid by Bowman Dairy Company to The Great Atlantic & Pacific Tea Company on the basis of the total sales of fluid milk by Bowman Dairy Company to The Great Atlantic & Pacific Tea Company in the Chicago area. The dollar volume of fluid milk delivered by Bowman Dairy Company to this A & P store during March was $2,006.53; 11% of this amount is $220.72.

[2] A discount of 11% (See Exhibit 4) was paid by Bowman Dairy Company to The Kroger Co. on the basis of the total sales of fluid milk by Bowman Dairy Company to The Kroger Co. in the Chicago area. The dollar volume of fluid milk delivered by Bowman Dairy Company to this Kroger store during March was $1,196.09; 11% of this amount is $131.57.

[fol. 460]

SCHEDULE II

Bowman Store Customers on Route 1471 for March 1955

Bowman Wholesale Store Customer	Average Daily Converted Points	Total Dollar Volume Per Month	Per Cent Discount	Amount of Discount Paid
S. Tomczkowiz 2640 West 51st Street	118.3	$ 677.77	6.36%	$ 43.11
A & P 2901 West 51st Street	340.0	1,899.49		
Goldblatt's 63rd and Ashland Avenue	208.6	1,214.34		
Gus Psomakos Spotlite 2446 West 47th Street	281.0	1,648.33	7.87%	129.72

A discount of 11% (See Exhibit 3) was paid by Bowman Dairy Company to The Great Atlantic & Pacific Tea Company on the basis of the total sales of fluid milk by Bowman Dairy Company to The Great Atlantic & Pacific Tea Company in the Chicago area. The dollar volume of fluid milk delivered by Bowman Dairy Company to the A & P store during March was $1,899.49. 11%, of this amount is $208.94.

A discount of 8½% was paid by Bowman Dairy Company to Goldblatt Bros. on the basis of the total sales of fluid milk by Bowman Dairy Company to Goldblatt Bros. in the Chicago area. The dollar volume of fluid milk delivered by Bowman Dairy Company to this Goldblatt store during March was $1,214.34. 8½%, of this amount is $103.22.

[fol. 461]

Schedule III

Bowman Downtown Chicago Accounts—March 1955

Name and Address of Account		Total Dollar Volume of Purchases of all Dairy Products[1]	Milk		½ Pints		Cream			
			Dispenser Gals.	Dispenser Price per Gal.	No. ½ Pts.	½ Pint Price per ½ Pint	½ Pts. Gals.	½ Pts. Price per Gal.	Half and Half Gals.	Half and Half Price per Gal.
1. Eastgate Hotel	162 E. Ontario St.	$ 347 32		$	1 404	$ 0625	52	$3 19		
2. St. Clar Hotel	162 E. Ohio St.	548 98	125	72			98	3 19		
3. (Ehlen's) Tracy Restnt.	540 No. Michigan	461 43			2 376	055			84	$2 10
4. B/G Foods	430 No. Michigan	423 92								
5. Polly Tea Room & Grill	410 No. Michigan	668 13	205	75	2 256	06			105	2 17
6. B/G Foods	230 No. Michigan	822 15							180	2 36
7. (Ehlen's) Kuberd Restnt.	172 No. Wabash	476 50	140	70	5 160	06			105	2 17
8. Carder's Restaurant	118 No. Dearborn St.	697 24							63	2 10
9. Ham 'n Egger Restaurant	58 W. Randolph St.	151 91			2 616	055			70	2 36
10. B/G Foods	174 W. Randolph St.	396 32			864	06			42	2 14
11. Weldon Lagerlof	201 No. Wells St.	454 90	220	74	1 608	06			105	2 17
12. Charles Harrison Restnt.	1 No. La Salle St.	1 131 61			5 035	06			90	2 00
13. La Salle Pharmacy	2 No. La Salle St.	178 14	120	65	108	0525			245	2 07
14. Lagerlof Lindquist Restnt.	100 No. Franklin St.	556 20	285	74					98	1 76
15. (Ehlen's) Kuberd Restnt.	107 So. La Salle St.	356 74	195	70					143	2 00
16. Wales Restaurant	Quincy and So. Wells	382 60	240	71					77	2 10
17. B/G Foods	176 W. Jackson	890 02	265	73					94	2 10
18. Atlantic Hotel	316 So. Clark St.	1 258 23			6 360	06			168	2 17
19. Wales Restaurant	220 So. Clark St.	956 41	565	71					260	2 09
20. Welty's Field Bldg. Restnt.	130 So. Clark St.	1 594 65	690	66	3 432	0575			546	2 10
21. Walter Lagerlof Restnt.	119 So. Clark St.	791 00	265	74			136	3 00	350	1 84
22. B/G Foods	109 So. Clark St.	429 25			1 740	06			125	2 17
23. Italian Village	71 W. Monroe St.	379 68			1 800	0675	67	3 39		
24. B/G Foods	33 W. Monroe St.	447 95			2 016	06			121	2 17
25. Polly Tea Room & Grill	17 No. Wabash Ave.	408 96	140	75					98	2 36
26. B/G Foods	118 So. Michigan	680 47			3 648	06			157	2 17
27. Harvey Restaurant	310 So. Michigan	1 073 32			4 388	065	179	3 14		
28. Wales Restaurant	330 So. Michigan	614 95	340	71	330	06			152	2 10
29. B/G Foods	63 E. Van Buren St.	482 79			2 608	06			118	2 17
30. (Ehlen's) Hamilton Grill	600 So. Michigan	461 33	180	70					84	2 10
31. Sheraton Blackstone Hotel	636 So. Michigan	2 592 84	215	59	9 648	0525	586	2 95	64	1 67
32. Harvey Restaurant	Dearborn Station	1 580 88	655	74			276	3 14		
33. Harvey Restaurant	Union Station	2 618 43	595	74			168	3 14		

[1] Includes all other dairy products purchased from Bowman in addition to those itemized on this schedule.
[2] Served during period from 3/23/55 through 3/31/55 only.

Exhibit 1

[fol. 462] Bowman Dairy Company

Resale Store Discount Schedule

Graduated Resale Store Discount Schedule

Average Converted Points Per Day	Percent of Discount	Average Converted Points Per Day	Percent of Discount
0 to 10	3 6% to 3 4%	80 to 90	5 6% to 5 8%
10 to 20	3 4% to 3 8%	90 to 100	5 8% to 6 0%
20 to 30	3 8% to 4 2%	100 to 110	6 0% to 6 2%
30 to 40	4 2% to 4 6%	110 to 120	6 2% to 6 4%
40 to 50	4 6% to 5 0%	120 to 130	6 4% to 6 6%
50 to 60	5 0% to 5 2%	130 to 140	6 6% to 6 8%
60 to 70	5 2% to 5 4%	140 to 150	6 8% to 7 0%
70 to 80	5 4% to 5 6%		

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of one or more converted points of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your total purchases of Bowman milk products will be converted to points. This total will be divided by the number of days during the month upon which Bowman Dairy Company make store deliveries. The result becomes your average points per day.
2. From your average points per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

   Milk, including quarts, half-gallons and gallons
   Golden Guernsey
   Cream, including Half & Half, Rich Cream and Whipping Cream
   Quick-Whip

Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

No. 8. Revised Discount Schedule Effective June 1, 1954 in conjunction with price decrease effective same date.

[fol. 463] EXHIBIT 2

This schedule in effect since June 1, 1954 except that on August 25, 1954, the following was added to the schedule, but not published:

150 to 200	7.0% to 8.0%
over 200	8%

[fol. 464]

EXHIBIT 3

Bowman Dairy Company

The Milk of Superior Flavor

Head Office—140 W. Ontario Street
Telephone SUperior 7-6800
Chicago 10, Illinois

May 28th, 1954.

The Great Atlantic and Pacific Tea Company,
2622 North Pulaski Road,
Chicago 39, Illinois.

Att'n—Mr. C. L. Anderson, Director of Purchases

GENTLEMAN:

We beg to state that on the basis of an examination of our cost accounting records, together with a review of the competitive quotations now available in all areas except Harvard, Illinois, taking into consideration our expense of sales, delivery, customer service and collection to your concern, when compared with the general average of such costs falling outside of the so-called chain store category, justify a discount to you on our products in the amount of 11%, effective Tuesday, June 1, 1954.

Yours very truly, Bowman Dairy Company, F. H. Kullman, Jr., President.

FHKJr:CEG
DR Nelson
6 17 54

[fol. 465]

EXHIBIT 4

Bowman Dairy Company

The Milk of Superior Flavor

Head Office—140 W. Ontario Street
Telephone SUperior 7-6800
Chicago 10, Illinois

May 28, 1954.

Mr. E. C. Brunst, Jr.
The Kroger Company
8235 Vincennes Avenue
Chicago 20, Illinois

Dear Ed:

Confirming our telephone conversation of today, our discounts will be adjusted as of June 1, 1954.

Thereafter, we will allow a discount of 11 Percent on your purchases of dairy products in All Areas except Progressive Dairy in Racine.

Our regular advertising allowances remain the same—½ of 1 Percent for Proof Advertising.

Very truly yours, Bowman Dairy Company, Roy W. Buthman, General Sales Manager.

RWB:BPM
CC: A. H. Kramer

GORAND'S

STREET MAP OF CHICAGO

AND SUBURBS

SCALE OF MAPS: 1 INCH = 2000 FEET
EACH PAGE SHOWS 9 SQUARE MILES (3 MILES x 3 MILES)

LEGEND

- C.T.A. CAR LINE
- C.T.A. TROLLEY BUS LINE
- C.T.A. GAS BUS LINE
- C.T.A. RAPID TRANSIT LINE AND STATION
- C.T.A. SUBWAY LINE AND STATION
- C.T.A. CAR LINE AND RAPID TRANSIT LINE
- C.T.A. CAR LINE AND SUBWAY LINE
- C.T.A. CAR LINE, RAPID TRANSIT LINE AND SUBWAY LINE
- RAILROAD AND PASSENGER STATION
- SUBURBAN BUS LINE
- UNDERPASS
- GRADE CROSSING
- OVERPASS
- PEDESTRIAN SUBWAY OR BRIDGE

- CHICAGO CITY LIMIT
- VILLAGE LIMIT
- SECTION LINE
- HOUSE NUMBERS — 3400

ABBREVIATIONS

CEMETERY	CEM.
FOREST PRESERVE	F.P.
HIGH SCHOOL	H.S.
PARK	PK.
PARKWAY	PKY.
PLAYGROUND	PG.

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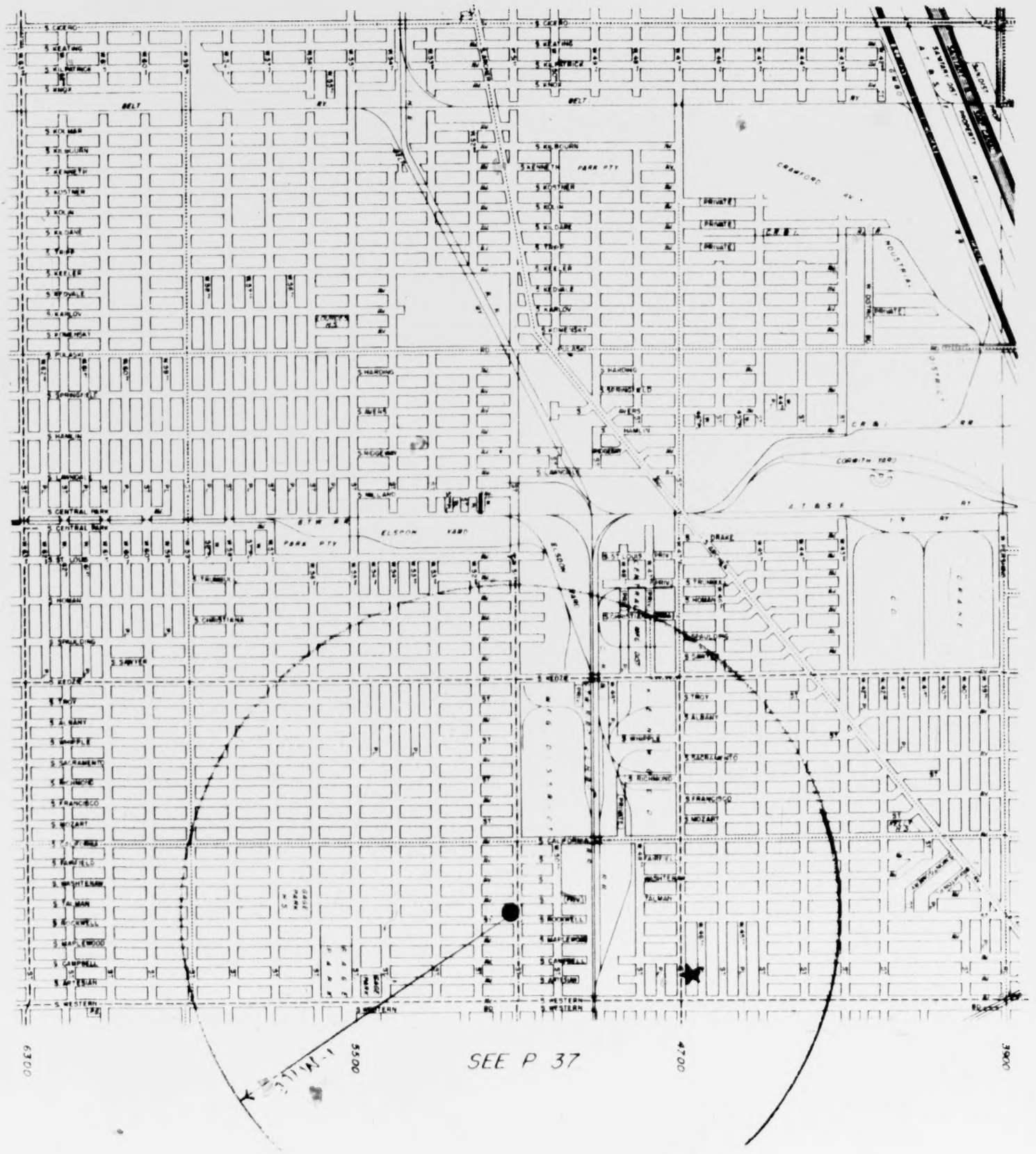
MAP REVISED: SEPTEMBER 1, 1950
C.T.A. ROUTES REVISED: DECEMBER 1, 1950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S. WESTERN
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S. ARTESIAN
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S. SACRAMENTO
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S. WHIPPLE
S. CALIFORNIA
S. RICKWELL
S. TALMAN
S. DRAKE
S. CRAWFORD
S. KILBOURN
S. KOLIN
S. KILDARE
S. KARLOV
S. PULASKI
S. SPRINGFIELD
S. KOSTNER
S. KENNETH
S. KILPATRICK
S. KNOX
S. KOMAR
BELT
PARK PTY
ELSDON YARD
ELSDON PARK
CRAWFORD
CORWITH YARD
CRANE
PRIVATE
CRB&I
ATSF
BTWRR
SANITARY DIST. PROPERTY
HOUSTON AV.
SKOKIE VALLEY
I-55 MTW-1

[fol. 465e]

Legend:

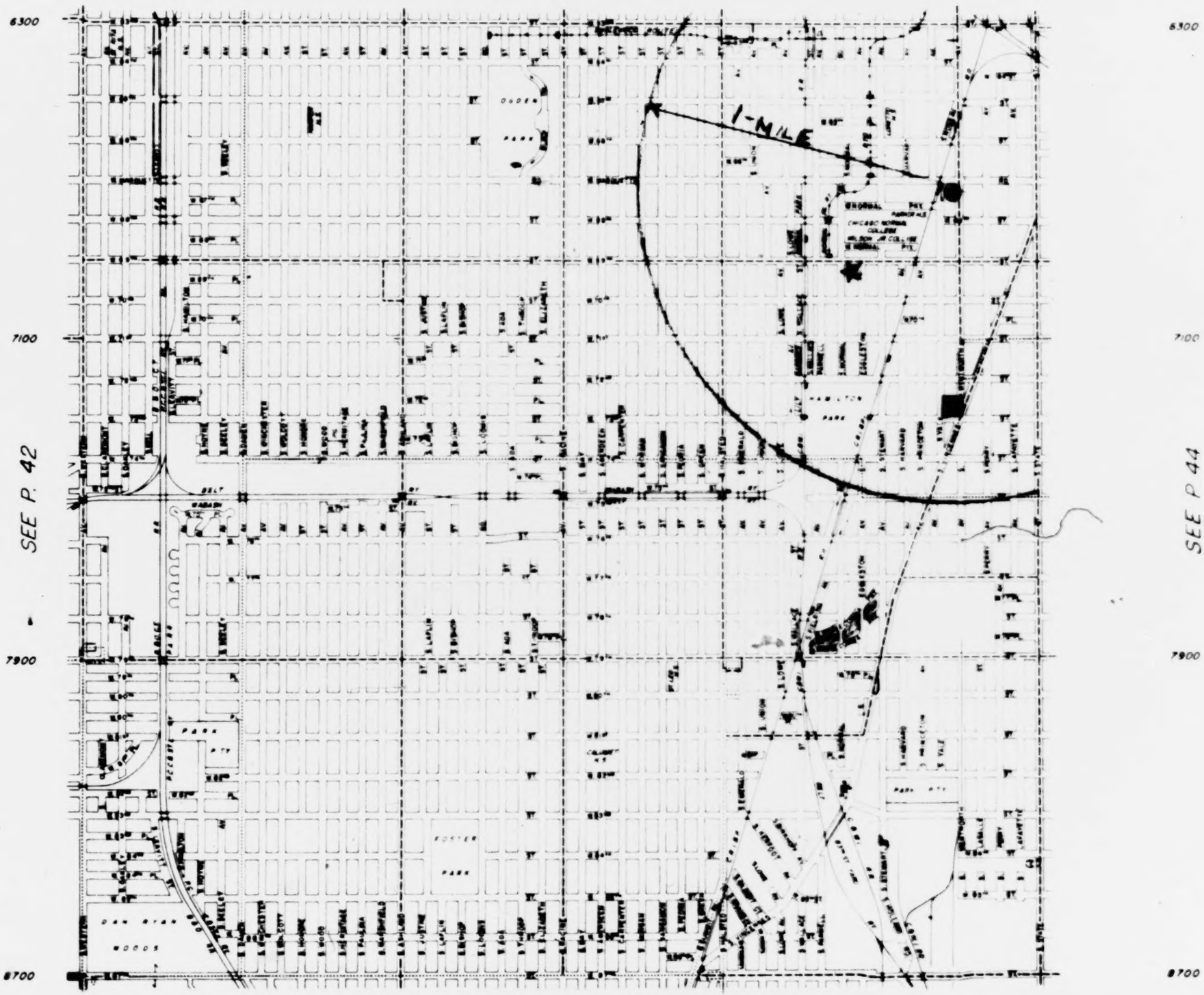
A & P stop ● Goldblatt's stop ■ Psomakos' stop ★

73

Legend:
A & P stop ● Kroger stop ■ Charlie's Market stop ★

[fol. 465d]

74



[fol. 466] In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 51 C 947

[Title omitted]

Supplemental Pre Trial Order as to the Borden Company
November 8, 1955

The Court, pursuant to Rule 16 of the Federal Rules of Civil Procedure, having directed the attorneys for the parties to appear before it for a pre-trial conference concerning the evidence to be offered upon the reopening of this action; the Court having set September 26, 1955 as the date for said conference; the Court having met with counsel for the parties on said September 26 and from time to time thereafter; and the plaintiff and the defendant The Borden Company (hereinafter called "Borden") having come to certain agreements in the course of said conferences,

It is ordered:

1. This order is a supplement to the Pre-Trial Order entered in this action on March 4, 1953;

[fol. 467] 2. This order pertains only to the plaintiff and the defendant Borden;

3. The introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff and the defendant Borden that the evidence sought to be introduced is immaterial or irrelevant, and the same reservation and objection shall apply to all stipulations, agreements and admissions of fact contained in this order;

4. This supplemental pre trial order and all matters herein referred to and all admissions of fact and agreements with respect to the further trial of this action shall be used for no other purpose than the trial of this action and are made solely for the purposes of this trial.

Agreements as to Facts and Exhibits

1. "Borden's Milk Discount Schedule to Grocers, Effective Tuesday, June 1, 1954," marked for identification as Exhibit A, may be offered in evidence without further proof or authentication.

2. For purposes of this cause, the term "fresh milk products," as used hereinafter, includes not only fluid milk, as described in Section I, paragraph 5, of the Pre-Trial Order of March 4, 1953, but the other milk products listed in Exhibits A and D, together with similar items occasionally sold by Borden.

[fol. 468] 3. Exhibit A was used as the basis for computing discounts upon all sales of all fresh milk products, including fluid milk, made by Borden to independently owned store customers in the Chicago area during the period from June 1, 1954 through August 28, 1955. The March 1955 and December 1954 discounts paid to the independently owned store customers listed on Schedules I and II attached hereto were computed and paid in accordance with Exhibit A, with the exception of the discounts paid to customers Popik, Schubert, and Arthur Cartan listed on Schedule II. These three customers were given 1½ per cent more than the percentage discounts which they would otherwise have received under Exhibit A.

4. The letter from Borden to the Great Atlantic & Pacific Tea Company (hereinafter called "A & P"), dated June 4, 1954, marked for identification as Exhibit B, may be offered in evidence without further proof or authentication. This letter was used as the basis for computing discounts upon all sales of fresh milk products by Borden to the A & P stores served by Borden's Chicago Milk Division in the Chicago area and in other parts of Illinois during the period June 1, 1954 through August 21, 1955, including the March 1955 and December 1954 sales to the A & P stores listed on Schedules I and II attached hereto.

5. The letter from Borden to The Jewel Food Stores (hereinafter called "Jewel"), dated June 4, 1954, marked for identification as Exhibit C, may be offered in evidence [fol. 469] without further proof or authentication. This letter was used as a basis for computing discounts upon all sales of fresh milk products by Borden to Jewel stores served by Borden's Chicago Milk Division in the Chicago

area and in other parts of Illinois during the period June 1, 1954 through August 21, 1955, including the December 1954 sales to the Jewel stores listed on Schedule II attached hereto.

6. During March 1955, Borden sold fluid milk to the store customers listed on Schedule I attached hereto, as well as to all of its other store customers in the Chicago area, at the same unit selling prices, and during the following month Borden paid the independently owned store customers listed on Schedule I attached hereto the discounts shown on the schedule.

7. During December 1954, Borden sold fluid milk to the store customers listed on Schedule II attached hereto, as well as to all of its other store customers in the Chicago area, at the same unit selling prices, and during the following month Borden paid the independently owned store customers listed in Schedule II attached hereto the discounts shown on the schedule.

8. All of the store customers listed on Schedule I attached hereto were regularly served on the same milk route, Borden Milk Route No. 25-W, during the month of March 1955.

9. The attached charts entitled "Borden Store Customers on Route 25-W for March 1955," and "Borden Store Customers on Routes 181, 155 and 145 for December 1954," and [fol. 470] marked as Schedules I and II respectively, may be offered in evidence without further proof or authentication.

10. The fluid milk referred to in Schedules I and II attached hereto was uniform in chemical and physical properties between said customers.

11. The store customers listed on Schedules I and II are not all of the store customers served by Borden on its Routes 25-W, 181, 155 and 145.

12. The form letter of Borden addressed to "Dear Grocer," dated August 29, 1955, marked for identification as Exhibit D, may be offered in evidence without further proof or authentication.

13. The prices charged independently owned store customers in the Chicago area by Borden during the month of September 1955 were the prices listed on Exhibit D, and these prices were charged by Borden during September to

the independently owned store customers listed on Schedules I and II attached hereto. No discounts or rebates were paid by Borden to the independently owned store customers listed on Schedules I and II attached hereto with respect to September 1955 sales to such customers except that customers Popik, Schubert and Arthur Cartan received a 1½ per cent discount. On September 16, 1955, William D. Bovenzo closed his store at 1001 South Marshfield.

14. The letter from Borden to A & P dated August 29, 1955, a true copy of which is marked for identification as [fol. 471] Exhibit E, and the attachment thereto, a true copy of which is marked as Exhibit F, may be offered in evidence without further proof or authentication.

15. The prices charged A & P in the Chicago area and the Chicago suburban areas during the month of September 1955 are the prices listed on Exhibit F. During September 1955, Borden made deliveries to the A & P stores listed on Schedules I and II attached hereto, except that the A & P store at 2420 West 63rd Street was closed on September 26, 1955. As stated on Exhibit E, these prices were net prices without rebate or discount.

16. The attached chart entitled "Borden Downtown Chicago Accounts—March, 1955," Schedule III, may be offered in evidence without further proof or authentication.

17. The classes and units of fluid milk referred to in Schedule III may have been sold and delivered in different types and sizes of containers, but said classes and units of fluid milk were uniform in chemical and physical properties as between the customers referred to in Schedule III.

18. The sales of fluid milk to the restaurants and hotels listed on Schedule III include sales which were delivered in round dispenser cans designed to be placed in milk-dispensing cabinets of a design meeting the specifications of the applicable state statute and city ordinances. With respect to these dispenser cans, the applicable health statutes and ordinances require a variety of manual operations, and require that the seals be left intact on these cans by the [fol. 472] restaurant or hotel customer until returned to the defendant. These seals must then be broken and removed by hand labor. These cans are generally of three, five or ten gallon capacities and are fitted at the bottom with either a plastic rubber or metal tube which protrudes

through an external shutoff valve in the dispenser cabinet. The plastic rubber tubes can only be used once and cost about 5 cents each; whereas the metal tubes can be sterilized and reused.

19. The locations of the places of business of the Borden customers referred to or reported on Schedules I, II, and III are marked on a copy of Gorand's 1951 Edition City Map of Chicago and Suburbs, which map is attached hereto as Schedule IV. This map may be received in evidence without further proof or authentication.

Enter:

[Copy illegible] United States District Judge.

[fol. 473] SCHEDULE I

Borden Store Customers on Route 25 W for March 1955

Borden Wholesale Store Customer	Total Dollar Volume for Month	Per Cent Discount	Amount of Discount
A & P 2328 W. Roosevelt Rd.	$655 08	8½%[1]	$81 48[1]
Joe Giammorino 1949 W. Polk Street	508 60	3%	15 26
Carmen Gargano 1517 W. Polk Street	786 98	3%	23 61
A & P 2350 W. Harrison St.	776 50	8½%[1]	63 00[1]
F. Giorgi 2325 W. Taylor St.	817 99	3%	24 54
William D. Fiorenzo 1001 S. Marshfield	697 38	3%	20 92

[1] A discount of 8½% (Exhibit B) was paid by Borden to A & P on the basis of the total sales of fresh milk products to all A & P stores served by Borden's Chicago Milk Division in the Chicago area and in other parts of Illinois, which total sales include the dollar value of Borden's direct deliveries to these stores.

[fol. 474]

SCHEDULE II

Borden Store Customers on Routes 181, 155, 145 for December 1954

Route No.	Borden Wholesale Store Customer	Total Dollar Volume for Month	Per Cent Discount	Amount of Discount
181	Savaitis 2515 W. 69th St.	$1,165.35	4%	$ 46.61
181	Popik 2913 W. 63rd St.	1,188.18	4% plus 1½%	65.35
181	Schubert 2610 W. 71st St.	4,082.90	4% plus 1½%	224.56
155	A & P 6740 S. Western Ave.	2,941.38	8½% [1]	250.02 [1]
155	Arthur Cartan 6653 S. Ashland Ave.	1,312.18	4% plus 1½%	72.17
145	A & P 2420 W. 63rd St.	2,173.10	8½% [1]	184.71 [1]
145	Jewel 2454 W. 63rd St.	2,947.47	8½% [2]	250.53 [2]

[1] A discount of 8½% (See Exhibit B) was paid by Borden to A & P on the basis of the total sales of fresh milk products to all A & P stores served by Borden's Chicago Milk Division in the Chicago area and in other parts of Illinois, which total sales include the dollar value of Borden's direct deliveries to these stores.

[2] A discount of 8½% (See Exhibit C) was paid by Borden to Jewel on the basis of the total sales of fresh milk products to all Jewel stores served by Borden's Chicago Milk Division in the Chicago area and in other parts of Illinois, which total sales include the dollar value of Borden's direct deliveries to this store.

[fol. 475]

Schedule III

Borden's Downtown Chicago Accounts—March 1955

Name and Address of Account	Total Dollar Volume of Purchases of all Fresh Milk Products[1]	Milk					Cream			
		Dispenser		½ Pints			18%		Half and Half	
		Gallons	Price per Gal.	No. ½ Pts.	Price per ½ Pint	Gallons	Price per Gallon	Gallons	Price per Gallon
1. Bolling's Restaurant 205 W. Wacker Dr.	$ 758 63	505	634	—	—	—	—	175	1 5757
2. Bolling's Restaurant 228 N. La Salle St.	787 91	385	634	552	053	—	—	160	1 5757
3. Bolling's Restaurant 111 W. Washington St.	654 80	300	634	—	—	—	—	148	1 5757
4. George's Restaurant 75 E. Washington St.	1 315 91	320	72	—	—	—	—	192	2 04
5. O'Connell's Restaurant 107 W. Monroe St.	451 01	—	—	4 080	0493	—	—	126	1 5586
6. George's Restaurant 208 S. La Salle St.	1 158 74	305	72	—	—	—	—	176	2 04
7. Congress (Pick) Hotel Congress & S. Michigan	2 500 35	—	—	12 480	055	448	2 60	—	—
8. Harvey Restaurant Union Station	2 900 92	945	74	2 000	065	524	3 14	—	—

[1] Includes all other fresh milk products in addition to those itemized on this schedule purchased from Borden for these locations.

[fol. 476] EXHIBIT A

Borden's Milk Discount Schedule to Grocers

Effective Tuesday, June 1, 1954

The following discount schedule will be applied to all purchases of Borden's fresh milk products.

Average converted units per day	% Discounts
0 — 24	0
25 — 74	2
75 — 149	3
150 and over	4

Discounts Will be Computed as Follows

1. Your total monthly purchases of Borden's fresh Milk products will be converted to units. This total will be divided by the number of days during the month that our trucks are on the street making normal store deliveries. This figure becomes your average converted units per day.

2. From your average converted units per day your discount can be found from the above discount schedule.

3. Your discount for the month will then be applied to your total dollar purchase of Borden's fresh milk products.

	Units		Unit
Gallons	4	Buttermilk	1
½ Gals.	2	Half & Half	1
½ Gal. Zest	2	Rich Cream	1
½ Gal. Gail Borden	2	Whipping Cream	1
Qts. Milk	1	Sour Cream	1
Skimmed Milk	1	Cottage Cheese	1
Chocolate Drink	1	Triple & Reddi Wip	1
		Yogurt	1

Discount checks will be mailed to you during the month following the month in which they were earned.

This Discount Schedule Applies to Borden-Owned Chicago Area Routes Only.

The Borden Company, Chicago Milk Division, 3638 Broadway, Chicago 13, Illinois.

[fol. 477] EXHIBIT B

June 4, 1954.

The Great A & P Tea Company,
2622 N. Pulaski Avenue,
Chicago, Illinois.

GENTLEMEN:

This is to advise you that we are changing our discount to you effective Tuesday, June 1, 1954 on your purchase of milk and certain dairy products in the Chicago area.

Prior to June 1, 1954, our discount to you was 8¼¢. Effective June 1, 1954, our discount to you will be 8½¢.

We are also enclosing a copy of our new price schedule effective retroactive to June 2, 1954

We are prepared to establish the legality of the discount offered to you.

Very truly yours, The Borden Company, Chicago Milk Division, Harold Fagerson, Vice President.

HRF:SP
Encl.

[fol. 478] EXHIBIT C

The Borden Company—Chicago Milk Division

3638 Broadway, Chicago 13, Ill.

Notice of Change In Discount Rate Effective 6/1/54

June 4, 1954.

Mr. E. A. Miller,
The Jewel Food Stores,
3617 S. Ashland Avenue,
Chicago 9, Illinois.

DEAR MR. MILLER:

This is to advise you that we are changing our discount to you effective Tuesday, June 1, 1954 on your purchase of milk and certain dairy products in the Chicago area.

Prior to June 1, 1954, our discount to you was 8¼¢. Effective June 1, 1954, our discount to you will be 8½¢.

We are also enclosing a copy of our new price schedule effective retroactive to June 2, 1954.

We are prepared to establish the legality of the discount offered to you.

Very truly yours, The Borden Company, Chicago Milk Division, Harold Fagerson, Vice President.

HFR:SP
Encl.

[fol. 479] EXHIBIT D

The Borden Company—Chicago Milk Division

3638 Broadway, Chicago 13, Ill.

August 29, 1955.

DEAR GROCER:

Effective August 29, 1955, our prices to you will be as follows:

Gals. Homo V.D. Milk	67	
Qts. Homo V.D. Milk	18	
½ Gals. Homo V.D. Milk	35	
½ Gals. Gail Borden Signature Quality Milk "Glass"	37	
½ Gals. Zest Modified Skim Milk "Paper"	325	
Qts. Chocolate Drink	23	
½ Pts. Chocolate Drink, Handi-Pak	75	per doz.
Qts. Vitamin Fortified Skim Milk	17	
Qts. Buttermilk	18	
Qts. Strawberry Drink	28	
Pts. Rich Cream	54	
½ Pts. Rich Cream	275	
12 Oz. Sour Cream	375	
8 Oz. Sour Cream	25	
Pts. Half & Half	27	
½ Pts. Whipping Cream	29	
Borden's Triple Whip or Reddi-Wip—7 Oz. Can	42	
8 Oz. Creamed Cottage Cheese (plain)	16	
12 Oz. Creamed Cottage Cheese (plain)	21	
16 Oz. Creamed Cottage Cheese (plain)	24	
8 Oz. Chive Creamed Cottage Cheese	17	
12 Oz. Chive Creamed Cottage Cheese	22	
16 Oz. Chive Creamed Cottage Cheese	25	
8 Oz. Pineapple Creamed Cottage Cheese	18	
12 Oz. Pineapple Creamed Cottage Cheese	23	
16 Oz. Pineapple Creamed Cottage Cheese	26	
Dry Curd Cheese (12 Oz.)	22	
Yogurt (8 Oz.)	185	

Glass Bottle Deposit

15—Gallon Bottles
06—½ Gallon Bottles
03—Quarts, Pints and ½ Pints

These prices will be net prices without rebate or discount, or advertising allowances. Our bottle service credit as announced in our letter of December 10, 1953, is discontinued.

Very truly yours, The Borden Company, Chicago Milk Division, W. L. Hedin, General Sales Manager.

WLH/bal

[fol. 480] EXHIBIT E

Copy

August 29, 1955.

The A & P Food Stores,
2622 North Pulaski Road,
Chicago, Illinois.

GENTLEMEN:

Attached hereto is a list of our prices to you covering deliveries to your stores located in Chicago and the Chicago Suburban areas which become effective August 29, 1955.

These prices will be net prices without rebate or discount, or advertising allowance.

Our bottle service credit as announced in our letter of December 10, 1953, is discontinued.

We are prepared to justify our prices to you.

Very truly yours, The Borden Company, Chicago Milk Division,——, ——, President.

WNW:lm
Attch.

[fols. 481-533]

Exhibit F

The A & P Food Stores

Effective August 29, 1955

Chicago & Chicago Suburban Area

	Net Cost
Gals. Homo V.D. Milk	62
Qts. Homo V.D. Milk	166
½ Gals. Homo V.D. Milk	324
½ Gals. Gail Borden (Glass)	342
Qts. Sofkurd	259
Qts. Golden Crest Milk	207
Qts. Chocolate Drink	212
½ Pts. Chocolate Drink (Handi-Pak) (Doz.)	664
½ Pts. Chocolate Drink	055
Qts. Buttermilk	166
Qts. Rich Cream	912
½ Pts. Rich Cream	243
12 Oz. Sour Cream	54
8 Oz. Sour Cream	231
Pts. Half & Half	25
½ Pts. Whipping Cream	268
Borden's Yogurt	17
Qts. Vit. Fortified Skim	157
Borden's Triple Whip	388
Qts. Strawberry Drink	248
½ Gal. Carton Zest Milk	30
8 Oz. Creamed Cottage Cheese (Plain)	148
16 Oz. Creamed Cottage Cheese (Plain)	222
2 Lb. Cottage Cheese	388

Glass Bottle Deposit

15—Gallon Bottles
06—½ Gallon Bottles
03—Quarts, Pints and ½ Pints

[fol. 534] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

[Title omitted]

Transcript of Proceedings of April 20, 1956

Transcript of proceedings had at the pre-trial conference in the above-entitled cause before Honorable William J. Campbell, one of the Judges of said Court, in his jury room, United States Courthouse, Chicago, Illinois, on Friday, April 20, 1956, at 2:00 o'clock p.m.

PRESENT:

Mr. Bertram Long, Mr. Thomas Kerr, and Mr. Elliott B. Wooley, Appeared on behalf of the Government;

Mr. Edward L. Hart, Jr. and Mr. John P. Stevens, Appeared on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

Mr. Stuart S. Ball, Mr. H. Blair White, and Mr. Joseph Greaves, Appeared on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 535] Mr. Kerr: Mr. Jinkinson sends his regrets that he will not be able to be here today.

The Court: Where is he?

Mr. Kerr: He has been called down to Danville, Illinois.

The Court: What is he doing down there?

Mr. Kerr: A Grand Jury investigation.

The Court: How are we doing here without the Court in the meanwhile, gentlemen? I hope you have got it all taken care of without me.

Mr. Ball: If the Court would be interested in a progress report?

The Court: I would like to hear it, yes. Do you mind if Mr. Ball states that?

Mr. Kerr: I think they are carrying the laboring oar.

The Court: As I left it, they had the laboring oar.

STATEMENT BY MR. BALL, COUNSEL FOR DEFENDANTS ON THE BORDEN COST STUDY AND COLLOQUY THEREON

Mr. Ball: Now, in the first matter that I would like to report to the Court it was about four weeks ago, I think we handed to the Government a proposed pre-trial order covering the cost defense of the Borden Company and this copy would be available to the Court.

The Court: Thank you very much.

Mr. Ball: I would like for the Court's benefit just to make a word of explanation of the same kind, Mr. Kerr, that I [fol. 536] made to you gentlemen when I gave the document to you because I think it will help the Court to understand something of the work which now devolves upon your shoulders and explain something of the time it took to prepare it.

This study, this order represents and reports upon the cost study that was made in July or August of last summer, and it has taken practically all of the time since then to get the material analyzed in such a way that it could be presented in an understandable form to the Government and to the Court.

What was done was that every one of the wholesale routes operated by the Borden Company out of the Englewood and Irving Park branches which includes all of the wholesale routes operated by Borden Company, store wholesale routes in the Chicago area, were surveyed, each for an entire week's operation.

The store wholesale routes that were covered, well over one hundred and thirty, represent practically all of the important store wholesale customers served by Borden in the City of Chicago. There are a few scattered store wholesale customers that are out of the ordinary area and who are served by the retail routes.

[fol. 537] The Court: Yes.

Mr. Ball: But they are, I think, an infinitesimal factor, and I think there are other reasons why that may be safely disregarded in looking at the picture of costs.

Now, what was done was that men were picked and trained with stop watches to spend a week on each route. The study took a period of five weeks and about one-fifth of these routes were studied in each of the five weeks.

The Court: Yes.

Mr. Ball: The men with the stop watch come to work with the driver in the morning, and he would get timed the various activities that were performed by the driver, and he was provided with a book of forms. These forms are attached as sample exhibits, or pre-trial exhibits, the pre-trial report. Each of these forms specified in very considerable detail types of work that were performed by the drivers on these routes and as the driver performed each task each day by means of a stop watch to the nearest minute the time was recorded on these sheets in pencil.

The survey sheets themselves as so prepared, have been collected together and are identified in this draft of an [fol. 538] order as a bulk exhibit and are available for inspection. They comprise raw data.

In some less detail cost studies were also made of certain other activities, such as time spent in the billing of credit to store customers and certain other home office activity that clearly relate directly to the delivery of the products to the store.

No attempt was made to get at differences of cost of production or any of the costs up to the point that the milk left the bulk plant to be delivered and the overhead cost was directly related to those activities.

As the result of the compilation of this data it was necessary to put it in some form of comprehensible order. Punch cards were prepared for IBM power equipment covering a substantial—well, most of the data from the surveys of the individual routes.

In addition as a check the Haskins themselves, who were the public accountants for the Borden Company with their staff worked on manual preparations of certain summary sheets issued upon the data so that the result of the computation made by the IBM cards could be checked against [fol. 539] the cards manually prepared by the Haskins people themselves.

Now, what we have attempted to do in this pre-trial order is to draw no conclusions, to state no opinions whatsoever but to state (1) exactly what the activities were that were surveyed; (2) describe the method by which the surveys were made step by step, to identify the documents

used, to identify the bulk exhibits which include, not only these first data sheets, but the punch cards, the data manually prepared by the Haskins people themselves.

To set out next in the pre-trial order those figures which appear on the books of record of the company that have some pertinence, either as directly applicable——

The Court: Yes.

Mr. Ball—to these costs, or as a comparable basis by which the results obtained through the computations of the cards could be checked against the company records, as a matter of comparison for accuracy.

We have attempted then to set forth the purely arithmetical results of certain kinds of computations, and have described the method by which in the making of those computations certain allocations have been made. No attempt [fol 540] has been made to draw from those schedules any conclusions as to relative costs by customers at all, because we feel that the conclusions that we will argue and the conclusions that the Government will argue are purely arithmetical deductions to be made from this basic data.

We have a feeling, therefore, that what we were trying to do is to put forth just the amount in the pre-trial order that would enable the Government by checking the bulk exhibits against the schedules to accept the schedules as a correct arithmetical summary of the bulk exhibits, so that for purposes of actual trial the bulk exhibits, if they met with that approval, might drop out of the record if the schedules themselves received the approval after checking by the Government.

The Court: Yes.

Mr. Ball: We would assume that if this material stands up under checks by the Government and the facts are verified, there would be no necessity on our part to call any witness at all in connection with our cost defense but all of the conclusions would be a matter of brief argument to be submitted to the Court.

Now, we would like to regard the statement of these paragraphs in sequence as if it were the testimony of Mr. [fol. 541] Malone, because Mr. Malone was the officer of the Borden Company who was designated to do the survey so that everything described in here was either done by Mr. Malone personally or done under his supervision and

direction. So that we are perfectly willing to bring Mr. Malone in at any time as the Government understands.

The Court: For cross examination.

Mr. Ball: For cross examination with no idea that Mr. Malone would have to be called to the stand eventually.

The Court: No, for cross examination by them for explanation of anything that appears in the order.

Mr. Ball: Now, we would assume that the Government is perfectly free to inquire for additional data from our books of record or additional documents or anything that might bear upon these matters, to question any others connected with the survey as to the details in which the work was done and to prepare, if they desire, other arithmetical schedules that might summarize some data that they feel otherwise is omitted or not presented in usable form in the order.

I am sure that that again is to be approached on our part and their part in exactly the same way that we ap- [fol. 542] proached the matter before.

It is a very interesting thing I think, as Mr. White was pointing out to me, as I started this explanation, that at the very end of our proposed pre-trial order on Page 86 we set forth the fact that this has cost the Borden Company, exclusive of attorneys' fees, the sum of $43,106.

Now, I mention that not for any other reason than its significance generally, it seems to me, to the Court and to the Government, and to counsel, as some indication of the problems that are presented under a Robinson-Patman Act type of legislation because if there is any significance that this figure has, it is that it is impossible every time you make a quotation of prices and price change to go out and make a cost survey contemporaneous with it to support the judgment.

Mr. Greaves: I understand we are going to get a bill for $7,000 additional from Haskins.

The Court: So that it will run well over fifty. I certainly commend you for what you have done. I want to read this carefully at my leisure, but certainly it has given you something to start on, I should think.

[fol. 543] Mr. Kerr: It has, your Honor.

The Court: I am very appreciative of your efforts here.

Mr. Kerr: If Mr. Hart will permit, let us talk to Borden

first while we have that before us. Then we can talk about that.

Mr. Ball: There has been also a presentation by Bowman but what I wanted to add to the Court is I know from the experience we have had in just the chore of digesting and presentation that we have put a very heavy burden on the shoulders of the Government again. I know Mr. Wooley has a job ahead of him, and I merely bespeak on their behalf so that the Court's patience that you have already exhibited to us in the affirmative that we are going to get two things is the result of this approach to our cost studies. In the first place, it is an immeasurable saving of trial time.

The Court: Yes.

Mr. Ball: But more than that a comprehension of the facts in the record for the benefit of the Court and of all parties concerned that I think will tend to focus our attention on the real issues.

The Court: A comprehension that would not be readily [fols. 544-547] obtained from the day by day presentation of the evidence.

Mr. Ball: Exactly.

* * * * * * *

[fol. 548] Mr. Ball: With this material and with the matters that I have outlined if we are successful in what we think we can at least visualize being done, we will be able, I think, to rest subject to such rebuttal evidence, Government rebuttal evidence, without the necessity of any witnesses in the trial.

The Court: Well, I certainly want to express my appreciation, not only to you, but to the Government counsel as well, for your cooperative efforts in this regard.

Mr. Ball: Government counsel has been exceedingly co-
[fol. 548a] operative.

The Court: You have saved a great deal of the Court's time. My work will start, of course, when you people finish.

Mr. Kerr: We appreciate that.

The Court: I can see now my summer vacation disappear into thin air. As I gather your timetable, you are going

to dump all of this in my lap just about the time I thought I was going to adjourn and take two months' rest.

Mr. Wooley: If you take two months, maybe we can adjust it accordingly.

The Court: That might be a good idea, except I have a lot of cases set for the Fall. Perhaps I better spend my summer on the milk business.

Now, do we want to hear from Bowman?

STATEMENT BY MR. KERR, COUNSEL FOR GOVERNMENT, AND COLLOQUY THEREON

Mr. Kerr: On the Borden, while we have it before us, I would like to say that with respect to everything that Mr. Ball has offered us before the cost study, I think his Honor should know, we are in substantial agreement.

Mr. Ball: It is to complete that.

Mr. Kerr: That is right. That material was in the hands of Borden counsel for redrafting in a form which we expect will be satisfactory to us.

[fol. 549] The Court: Very good.

Mr. Kerr: With respect to the cost study which we have now had for a couple of weeks, we want to bring up something that was discussed here a few, well, a few meetings ago. We spoke to your Honor about the matter of the relevancy of a substantial portion of evidence being discussed before a large undertaking of work upon that matter was begun. We said that if it came to a point where there was something that we felt was relevant, could we bring it forward and ask your Honor what his ruling would be about it before we undertook many weeks of statistical work.

With respect to the Borden cost study, and we do not wish this to be decided in any way today, we want to say to the pre-trial conference that we think this is a matter that both sides will want to research and then perhaps discuss before your Honor.

With respect to the Borden cost study, as far as we can determine from studying it, all of the data, all of the raw data contained therein was obtained after this proceeding was begun in this last phase. In other words, all of the cost justification material and determination was made

after the allegation of price discrimination and the particular customers who had been discriminated against had been singled out.

[fol. 550] Now, we wish the question to be considered by your Honor as to whether cost justification material which is entirely accumulated after the fact, after the violation has been alleged, is acceptable to the Court, whether it is relevant in defense of the allegation of the cost justification or whether or not the law requires the businessman who considers giving a difference in price to customers, whether or not the law does not envisage that that businessman will determine at that time, whether or not the difference in price is fair.

The Court: Of course, as I understand your complaint, you allege the continuing differential in prices between certain customers of the same class and using the same quantities?

Mr. Kerr: That is correct, your Honor.

The Court: So that the information, if your complaint is a continuing one, as to these discriminatory practices, the information would be material, at least as to the discrimination of any that is in existence at the time the cost study is made.

Mr. Kerr: Yes.

The Court: It might not be and it might also be or might not be explanatory of the previous discrimination, if indeed a previous discrimination is found.

[fol. 551] Mr. Kerr: That is correct.

The Court: From the evidence.

Mr. Kerr: Before the Court we have the Government's case which was handed in in November.

The Court: Yes.

Mr. Kerr: Which had to do with prices charged in March and a few prices in December of 1954 and March of 1955.

The Court: Right.

Mr. Kerr: As far as we can tell from the face of the Borden cost study—now, we could stand corrected on this, of course—but as far as we can read on its face all of the cost justification data was accumulated after those two times so that the discriminations existed before the cost justification study was begun or was made.

We wish to bring this up at this time and ask the de-

fendants, perhaps, to look into it and argue their side of it to your Honor. We want it to be decided before we undertake what will be, I think you must admit also——

The Court: Your rebuttal.

Mr. Kerr: ——considerable time to study and rebut this cost study.

[fol. 552] The Court: Well, before I hear from the defendants on the point I merely want to reiterate what I have just said. I think by and large, take it entirely now as academic or a hypothetical question, where a continuing offense is alleged in plaintiff's complaint and an equity complaint such as this, any evidence down to the time of trial as to justification of the practice is on its face admissible.

Now, what I think you are saying and which you may well argue in your brief, and if this evidence, and you are not sure that it is, but if it is limited entirely to evidence of events that have occurred subsequently to the filing of the complaint and of the introduction of the case in chief against these defendants, your argument, I should think offhand, without going into it, goes more to the weight than to the admissibility of such evidence; and the argument is available to you, of course, in support of your complaint and against their defense that, too, this is admissible and it is evidence of how they arrived at the cost that they gave Merchant B in 1956, but it is not explanatory of what they did with Merchants A and B in 1953.

Mr. Kerr: That is correct.

[fol. 553] The Court: Now, that I think goes to the weight rather than the admissibility if your argument exists.

Mr. Kerr: If it goes to the weight, your Honor, then I think we should indicate our study of the data which has been given us and after checking it, state whether or not we can accept it in the pre-trial order.

The Court: Yes. The fact that they may choose to rest their case on evidentiary data that is accumulated subsequent to your case in chief and argue from that that this applies also to the prior violations as alleged in your complaint is a matter of choice of the defense counsel.

Mr. Kerr: Yes.

The Court: And, of course, if they do rely entirely on such evidence they realize, and I should think they antic-

ipate that you may make the very argument that you have just presented. I do think, however, without even hearing from them, that this argument as to the weight of the evidence rather than to its admissibility, since your complaint alleges a continuance of these facts and asks for injunction restraining them in the future——

Mr. Kerr: Very well.

The Court: Do you want to speak to that point?

[fol. 554] Mr. Hart: If the Court please, I would like to say just——

The Court: I want to hear him on his first.

Mr. Ball: If I have these general comments, while I did not anticipate it would be raised at this particular stage of the proceeding for the reasons I think the Court has expressed; on the general proposition of cost defense the very point that I mentioned here about the very cost is in itself an indication that these can't be made twenty-four hours or overnight, at such time as the question is raised.

Now, the problem here of weight is simply what factors are there that indicate that the cost differentials established as over a five-week period, which are compared to book costs that run over the entire year——

The Court: Yes.

Mr. Ball: —raise an inference, a substantial inference or proof that the same differentials existed four months earlier.

Now, it seems to me that that is a problem of arguing a relative weight inference.

The Court: That is exactly the way I felt about it. Of course, in the first place, it is a matter of choice for de-

[fol. 555] fense counsel to elect. I mean, of course he doesn't have to introduce any evidence if he doesn't want to. He can merely argue the weight and the sufficiency of your evidence.

Mr. Kerr: Yes.

The Court: In support of your complaint and if he chooses to introduce evidence all of one period and argue it from that, that it applies to the preceding period for his justification, for what his client has done in the preceding period, that is a matter of choice of defense counsel. I didn't mean to interrupt you, Mr. Hart.

Mr. Ball: May I also say to the Court we do mention

that this is not the only cost survey of this type. We have made written surveys.

The Court: Thus far this is the one that you are offering.

Mr. Ball: We have deliberately chosen not to put the one of three years ago that we would have put in at the time of the prior trial because to conform it to this pattern would require another several months of work. Now, there is that practical problem that I want the Court to understand because a reference has been made in the pre-trial order of this prior survey.

[fol. 556] The Court: Yes.

* * * * * * *

STATEMENT BY MR. HART, COUNSEL FOR DEFENDANTS, BOWMAN DAIRY COMPANY, AND COLLOQUY THEREON

Mr Hart: I want to point out to the Court that Mr. Kerr's remarks would not necessarily apply to the Bowman study. We don't know. Maybe he thinks they do.

The Court: Now, let me be informed as to what you have [fol. 556a] been doing all of this time. You have also completed your study, have you?

Mr. Hart: Yes.

The Court: And submitted them to the Government?

Mr. Hart: We have prior to the time that the Borden study went in. They have had it considerably longer. I don't know just exactly.

The Court: Are you in a position to comment on his?

Mr. Kerr: Yes, your Honor, we are in position to comment on the Bowman cost study.

First, again with Bowman as with Borden, on other matters, I think we are in substantial agreement. They have conducted two outside surveys and we have accepted both of those and are willing to stipulate to that.

The Court: Yes.

Mr. Kerr: They can go into the record.

There was, I think he wanted to put in some of the ordinances. He wanted to make up some other wording.

Mr. Hart: Yes.

Mr. Kerr: I think that that is all going to be ironed out fairly well. So we are in agreement on that.

On the Bowman cost study we do not make the remark

[fol. 557] Mr. Hart would wish me to say now. We do not make the remark that it is entirely after the fact of the allegations in this complaint, or in the facts which we put in in November.

With respect to your cost study and this goes to Borden, now that we have talked this matter over, we will after checking, generally accept the cost study as your offer of proof upon the cost study. We will be glad to stipulate as to the qualifications of the person who would present it and his background as an expert, but we will require, we do desire to cross examine the person presenting the study in Court upon the cost study which has been presented to us.

The Court: You desire to cross examine him in Court, or would you rather do that privately?

Mr. Kerr: As long as it is on the record, your Honor, we think that it should be before your Honor so that——

The Court: Well——

Mr. Kerr: These rulings can be made at the time.

The Court: If it is to be before me, I wouldn't want it until I have had complete opportunity to study and digest the report on which you are going to cross examine.

Mr. Kerr: All right.

The Court: That is going to slow up putting it in here. [fol. 557a] Could you adopt a different tactic so that we still can get the entire record in at one time?

Could you conduct your cross examination of the expert by way, first of all, do not waste time on his qualifications and all that as long as you are stipulating them, but on just the material parts of the report that you wish to question, could you do that by way of deposition? And then let us, say, have cross examination and redirect by way of deposition and file the depositions at the same time?

So that what I would like to do, since we have made the progress that we have made thus far in our pre-trial conference, for which I commend all of you——

Mr. Kerr: Yes.

The Court: In fairness to both sides, I would like to have the whole case before me in the same format. In other words, to read some of it and then hear the rest of it in the way of cross examination of experts or otherwise in Court, and then adjourn the Court hearing and get the briefs, I think is not fair to either one of you because—I don't know,

maybe some Judge can do it, but I can't carry in my mind and in the meanwhile I am trying, I understand, two [fol. 558] or three important criminal cases and certain other cases that are on my calendar—I can't carry in my mind in the intervening three or four months your cross examination of this expert on the material that he files in the pre-trial order.

Now, what I would like to have, in fairness to all of you and I think agreeable to the procedure that we have set forth here that we have defined in this pre-trial conference, if we could present it all so that I can start reading with Document 1 and then reading Document 199, and then turn to your briefs, that when, for example, I am reading the Borden Company pre-trial order here, assuming this is what we agree on, having first read what you submitted last November——

Mr. Kerr: Yes.

The Court: —then reading this, I can sit down and alongside of me your cross examination of this man which I can read at the same time and then go on to his study and your cross examination of his expert, finishing all of that, and then start on the briefs and refer back as I read to these various documents in evidence.

Now, can it be done that way?

Mr. Kerr: I think I did not make myself clear. I think that is about what I am talking about.

[fol. 559] The Court: Well, that would be helpful to me.

Mr. Kerr: Mr. Hart has presented and Mr. Ball has presented a cost study which you have before you.

The Court: Yes.

Mr. Kerr: And other matters.

The Court: That is right:

Mr. Kerr: We will say that that is their affirmative defense in the case, and that we have reached the point in the case in which their witnesses on the stand have offered that.

The Court: This? Exactly.

Mr. Kerr: That is correct.

The Court: There are two other portions that he has not read.

Mr. Hart: Two other portions that we are going to submit within the next two weeks also.

The Court: Very well. But as to this phase of it, their

evidence is in, their witness on the stand and he has bowed in your direction and said, "Your witness"?

Mr. Kerr: Right. In addition to that, we will have checked all of the raw data so that there is no——

The Court: Yes.

Mr. Kerr: ——misunderstanding or there are no differences of mere numerical matter.

[fol. 559a] The Court: Or authenticity.

Mr. Kerr: And the only thing left will be to go into the actual theory of the cost justification and I think——

The Court: Insofar as this draws conclusions?

Mr. Kerr: That is correct.

The Court: To cross examine him on the conclusions drawn. Now, Mr. Ball represented—just a moment. Mr. Ball represented with reference to his and Mr. Hart has previously represented with reference to his, that they have tried to avoid——

Mr. Kerr: No, Mr. Hart's study has made conclusions.

The Court: There are conclusions.

Mr. Kerr: That is correct.

The Court: I thought that you were attempting to avoid them also.

Mr. Kerr: They differ in this respect.

The Court: Very well. Then, insofar as Mr. Hart presents conclusions and insofar as Mr. Ball avoids conclusions, you desire cross examination?

Mr. Kerr: That is correct.

The Court: I don't see why you should not have it in the form of a deposition and redirect on the same points of cross examination.

[fol. 560] Mr. Ball: It is my anticipation that if Mr. Kerr would look at our draft as if it were Mr. Malone's testimony in chief——

The Court: Yes.

Mr. Ball: Then we would get——

The Court: Then we would have this.

Mr. Ball:—in the deposition cross examine Mr. Malone. I envisage one step further and we will not need then the cross examination or examination in the raw form of a deposition but that could again be reduced to comparable paragraphs on which we would agree based upon that.

The Court: That would be very helpful if you could.

Mr. Kerr: We will certainly attempt, your Honor. We will certainly attempt.

The Court: That is, at least reduce it insofar as you can, but if you can't it still does not present the difficulty to me that the sporadic cross examination in an occasional court session would present because if you can hand with this even the complete deposition of Mr. Malone on cross examination and redirect, it will certainly present it in a more orderly fashion to me, if it can be stipulated that that be taken as if the testimony were given in open Court, [fol. 561] which you will stipulate.

Mr. Kerr: Actually, your Honor, we do not contemplate that it would be sporadic at all.

The Court: It will be as far as I'm concerned.

Mr. Kerr: Everything will be done and then we would have this one session in whatever two or three days.

The Court: Then it would be two or three months before you get your briefs in.

Mr. Kerr: That is correct.

The Court: By the time I open your first brief I will have completely forgotten who was on the stand and what he said. That is why I would like to have this, all frankly now, and you gentlemen have been very fair with me and I am trying to be equally fair with you all the benefit that that will be to the Government and after all this is a trier of the facts you have to deal with here. You have been plagued with me in this particular case all that that will do for you when I sit down to decide this case is that I will tell this man sitting here, this court reporter, to bring me in the transcript of that testimony that took place three or four months ago before I set time for filing briefs. Then I will try to refresh my recollection at that time by going through it. And the effect, if any, in not having the [fol. 561a] jury here I can assure you, there are no melodramatic effects that would influence the Court one way or the other and sometimes those enter it in a jury trial. And all I will have again is the same record that you can give me. So why not save my sitting through it the first time?

Mr. Ball: I would like to make, if I may, Mr. Kerr, one rather general observation because of what you said about cross examination theory.

I had a suit and hoped that the problem of the theory in our particular case would be a problem of argument of counsel. For this reason: We have made in this schedule certain compilations, arithmetical divisions which we call allocations. We have not attempted to draft any paragraph to state the reason we did it this way. We have merely described how we did it.

Now, it would seem to us that if there are other ways in which it can be done it is perfectly possible for those arithmetical activities to be performed by you and submitted as different kinds of schedules.

The Court: In rebuttal.

Mr. Ball: Well, it could include it in the order. Then we would submit to the Court. The Government in taking [fol. 562] this basic data has divided it arithmetically in this fashion: We have divided it here——

The Court: Yes.

Mr. Ball: Now, we are drawing the conclusion as the result of their allocation or division of it. We are drawing this conclusion. Now, it seems to me, frankly,—I just don't consider on the basis of our approach that this is a situation for expediting or theory.

It just seems to me it is a good old legal question of what inferences do you draw from certain factual data.

I want to make that point clear to Mr. Kerr and to the Court that when we talk about cross examination of theory, I must confess I see very little scope of cross examination for theory because we are trying to present a theoryless pre-trial order leaving the theory to be merely the argument as to the validity of interests.

Mr. Kerr: Well, you carried the burden here of justifying cost differences which have been shown, and as his Honor said previously with respect to another matter, it is up to you to decide whether or not you are going on the burden. [fol. 563] Whether or not you have to cite your theory in order to successfully bear that burden, is something that we will say now that we will argue.

Mr. Ball: I understand that.

The Court: You may argue that in your briefs.

Mr. Ball: That is right.

The Court: But his point now is whether or not cross examination is necessary. In view of the facts that he

has completely and factually said. I have not read this yet either, presented his evidence here as much as it could have been elicited by direct and cross examination in Court.

He further states that if there is something further that you would have elicited upon cross examination, that he has not now factually set up in here, why, he is willing to add that to this so that when it is finished this becomes, not a stipulation of testimony so much as a stipulation of facts.

Mr. Kerr: Well, let me say this: We have studied the Bowman one much more thoroughly than the Borden right now. It might be that we can do it.

The Court: There are two different theories.

Mr. Kerr: That is correct.

The Court: Now, I think in order to do justice to his [fol. 564] presentation, to Mr. Ball's presentation here, you must study this on the theory, on the basis of the theory of which he has submitted it.

Mr. Kerr: All right.

The Court: And which he agrees may leave it incomplete from your point of view at the present time. And he further states he is willing to complete it if, indeed, there are any factual matters that should be added here in order to present a complete picture.

Do I correctly summarize both of your positions?

Mr. Kerr: I think so, Judge.

The Court: Suppose you then review his pre trial order in that light, and with that view in mind when you are prepared to speak further to it we will hear you. If it then becomes necessary, in your opinion, to [illegible] of the deposition of Mr. Malone, we will do so.

I hope that since it is presented in this fashion that it will be possible for you to add whatever you think should be added by agreement with the Borden Company and get it all in here in the one form.

Mr. Kerr: I think we probably can. We have worked together very well so far.

The Court: Well, continue. Do I correctly summarize [fols. 565-617] it?

Mr. Ball: You do. There is one colossal point that I think the Court may be interested in.

As the Court is aware, there is a very great difference

in approach between the defense that we have introduced on cross and that introduced by Bowman.

The Court: Yes.

Mr. Ball: I think in many ways that will be helpful to the Court.

The Court: Yes.

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[fol. 618] [File endorsement omitted]

[fol 619] In United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America Plaintiff,

vs.

The Borden Company, et al., Defendants

Transcript of Proceedings—March 7, 1957

Transcript of proceedings had at the pre-trial conference in the above entitled cause before Honorable William J. Campbell, one of the Judges of said Court, in his jury room, United States Courthouse, Chicago, Illinois, on Thursday, March 7, 1957 at 2:00 o'clock, p.m.

Present:

Mr. Bertram [illegible]g, Appeared on behalf of the Government;

Mr. John P. Stevens, Appeared on behalf of the defendants Bowman Dairy Company and Rideeview Farms Dairy, Inc.;

Mr. Stuart S. Ball, Mr. H. Blair White, and Mr. Joseph Greaves, Appeared on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 619a] The Court: How did you and Mr. Hart get along on this fiber versus glass bottle issue that was left open, wasn't it, the last time?

Mr. Long: At the last time we had thought that we were going to take a further deposition of Mr. Bergfeld on that point.

The Court: Yes.

Mr. Long: That fiber against glass study, and the restaurant cost study. We have analyzed those and gone over those very carefully and have decided we do not care to take any further deposition of Mr. Bergfeld.

The Court: Then they can rest, can't they?

Mr. Long: They can rest and we have indicated sort of generally the other day to Mr. Stevens what our feeling is about the restaurant cost study. We do not feel like

there is probably any area of agreement that we know of on that.

The Court: I thought we more or less decided you could make your day survey too, if you wanted to, and put that in more or less in the form of a rebuttal.

Mr. Long: We have prepared that.

The Court: Put his in and argue the conclusions to be drawn from it. Wasn't that what we decided?

[fol. 620] Mr. Long: That is what we had sought to do. We, I think, will probably do the same way on the Bowman store competition survey. In other words, we have taken those facts and figures and we have made a little survey of our own. We have made a graph or a chart which we think may show something else than what they show there.

The Court: Yes. It is all a matter purely of argument, anyway, and what conclusions should be drawn from these various facts that are developed by the surveys.

My thought was, and I think I expressed it previously, to let them in both for the Government and for the defense.

Mr. Long: Fine.

The Court: As to what they are worth, and then for what they are worth, and let us argue the effect of it.

Mr. Long: Yes.

The Court: Are you agreed that you can rest now, then?

Mr. Stevens: No, not quite, your Honor?

The Court: What else is there?

Mr. Stevens: It was my understanding and I believe [fol. 621] Mr. Hart's, that we were to work out with the Government, which we have done, areas of agreement or disagreement.

The Court: That is right.

Mr. Stevens: On the cost studies.

The Court: Anything you can agree on include in the stipulation.

Mr. Stevens: Correct, and we had had a conference prior to our last session in which we had gone over a number of points on which we did agree and on a few to which they took exception to our studies. We were going to undertake to draft a paragraph reflecting that so that we can define the issues for the benefit of your Honor.

The Court: Very good.

Mr. Stevens: We did not go ahead with that until after the deposition of Mr. Bergfeld was completed because we

thought that might shed further light on the general problem and I just learned this week from Mr. Long that they had decided not to go forward with the deposition and that they had completed the last timber study and I rather had decided not to make the results of that study available to us until we had rested on what material we had.

[fol. 622] So that I have now started, in fact I have drafted a good deal of what would in my opinion, according to my understanding, reflect the—

The Court: The areas of agreement.

Mr. Stevens: —the areas of agreement and then incidentally, I have sent what I think is the heart of that out to Mr. Bergfeld in New York to look at because it deals largely with his special confidence.

The Court: Yes.

Mr. Stevens: But there is one thing that bothered me and that I thought I would like to ask Mr. Long because in reading over the transcript of the last session which I did this morning, I found a comment by Mr. Jinkinson which seemed to me—I didn't quite understand. It seemed to me to be perhaps changing. It is on Page 10 of the last transcript in which he said for the record:

> "We agreed with several matters in regard to this cost data that the Government said we would agree to."

He said to put those in the form to show us after he gets it in the form—I think you might recall, your Honor, Mr. Hart was under the impression last time that the pre-trial would be at 2:30.

[fol. 623] The Court: He was late.

Mr. Stevens: He did not come, for which he wanted me to apologize for him for that.

The Court: Yes.

Mr. Stevens: But he did not want Mr. Hart to be left with the impression that he says we specified to certain things we would agree to, he did not mean that we didn't disagree with the other things that we did not agree to.

Well, as I understand that, it seems to be saying when we agreed to some things we may disagree.

The Court: What I understood him to say—

Mr. Stevens: We disagreed with everything else.

The Court: Yes.

Mr. Stevens: At our conference there—Mr. Long may correct me on this—it was my understanding and the reason I want to bring it out now, it will make a lot of difference in the drafting of it. I won't draft a lot of paragraphs if there is no point to it.

The Court: Yes.

Mr. Stevens: It was my understanding with respect to the cost study, and except for the restaurant study, which I do not mean to discuss, or the January, 1956 study, which [fol. 624] is the one that the glass fiber study is connected with, except for that that the Government had only two objections to our cost defense, with respect to the March, 1955 prices. One was that the time studies that we used in computing time standards were '55 studies, all taken from routes on the Elston Division.

Mr. Wooley seemed to feel that we should have taken studies from all of our divisions. We felt that would be one point of disagreement which we would identify for your Honor.

The second point of disagreement was that we prepared a cost of running a route per day. We have all the expenses involved in the cost of running the route. We took the total cost per route day and apportioned it among customers on the basis of the driver's time required to service the various customers, and that the Government apparently felt that the use of driver's time to apportion the total cost of operating the route was an inappropriate method of apportioning. If it would have been limited to the driver's compensation that could be apportioned that way, but since the total route cost included a computation based upon a number of elements such as trucks, garage [fol. 625] expense, and so forth——

The Court: Yes.

Mr. Stevens: —we couldn't use that method of apportioning time. Well now, those were as I understood it at our conference the two objections they had to our basic approach and that if we persuaded your Honor that our approach was sound with respect to those two points that then they would accept the fact that we had made out a good cost defense.

And, on the contrary, if we failed to persuade your Honor on either of those two points——

The Court: Yes.

Mr. Stevens: — we would have to agree that our cost defense had not been successful.

The Court: And that persuading would be done in the briefs, having narrowed it —

Mr. Stevens: That would be ——

The Court: — or the order and the pre-trial conference.

Mr. Stevens: The argument in the briefs would be limited to those two points with the exception as I indicated earlier to the restaurant study.

The Court: The fiber glass.

Mr. Stevens: Glass fiber point in that later study.

[fol. 626] If that is not so there is a lot of persuading to be done. There are a lot of subsidiary issues.

The Court: What is your understanding?

Mr. Long: My understanding of what Mr. Jinkinson meant there was that we had in mind one other thing there that I think may not have been made explicit to them, which I think we thought was implicit, and that is that we thought the coverage of cost elements may not have been all that it should be.

We had in mind particularly in examining Mr. Bergfeld about the central office expenses in which there was no findings there; there was no central office expenses which were made a part of that cost study there.

The Court: That was the third objection.

Mr. Long: Yes.

The Court: Which you had to the cost study they presented.

Mr. Stevens: It was not an adequate coverage of all the cost elements that should have been in the cost study, the central office expense.

The Court: The expense of the central office was not included in the computation.

[fol. 627] Mr. Stevens: Yes.

Mr. Long: The time of the executive officers of Bowman Company and so forth, was not computed and an account kept of that so that could be allocated to the total cost.

The Court: Of course, that would be pretty well a cost analysis by some individual anyway, wouldn't it? I don't know how you could do that with much mathematical certainty.

Mr. Long: As to that, we don't know what the time of the executives are. We have no time studies upon which

we can make a rebuttal on that, except that we felt there ought to be a coverage of that.

The Court: Well, then the areas of disagreement are three rather than two?

Mr. Stevens: I don't want to——

The Court: I think you could pretty well pinpoint it in your stipulation and add merely one area to the two that you have enumerated.

Mr. Long: That is fine.

The Court: Other than that you do not challenge the cost study?

Mr. Long: No. We examined, I think there was some feeling about the solicitors, the matter of the solicitor's [fol. 628] costs there.

The Court: Of course, you are not precluded from argument on any of these things, I mean, but what he is talking about, I mean argument with reference to the overall weight.

Mr. Long: Yes.

The Court: Of the exhibit as such is open to you in the briefs, but what he is talking about is your particular objection to this as a good cost study with reference to their defense. These other things that you are talking about I think we would never be able to get into a stipulation, if we bring in each and every one of these little one of these. Can I confine it to the three?

Mr. Long: Yes, I think so. The principal issue Mr. Stevens already quite clearly articulated, the principal issue between us.

Mr. Stevens: Is the question of drivers and the method of allocating the cost.

The Court: That is right.

Mr. Long: We thought we would leave it open for these other things as much as we could so that whether they are a matter of argument or whether they are a matter of rebuttal, at least we want to have a chance to reply.

[fol. 629] The Court: I do not want to restrict you in your argument. Suppose, for example, we were actually in the trial of the case and you presented this cost study. You had your cost accountant and your analyst on the stand and qualified and they said yes, this is the result of the survey and here it is, Defendants' Exhibit 421-A and B, and then they object to it because of these main reasons

that he has just enunciated and I overrule the objection and they are received.

It still can be argued as part of the general issue, the weight of it, can't it?

Mr. Stevens: Your Honor, if I may make this observation? As I understand it, those three objections, they are not to the admissibility of the cost.

The Court: They go more to the weight.

Mr. Stevens: They go to the ultimate conclusion of whether or not this is a sound cost analysis and I think if we prevail in this case

The Court: As to admissibility.

Mr. Stevens: Of course. As I understand the Government's position if we prevail on the issues which separate us now they would accept the fact that our defense should be sustained. I think it went that far and I think we made [fol. 629a] the contrary agreement if we failed on those issues that this defense would not be sustained.

Mr. Long: I think that is right and fairly well stated.

The Court: Let it be so understood and you argue on those three points in the briefs. If you prevail then this pretty well sustains your defense.

Mr. Stevens: That was my understanding.

The Court: Very good. Is that yours?

Mr. Long: Yes.

The Court: It is so understood then.

Mr. Long: Do I understand now that whenever we find out our areas of agreement and we agree to a certain part of their pre-trial order there, then we are going to have the right to come in with our rebuttal which will contain our own view of the way we think these ought to have been allocated here, these costs ought to have been allocated here.

The Court: I see.

Mr. Long: We have charts and graphs that we are going to put in there, using their facts and figures.

The Court: As a matter of rebuttal, certainly.

Mr. Long: Yes.

[fol. 630] The Court: That would be on the trial in any event and I do not see why it couldn't be done here.

Mr. Ball: That will be done on the rebuttal portion of the pre-trial order?

Mr. Long: Yes.

The Court: Certainly, not as part of the defense. You

can't stipulate to that but it will be as part of the rebuttal, of the rebuttal portion, rather.

Mr. Long: Yes.

The Court: Of the pre-trial order. What I want to do is to get these defendants rested.

Mr. Long: Surely.

The Court: Then I will let your rebuttal in.

Mr. Long: Yes.

The Court: All right, will you put it in then with the understanding that these are the three main objections. If you prevail with reference to those I will accept your cost analysis as a good defense on this point.

Mr. Stevens: All right, your Honor.

The Court: Is that understood?

Mr. Stevens: That is my understanding.

The Court: And agreed by both sides.

[fols. 631-643] Mr. Stevens: Just so that it is clear, the third part that you mentioned, Mr. Long, is the cost study is deficient because it failed to include an element of cost in computing the total cost per route day, the central office overhead?

Mr. Long: That is right.

The Court: Very well.

Now then, how about this fiber versus glass bottle? Are you going to come up with a few paragraphs or a stipulation on that? There are two other points to resolve before you rest.

Mr. Stevens: As I understand Mr. Long, they want us to rest first before they let us know what the results of that study is. I don't— anything about that except that they spent a lot of time making it.

Mr. Long: To be frank, I am not sure.

The Court: Do you want to include this as partial rebuttal, if you include it at all?

Mr. Long: Yes.

The Court: That doesn't need to hold up your resting.

* * * * * * *

[fols. 644- 656] [File endorsement omitted.]

In United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America, Plaintiff,

vs.

The Borden Company, et al., Defendants

Transcript of Proceedings—May 17, 1957

Transcript of proceedings had at the pre-trial conference in the above-entitled cause before Hon. William J. Campbell, one of the Judges of said Court, in his jury room, United States Courthouse, Chicago, Illinois, on Friday, May 17, 1957, at 2:00 o'clock, P.M.

Present:

Mr. Earl Jinkinson, Mr. Bertam Long, and Mr. Elliott Woolley, On behalf of the Government;

Mr. Edward L. Hart, Jr., and Mr. John P. Stevens, On behalf of the defendants, Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

Mr. H. Blair White, and Mr. Joseph Greaves, On behalf of defendants The Borden Company and Belmont Dairy Company.

. . . . . .

[fol. 657] The Court: May I keep this? I see you note others as we go along here. 31 they say, take the second sentence up, 31, Page 21.

Mr. Jinkinson: We will buy the first sentence.

The Court: The first one you like?

Mr. Jinkinson: We don't like it but we'll buy it.

The Court: All right.

Now then, the second sentence, "Plaintiff concedes that if the Court finds and concludes——"

Mr. Hart: I might say that this again is paraphrasing the discussion at that last hearing. The concessions that we have in 29 and the concessions by the Government here——

The Court: Yes.

Mr. Hart:—are inter-dependent one upon the other.

The Court: Yes. Now, you don't want to concede that, do you?

Mr. Long: No. We do not like "the Court should find" or "conclude," "should or should not." That is up to you.

The Court: That if the Court finds and concludes—

Mr. Hart: Whatever the Court may find.

Mr. Jinkinson: This is what the Court is ultimately going [fol. 658] to find, isn't it?

The Court: Yes. Do you want to say that instead of this, instead of "the plaintiff concedes," that if the Court finds and concludes such and so, then the Court should find and conclude that the price differences identified on Schedule I of the pre-trial order were fully justified by the cost differences? I think this goes a little farther than the concessions in 29, doesn't it?

Mr. Stevens: No. It is about the same.

Mr. Hart: I think it is about the same.

Mr. Jinkinson: Well, it is just a restatement of 29.

Mr. Hart: We can say to be fully and completely cost justified.

Mr. Stevens: In the other we say they would not be shown.

The Court: Yes.

Mr. Stevens: This was my understanding of our last session, that these three points of difference would determine whether or not this was a good defense.

Mr. Hart: In other words, it has nothing to do with the ultimate finding of the Court, except upon this particular feature of it.

The Court: Yes. We did discuss this at the last pre-trial. [fol. 659] You refresh my recollection on that, will you?

Mr. Long: I don't know that we quite put it in this final form.

The Court: We got into an agreement on this.

Mr. Long: 28; I thought 28 was what we agreed on, Paragraph 28 there. Mr. Stevens and I had a colloquy but I didn't know that we quite went as far as 29 and 31.

The Court: How would you propose—29 I have ruled on. How about 31? How would you propose to change this? Do you want to eliminate it altogether? Certainly we did discuss this.

Mr. Long: That is right.

The Court: At our last pre trial. We did arrive at an agreement.

Mr. Long: I thought we would rather have the last part of 29 that you have already ruled on and the last part of 31 go out and 28, including the agreement of counsel, being sufficient in itself without the last part of 29 and the last part of 31.

The Court: Well, I would want to refresh my recollection by the transcript of the last pre-trial; but before we get to that, would this be satisfactory, subject to my refreshing [fol. 660] my recollection and of course subject to your pointing this up in your argument, if we adopt the same tactics here that we did just a moment ago with reference to—was it 30?

Mr. Hart: No. That was 29.

The Court: With reference to 30, when I said that the plaintiff represents, didn't we? Or the defendant represents, I think it was, wasn't it? Yes, the defendant, Bowman Dairy, represents. Why don't we say here instead of the plaintiff concedes, you could make the suggestion here on behalf of the defendant and of course that gets into argument. What you want to avoid is the concession?

Mr. Long: Yes.

The Court: It seems to me that we went pretty nearly this far the last time. I lose confidence in my ability to recollect things because——

Mr. Stevens: This is what we did.

The Court: Let me see it. Where are we? Is this the last page?

Mr. Hart: We drafted 29.

The Court: (Reading):

> "Mr. Ball: That will be done on the rebuttal portion of the pre-trial order?
>
> "Mr. Long: Yes."

Mr. Stevens: Towards the middle of the page, your Honor.

[fol 661] The Court: (Reading)

> "The Court: Certainly, not as part of part of the defense. You can't stipulate to that but it will be as part of the rebuttal, of the rebuttal portion, rather.

"Mr. Long: Yes.

"The Court: Of the pre-trial order. What I want to do is to get these defendants rested.

"Mr. Long: Surely.

"The Court: Then I will let your rebuttal in.

"Mr. Long: Yes.

"The Court: All right, will you put it in then with the understanding that these are the three main objections. If you prevail with reference to those I will accept your cost analysis as a good defense on this point."

That is about as clear as I could say it, isn't it? Apparently I did so. All right. Then that being the case, let me see, since after your discussion at the last meeting, that was the conclusion that I came to. Let me eliminate the necessity [fols. 662-666] for the plaintiff conceding anything and since this is to be an order of mine, just start with the words: "If the Court finds and concludes" and strike the words "plaintiff concedes that." Start with "If the Court finds and concludes," 1, 2 and 3. Then the Court should find and conclude that the price differences identified on Schedule 1 of the pre-trial order were fully justified by cost differences. I think I said that your cost analysis was a good defense on this point.

Mr. Hart: Yes.

The Court: That states the same thing. The Government is not then conceding it but I am stating what I found at the last pre-trial conference after I had heard you on the point.

Mr. Long: That will be fine.

The Court: Is that agreeable to you?

Mr. Long: Yes.

The Court: Correct the order accordingly.

* * * * * * *

[fol. 667] Mr. Jinkinson: Now, your Honor, we get down to a very, very—what the Government considers a very, very serious objection again on Page 25.

Mr. Hart: 25?

Mr. Jinkinson: 25. It is part of Paragraph 34. That is from Page 25 over to the top of Page 37. That, your

Honor, is the inclusion herein in this pre-trial order of text books.

In the first place the Government can't examine the text books. In the second place if we are going to get into a labyrinth of textbooks, we are going to produce textbooks to read for the next three or four years. It is a question of cost accounting.

The Court: I can assure you I won't read them.

Mr. Jinkinson: They are only an opinion.

Mr. Long: That is one reason we don't want them in.

The Court: Why does brother Bergfeld have to put in all of this?

Mr. Hart: The question that they raised, if the Court please, is paraphrased there in section, or in Paragraph 28. They have raised the point that using drivers' time as a method of allocation of all costs is unique and unheard of.

[fol. 668] Mr. Woolley: Illogical.

Mr. Hart: All this is is a demonstration that that same method has been used in cost accounting for a period of some years.

The Court: Why don't I give you leave to attach this as an exhibit to your brief?

Mr. Hart: Fair enough.

The Court: And take it out of the pre-trial order?

Mr. Hart: All right.

The Court: You can have the same leave with reference to authorities or printed volumes that you want to attach to yours.

Mr. Long: That is better.

The Court: It is agreed then that the references commencing on Page 25, the present form, Page 25, with Reference A and concluding on the top of Page 37, be deleted from the pre-trial order, and that leave be given—wait a minute. No, no, I beg your pardon. Stopping with Reference K on Page 36, because otherwise we are getting into testimony there. Stopping with Reference K, inclusive, Page 36, be deleted and the defendant Bowman Dairy Company be given leave and is hereby given leave to attach said references to its brief as an appendix thereto, and cite the attention of the Court to such references at the

[fols. 669-720] point in this brief where it is arguing the effect of Mr. Bergfeld's testimony.

Mr. Hart: Yes. I think that will answer it.

The Court: That similarly be given the Government with reference to similar appendices to its brief. Is that satisfactory?

Mr. Jinkinson: Yes.

Mr. Hart: Yes.

. . . . . .

[fol. 721] In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 51 C 947

[Title omitted]

Additional Pre-Trial Order Relating to Plaintiff and to Defendant The Borden Company—September 19, 1957

The Court, pursuant to Rule 16 of the Federal Rules of Civil Procedure, having directed the attorneys for the parties to appear before it for a pre-trial conference concerning the evidence to be offered upon the reopening of this action; the Court having set September 26, 1957 as the date for said conference; the Court having met with counsel for the parties on said September 26 and from time to time thereafter; the Court having entered the Supplemental Pre-Trial Order of November 8, 1955; and plaintiff and defendant The Borden Company (hereinafter called "Borden") having come to further agreements in the course of said conferences:

It is Ordered:

1. This Order is a supplement to the Pre-Trial Order entered in this action on March 4, 1953 and the Supplemental Pre-Trial Order entered in this action on November 8, 1955;

2. This Order pertains only to plaintiff and defendant Borden;

3. The introduction of evidence under any and all of said agreements is made without agreement as to the weight [fol. 722] of such matters and subject to the objection reserved by the plaintiff and the defendant Borden that the evidence sought to be introduced is immaterial or irrelevant, and the same reservation and objection shall apply to all stipulations, agreements and admissions of fact contained in this Order;

4. This Order and all matters herein referred to and all admissions of fact and agreements with respect to the further trial of this action shall be used for no other purpose than the trial of this action and are made solely for the purposes of this trial.

5. Schedules I, II, III and IV and Exhibits A, B, C, D, E and F referred to herein are the schedules and exhibits attached to the Supplemental Pre-Trial Order of November 8, 1955.

6. All Exhibits, Borden Bulk Exhibits and Schedules referred to in this Order may be offered in evidence without further proof or authentication.

I. Additional Agreements as to Facts, Exhibits and Schedules

A. Borden's Store Prices and Discounts

1. Exhibit D was mailed by Borden or delivered by its route drivers on August 29 and 30, 1955 to Borden's independently owned store customers in the Chicago area.

2. Exhibit G, being a form letter of Borden addressed to "Dear Grocer", dated June 2, 1954, was mailed by Borden to its independently owned store customers, together with Exhibit A, on June 4, 1954, and sets forth the prices charged by Borden to all of its store customers beginning June 2, 1954.

3. Exhibits H and J are, respectively, a discount schedule [fol. 723] effective June 1, 1954, and a price list effective June 2, 1954, issued by the Dean Milk Company (a distributor of fluid milk in the Chicago area and hereinafter called "Dean").

4. The Dean discount plan and price list, Exhibits H and J, were distributed by Dean to many of its store customers in the Chicago area on or about June 1, 1954. The price list sets forth the prices charged many store customers by Dean beginning June 2, 1954, and the discount schedule sets forth the discounts allowed by Dean to many of its store customers beginning June 1, 1954. Copies of Exhibits H and J were in Borden's possession before it prepared and issued Exhibits A, B, C and G.

5. In preparing its price list dated June 2, 1954, Exhibit G, and its discount plan effective June 1, 1954, Exhibit A, Borden copied the Dean price list and discount plan shown on Exhibits H and J.

6. Various price changes to store customers in the Chicago area were made by Borden, Dean and other distributors be-

tween June 2, 1954 and December, 1954. In December, 1954 and in March, 1955, the prices charged by Borden to its store customers and the prices charged by Dean to many of its store customers continued to be identical on identical fluid milk products. All discounts allowed by Borden to store customers listed on Schedules I and II were computed from said prices.

7. Jewel discontinued purchasing in the Chicago area, and in other parts of Illinois, fresh milk products from Borden on August 29, 1955. Jewel began at that date to [fol. 724] purchase fresh milk products for its stores from Dean.

8. Discounts to A & P and Jewel were, in accordance with Exhibits B and C, computed on the basis of total sales of fresh milk products to all stores of these customers served by Borden's Chicago Milk Division in the Chicago area and in other parts of Illinois. The dollar amount of discount so computed was transmitted periodically to each of these two customers by means of single checks. Discounts were never paid to the individual stores operated by these customers.

9. Exhibits K and L, being a letter and price list of August 29, 1955 issued by Dean, were distributed by Dean to many of its independently owned store customers early in the morning of August 29, 1955. Copies of Exhibits K and L were in Borden's possession before it prepared and issued Exhibits D, E and F.

10. In preparing its price list dated August 29, 1955, Exhibit D, Borden copied the Dean price list shown on Exhibit L except for the price of gallons of milk.

11. Exhibit L sets forth the prices charged by Dean to many of its independently owned store customers from August 29, 1955 to September 5, 1955. On the latter date Dean reduced its price to many of its independently owned store customers on gallons of milk to 67¢, and with this change the prices listed on Exhibit L were charged many such customers by Dean during the remainder of September, 1955.

B. Regulations Governing Sales of Milk

12. The sale of fluid milk in the Chicago area is governed by the provisions of Section 8 of the Illinois Pasteurization Act, Ill. Rev. Stats., Ch. 56½, Sec. 122, and Section 46 of [fol. 725] the Illinois Graded Milk Act, Ill. Rev. Stats., Ch. 56½, Sec. 215.

13. The sale of fluid milk in the City of Chicago is subject to the provisions of Chapter 154, Sec. 15, and Chapter 130, Sec. 23.1 of the Municipal Code of Chicago, which provide as follows:

> "154-15. All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized, and all certified milk and milk products sold for consumption in the raw state shall be placed in their final delivery containers at the farm at which they are produced.
>
> "Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles or in single service containers complying with standards prescribed in the unabridged form of the 1939 edition of the United States Public Health Service Milk Ordinance printed in Public Health Bulletin 220, as amended July 18, 1941, certified copies of which ordinance and amendment shall be on file in the office of the city clerk. Provided however, that nothing herein contained shall be construed to prohibit hotels, soda fountains, restaurants, and similar establishments from dispensing milk or milk products from sanitary dispensers approved by the board of health.
>
> "The delivery of milk and milk products to, and the collection of milk and milk products containers from, quarantined residences shall be subject to the rules and regulations of the board of health.
> (Amend. Coun. J. 3-16-44, p. 1621; 12-3-45, p. 4544)"
>
> "130-23.1. All milk, fluid milk products, ice-cream, frozen custard, sherbet, ices and similar frozen desserts served, shall be obtained from sources approved by the board of health. Only grade A pasteurized milk and milk products shall be used.
>
> "In the case of milk drinks prepared, served or sold, the milk used shall include the entire contents of the

original container, or shall be from an approved bulk dispenser. All milk drinks shall be mixed in a sanitary manner.

[fols. 726-729] "All milk and fluid milk products shall be served in the individual original containers in which they were received from the distributor, or from a bulk container equipped with an approved dispensing device complying with the following specifications:

(a) It shall comply with the requirements of section 130-22, pertaining to the construction of utensils and equipment.

(b) No surfaces with which milk or milk products come in contact, except the delivery orifice, while the dispenser is in use, shall be accessible to manual contact, droplet infection, dust, or flies.

(c) All parts of the dispenser with which milk comes in contact, including any measuring device, shall be cleaned and subjected to a bactericidal treatment at the milk plant where filled and not at the food dispenser's establishment.

(d) The dispenser shall be filled and sealed with two seals at the milk plant in such a manner as to make it impossible to withdraw any of its contents without breaking one seal and impossible to replace any of its contents without breaking the other.

(e) The dispensing device shall be so constructed as to automatically mix the milk and cream thoroughly with each dispensing operation except in the case of milk products which remain homogeneous without mixing. All milk and milk products and cream served from dispensers shall be kept at a temperature of 50° F. or less until served. In the enforcement of this requirement the board of health may make an exception in the case of cream served with coffee, cereals, etc. The board of health may permit the serving of cream from the original container or from a dispenser which complies with sub-paragraphs (a) and (b) of this section, and which can be filled in a sanitary manner, kept clean, and frequently subjected to bactericidal treatment complying with the require-

ments of section 130-26. (Added. Coun. J. 6-25-47, p. 456)."

Similar provisions are contained in the ordinances of the Village of Oak Park, Illinois, and of the Cities of Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe, Illinois.

C. Facts Relating to Bulk Wholesale Customers

* * * * * * *

[fol. 729a] 26. All deliveries by Borden in the Chicago area to the customers named on Schedule III are made from Borden's Chestnut Street branch. Borden operates 28 bulk wholesale routes out of its Chestnut Street Branch.

27. Borden's Chestnut Street branch is located at 312 West Chestnut Street. Raw Milk is received and processed at this plant, and distributed therefrom. Among the classes of customers served are hotels, restaurants, candy factories, bakeries, soup manufacturers, margarine manufacturers, and similar consumers of milk. No sales are made from [fols. 730-768] this branch to store customers, vendors, or individuals purchasing at retail.

28. The physical arrangement, equipment, and dock facilities of the Chestnut Street branch differ from those at other Borden branches in the Chicago area. These differences consist of adaptations to the type of business handled by this branch in order to effectuate economies.

29. All trucks operated from the Chestnut Street branch are large trucks which are different in design from those operated from the other Borden branches in the Chicago area. These trucks are specially equipped for the efficient handling of deliveries to the type of customer served. The trucks operated out of the Chestnut Street branch do not pick up products at any of the other Borden branches.

30. The drivers of the trucks operated out of the Chestnut Street branch are, by virtue of applicable labor contracts, compensated on a different basis than the drivers of trucks operated out of other Borden branches in the city.

* * * * * * *

[fol. 768a] 81. Exhibits YY through BBB are maps of the "loop area" of Chicago, Illinois.

F. Store Customer Cost Survey

82MD.* For some time prior and subsequent to June, 1955, J. F. Malone was the District Controller of the Chicago Central District of Borden. He has subsequently become district operational analyst. In both capacities he has reported to O. N. Koenig, District Chairman of the Chicago Central District.

83MD. As District Controller, Mr. Malone had supervision over all of the accounting activities of the Chicago Central District and of the divisions comprising parts of that District. His responsibilities included, and still include, the making of surveys and related studies of costs.

84MD. Mr. Malone was first employed by Borden as a clerk in the Accounting Department in March, 1927. During the next eight years he filled various accounting clerical positions in the Accounting Department of what was then Borden Farm Products Company of Illinois, including the positions of property accountant, cost accountant, and general ledger accountant. He then became, in succession, office manager and chief accountant and controller of the Chicago Milk Division, vice president in charge of accounting and purchasing of the Chicago Milk Division, and then District Controller of the Chicago Central District. Mr. Malone was for several years chairman of the accounting advisory committee of the International Association of Milk Dealers, and is currently a member of the accounting committee of that Association.

[fol. 769] 85MD. Numerous cost studies, varying in extent, have been made under Mr. Malone's supervision. A study and survey similar to that described in subsequent paragraphs of this Order was made in 1949, and another in 1950.

86MD. Studies have also been made in other markets in which Borden operates dealing with similar elements of

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* All numbered paragraphs designated as "MD" constitute summaries of the testimony of J. F. Malone given on deposition taken by plaintiff on January 15, 1957.

cost. None of these other studies were reduced to the same written form as the present study. They were studies on the part of management to ascertain the facts for use in setting management policies. These studies began approximately fifteen years ago and resulted from the shift that took place in the distribution of milk from retail to store wholesale sales, which occasioned the development of additional cost factors. These studies include a cost study made in the Chicago area on the distribution of ice cream, and other studies of distribution costs outside of the Chicago area but within the territory of the Chicago Central District.

87MD. The 1949 study and survey was based upon deliveries on the store wholesale routes operated out of the Englewood branch. The 1950 study and survey covered deliveries on the store wholesale routes operated out of the Irving Park branch.

88MD. The 1949 and 1950 studies were taken by management as confirming the facts as to the costs of distributing milk at wholesale as understood by management prior to the making of the studies. However, discount schedules to various classes of store wholesale customers had preexisted these studies.

89. Borden for many years has employed the firm of Haskins & Sells as independent auditors. In addition to the [fol. 769a] making of annual audits, Haskins & Sells is employed by Borden to make tests of accounting procedures, recommendations as to improvements in such procedures, and to make other special studies as requested.

90. In June, 1955, Mr. Malone was instructed by Mr. Koenig to re-study the difference between the cost of delivering fluid milk and milk products to Borden's corporate chain store customers in the Chicago area (as such area is defined in the Complaint) and the cost of delivering such products to different independent stores in the same area classified according to volume of purchases and discounts received under the Borden discount plan then in effect.

91. Mr. Malone thereupon caused a study of such costs to be made under his supervision during the five weeks beginning July 11, 1955, and ending August 13, 1955. In making this study, Mr. Malone used the services of regular

Borden employees, of persons temporarily employed to make time studies, and of Haskins & Sells.

92. The study thus made under the supervision of Mr. Malone will be referred to hereinafter in this Order as "the cost study."

93. The cost study did not include:

a. the cost of raw milk, cream, and other dairy products and the procurement costs involved in purchasing such raw milk, cream, and other dairy products;
b. the cost of transporting raw milk from points of procurement to bottling plants;
[fol. 770] c. the cost of pasteurizing and otherwise processing such raw milk into finished products;
d. the costs of packaging and storing such finished products prior to delivery; or
e. the cost of containers and container facilities and supplies used in the packaging of such finished products.

The cost study was directed to the determination of the cost of distribution of fluid milk and milk products from the coolers at the distribution branches to store wholesale customers.

94. During the five-week period in which the cost study was made, time studies were made of various company activities relating to the distribution of fluid milk and milk products. The manner in which time studies were made is described in subsequent paragraphs of this Order.

95. Borden's deliveries of fluid milk and milk products in the Chicago area are made by Borden's Chicago Milk Division, which forms a part of Borden's Chicago Central District. The division main office is located at 3638 North Broadway, Chicago. In 1955, the Chicago Milk Division operated four distribution branches, known as the Englewood, Hammond, Irving Park and Chestnut Street branches.

96. No deliveries of fluid milk were made by the Hammond branch located at 402 Clinton Street, Hammond, Indiana, to customers inside the Chicago area as defined in the Complaint.

97. The Chestnut Street branch has been described in paragraphs 14-20 and 26-30 of this Order. No deliveries were made from this branch to store wholesale customers.

[fol. 771] 98. In July and August, 1955, the Englewood branch had 57 store wholesale routes, and the Irving Park branch had 77 store wholesale routes. During the various weeks of the survey, these routes served 1,576 store customer locations. The 134 wholesale routes operated out of the Englewood and Irving Park branches delivered, in July and August, 1955, 88.12% and 87.65%, respectively, of the total fluid milk and milk products delivered on all store wholesale routes by the entire Chicago Milk Division. By far the greater proportion of the deliveries of the Englewood and Irving Park branches were made in the Chicago area, the remainder being in nearby suburban areas.

99. Retail routes are also operated out of both the Englewood and Irving Park branches. Some of these routes serve a few store wholesale customers. In July, 1955, 133 store customer locations were served by these retail routes.

100. The Englewood branch is located at 320 West 70th Place, Chicago. It serves a territory in the City of Chicago bounded by Rossevelt Road on the north, Lake Michigan on the east, the city limits of Chicago on the south, and Cicero Avenue on the west. This branch also serves approximately 30 suburbs, including Blue Island, Harvey, Homewood, Oak Lawn, and Evergreen Park.

101. The Irving Park branch is located at 3014 North Tripp Avenue, Chicago. It serves a territory bounded by Roosevelt Road on the south, Lake Michigan on the east, the city limits on the west, and extends north as far as Lake Forest, including approximately 30 suburbs, such as Evanston, Des Plaines, and Park Ridge.

[fol. 772] 102. Borden identifies the various accounts maintained in its books of account by coded account numbers. The breakdown of accounts pertinent to the cost study, and their code number identification, is as follows:

a. *Breakdown by location.* Different locations or branches are assigned numbers. Those pertinent to the cost study are:

721—Englewood branch
723—Irving Park branch
730—Division main office
902—District main office

b. *Breakdown by type of expense.* Different functions of operations are assigned numbers. Those pertinent to the cost study are:

4—Division Main office—Accounting
12—District Main office—Tabulating Department
21—Division Main office—Credits and Collection Department
23—Selling and Delivery Expense—Branches
71—Automotive Expense—Branches

c. *Breakdown by type of operation.* Expenses incurred in different types of company operations are assigned numerical codes. The five types of operations conducted at the Englewood and Irving Park branches in July and August, 1955, and the code number assigned to each, are as follows:

1—retail
2—wholesale
[fol. 773] 3—counter-vendor
4—handlers
5—cheese

d. *Breakdown by name of account.* Various subdivisions of the accounts are described by name, and each subdivision given a specific number. For example, that subdivision of an account to which route men's wages are charged is assigned the number 10.

103. The code numbers given to the breakdowns described above are given in the sequence listed. For example, the account given the code number 721-23-2-10 represents the salaries of routemen charged to wholesale delivery expense at the Englewood Branch.

104. The breakdown of costs between branches and between functions within a branch is on an actual basis and is supported by invoices and other records.

105. Branch accounting clerks are employed at both the Englewood and Irving Park branches. These branch accounting clerks make, or supervise the making of, reports and originate other accounting data which are entered on the books of account kept at the division main office.

106. A clerical staff is employed at the division main office under the supervision of the division controller of the Chicago Milk Division. Entries in the books of account are made by this staff.

107. Charges are made to the various classifications of accounts in accordance with standing written instructions.

108. The cost study as set forth in subsequent para- [fol. 774] graphs of this Order discloses the cost and the allocations as between different types of wholesale customers of some or all of the expenses charged to the accounts designated as follows:

721 and 723—23-2-2	Salaries—Office employees (wage cost of branch clerical employees)
721 and 723—23-2-8	Salaries—Senior Route Foremen (Route Supervisors, etc.)
721 and 723—23-2-9	Salaries—Junior Route Foremen (Swingmen, Route Riders, etc.)
721 and 723—23-2-10	Salaries—Routemen
721 and 723—23-2-34	Extra Compensation—Routemen
721 and 723—23-2-47	Salaries—Additional Vacation Labor
721 and 723—23-2-49	Union Severance and Retirement, Health and Welfare Expense
721 and 723—23-2-123	Provision for Bad Debts
721 and 723—23-2-126	Branch and Route Waste
721 and 723—23-2-127	Loss on Conversion of Route Returns
721 and 723—23-2-137	Outside Statistical Service
721 and 723—23-2-227	Insurance — Unemployment compensation—Federal Insurance
721 and 723—23-2-264	Automobile Expense (This is a control account which covers the total expenses charged to type 71 accounts)

721 and 723—23-2-268	Transfer from Main Office Credit and Collection Expense (Charge from 730-3 Credit and Collection Department)
721 and 723—71-2	Automobile Expense—Wholesale—Englewood and Irving Park. (All charges to this account except freight on leased trucks.) This account contains the details supporting the accounts 721-723-23-2-264.
730—4-1	Salaries-Administration
730—4-138	Tabulating Department Charge
730—21-1	Salaries-Supervision
[fol. 775] 730—21-2	Salaries—Office Employees
730—21-227	Insurance—Unemployment Compensation and Federal Insurance
902—12—1	Salaries—Supervision
902—12—2	Salaries—Office Employees
902—12—225	Rents Paid
902—12—227	Insurance—Unemployment Compensation and Federal Insurance
902—12—305	Transfers to other Departments

The various expenses covered by the above accounts are described more fully in subsequent paragraphs of this Order.

109. Expenses charged to the accounts listed below are not incurred with respect to store customers, and are not included in the cost study:

721 and 723—23-2-97	Soda Straws (This cost is in connection with deliveries to drug stores, restaurants, and similar wholesale customers but not to store customers.)

721 and 723—23-2-171	Automatic Vending Machine Maintenance (Expense applicable to vending machines not placed on premises of store customers.)

110. The cost study as set forth in this Order does not show allocations to various classifications of store customers of the expenses charged to the accounts designated as follows:

721 and 723—23-2-1	Salaries-Supervision
721 and 723—23-2-6	Salaries-Salesmen and Solicitors
721 and 723—23-2-12	Salaries-Platform men, Yardmen, Watchmen, and Shipping Clerks. (The major charges to this account are the wages of labor employed on the branch platforms in loading and unloading trucks.)
[fol. 776] 721 and 723—23-2-14	Salaries—Chauffeurs and Helpers.
721 and 723—23-2-48	Salaries—Miscellaneous (The Major charges to this account are the wages of demonstrators who conduct demonstrations and promotion of Borden products.)
721 and 723—23-2-51	Ice Used (Cost of ice used in refrigerating milk in trucks)
721 and 723—26-2-62	Service Clothing
721 and 723—23-2-94	Coach Candles (The cost of candles used to keep milk warm in winter in unrefrigerated trucks.)
721 and 723—23-2-98	Miscellaneous Materials and Supplies
721 and 723—23-2-101	Office Expense

721 and 723—23-2-102	Telephone and Tel[illegible]h
721 and 723—23-2-107 and 110	Gifts and Donations
721 and 723—23-2-111	Traveling Expense
721 and 723—23-2-115	Membership Fees and Dues in Trade Associations, Clubs, etc.
721 and 723—23-2-139	Cashiers Overages and Shortages
721 and 723—23-2-140	Holdups
721 and 723—23-2-169	Store Neon Signs—Cost and Maintenance (Borden neon signs are available to all store customers.)
721 and 723—23-2-190	Glass Bottle Service Charge (All stores handling gallon jugs are given the same allowance for handling them.)
721 and 723—23-2-200	Repairs to Building
721 and 723—23-2-201	Repairs to Machinery and Equipment
721 and 723—23-2-204	Repairs to Office Equipment
721 and 723—23-2-225	Rent Paid
721 and 723—23-2-228	Insurance—Group Life and Retirement Plan and Health and Accident
721 and 723—23-2-229	Insurance—Workmen's Compensation
[fol. 777] 721 and 723—23-2-230	Insurance—Fire—Plate Glass, etc.
821 and 723—23-2-236	Taxes—Real and Personal Property
721 and 723—23-2-238	Taxes—Licenses—Other
721 and 723—23-2-240	Depreciation on Buildings
721 and 723—23-2-241	Depreciation on Machinery and Equipment
721 and 723—23-2-258	Expense Fund Disbursements
721 and 723—23-2-260	Laundry
721 and 723—23-2-262	Light, Heat, Power and Refrigeration
721 and 723—23-2-263	General Sales Overhead

721 and 723—23-2-265	Special Accrual Overhead
721 and 723—23-2-294 and 298	Miscellaneous Expense
721 and 723—23-2-299	Advertising Allowance to Stores (Available on same terms to all store customers.)

111MD. The accounts 721 and 723—23-2-6, "Salaries—Salesmen and Solicitors," is a standard account classification throughout Borden operations. No distinction exists between salesmen and solicitors in Borden's fluid milk operations in the Chicago area, although such a distinction may exist in connection with some of Borden's other operations.

112MD. In the Chicago area Borden solicitors solicit new accounts. In the store wholesale business there is a heavy turnover. Retail stores have a high mortality rate. Solicitors solicit the business of newly-opening stores. They also call upon existing accounts to investigate and see that the type of service rendered is that which the company policy dictates. Solicitors hear complaints from store customers. They check with store customers as to the quality of Borden [fol. 778] products. They assist in putting up store promotional displays, and distribute point-of-sale materials; they bring to the customer knowledge and information with regard to new products and new sales promotions. They discuss with store customers the financial situations of the latter with respect to past due accounts.

113MD. Borden solicitors in the Chicago area would not call on a chain store with respect to securing or mantaining that business.

114MD. The accounts 721 and 723—23-2-190, "Glass Bottle Service Charge," covers the costs in connection with the return of gallon jugs to Borden. Based on Mr. Malone's experience, he is of the opinion that, over a long period of time, the consumer demand for gallon containers in the Chicago area has been consistent as between independent stores and chain stores. Gallon jugs came into use in the Chicago area in the depression days.

115MD. Studies have been made by the Federal Market Administrator which, in Mr. Malone's opinion, show a relative consistency in consumer demand for such con-

tainers. At the present time, about a third of the milk sold to stores is purchased in gallon containers, about a third in half-gallon containers, and most of the rest of it in quart size and smaller containers. The percentages are about the same irrespective of the class of customer, and hence the proportion of milk sold in gallon containers to the chain stores is the same. The same relationships are also consistent as between chain stores and independent stores with respect to other types of containers in which fluid milk is [fol. 778a] sold in the Chicago area.

116MD. In Mr. Malone's opinion, it would be entirely proper to allocate all of the cost elements listed in paragraph 110 of this Order in proportion to the ascertainable direct costs to individual customers and classifications of customers, and that such method of allocation would be entirely consistent with, and fully justified by, standard cost accounting practices.

117MD. The cost study does not cover allocations to various classifications of store customers of the cost of goods sold, including manufacturing and processing costs.

118MD. The monthly record of costs of sales by units is prepared without respect to bulk wholesale, store wholesale, or retail, and hence these costs are equally applicable to store wholesale sales and to bulk wholesale sales. It would thus be possible to take the cost of sales and compute them customer by customer for the test period. To do so would require a great deal of labor, since it would require, with respect to each customer, a separate computation with respect to each item shown as delivered at a particular time to that customer on the forms which were kept during the survey. This computation would have to be preceded by a summarization of the daily quantity by item, by customer. This computation would require more than a hundred thousand separate computations.

119MD. Based on his experience, Mr. Malone is of the opinion that the pattern of purchases by store wholesale customers for resale does not vary substantially between classes of store customers. The reason for this is that con- [fol. 779] sumer buying habits determine the types of purchases made by the various store wholesale customers, and all classes of store wholesale customers are selling to the same type of consumer. In this respect the pattern of

purchases by store wholesale customers differs from that of the purchases by bulk wholesale customers, where a great deal of variance occurs between customers, depending upon the type of customer operation and the type of facilities which the bulk wholesale customer has.

120MD. The variance in bulk customer purchasing habits is illustrated as follows: Some bulk wholesale customers, such as De Met, which have bakery operations, will buy in quantities and container sizes suitable for their needs which would be entirely different from that of restaurant customers. Some restaurant customers will have facilities such as dispensers, and other restaurant customers will not. Some restaurant customers will furnish the consumer at their restaurants with milk in small individaul containers, and others will serve milk to their customers only by the glass. Hence, some restaurant customers will make their purchases largely in half-pint sizes, and others will buy in bulk and in bulk dispenser cans. Some restaurants will make servings to customers of one-third of a quart, and others will make the individual servings half-pints, and the customer's practice in this respect will determine the type of unit purchases made.

121MD. For these reasons set forth in paragraphs 114-120 of this Order, the pattern of buying among bulk wholesale customers varies greatly, whereas the buying of store wholesale customers is somewhat more uniform.

[fol. 780] 122. Schedule XXIII, "Average Weekly Cost of Expenses not Allocated in Whole or in Part by the Cost Study as set forth in this Order," shows, with respect to the expenses charged to the accounts listed in paragraphs 109-110 of this Order, the total amount of such expenses for the twelve months ended July 31, 1955, as set forth in the books of account. The Schedule further shows the weekly average of such expenses computed by dividing the twelve months' figure by 52.

[fol. 781] SCHEDULE XXIII

Average Weekly Cost of Expenses Not Allocated In Whole or In Part by the Cost Study As Set Forth in This Order

Account No.	Total for Twelve Months Ended July 31, 1955	Weekly Average
721 and 723—23—2—1	$ 11,594 81	$ 222 98
721 and 723—23—2—6	107,423 01	2 065 83
721 and 723—23—2—12	467,579 61	8 991 92
721—23—2—14	3,636 97	69 94
721 and 723—23—2—48	21,404 92	411 63
721 and 723—23—2—51	15,587 83	299 77
721 and 723—23—2—62	1,262 16	24 27
721 and 723—23—2—94	(656 45)	(12 62)
721 and 723—23—2—97	2,421 97	46 58
721 and 723—23—2—98	3,330 90	64 06
721 and 723—23—2—101	11,027 35	212 06
721 and 723—23—2—102	6,524 71	125 48
721 and 723—23—2—107 and 110	6,154 77	118 36
721 and 723—23—2—111	22,647 54	435 53
721 and 723—23—2—115	100 00	1 92
721 and 723—23—2—139	(1 94)	(04)
721 and 723—23—2—140	48 50	93
721 and 723—23—2—169	13,732 39	264 08
721 and 723—23—2—171	559 27	10 76
721 and 723—23—2—180	120,491 49	2 317 14
721 and 723—23—2—200	8,431 86	162 21
[fol. 782] 721 and 723—23—2—201	1,420 33	27 31
721 and 723—23—2—201	297 43	5 72
723—23—2—225	821 48	15 80
721 and 723—23—2—228	1,395 10	26 83
721 and 723—23—2—229	11,073 74	212 96
721 and 723—23—2—230	3,990 66	76 74
721 and 723—23—2—236	15,125 31	290 87
721 and 723—23—2—238	16,705 52	321 26
721 and 723—23—2—240	11,670 24	224 43
721 and 723—23—2—241	1,646 24	31 66
721 and 723—23—2—258	1,599 16	30 75
721 and 723—23—2—260	3,747 75	72 07
721 and 723—23—2—262	12,496 49	240 32
721 and 723—23—2—263	186,351 29	3,583 68
721 and 723—23—2—265	26,617 89	511 88
721 and 723—23—2—294 and 298	70,006 40	1,346 28
721 and 723—23—2—299	109,113 74	2,098 34
	$1,298,696 37	$24,974 93

( ) Denotes Red Figures.

[fol. 782a] 123. Deliveries of fluid milk and milk products on the 134 wholesale routes operated by the Englewood and Irving Park branches are made by truck. Each wholesale route is operated six days a week, Monday through Saturday. One delivery a day is generally made to store locations. Some store locations receive deliveries on fewer than six days a week and in some cases, more than one delivery is made in a single day.

124. The trucks are pre-loaded at the branch by platform employees before the drivers report to work. The quantities loaded on the trucks are based on "load sheets" prepared by the drivers at the end of the previous day's business.

125. Emergency and other special deliveries are made from time to time to wholesale customers ordinarily served by the route trucks. These deliveries are made by a different truck (hereinafter referred to as the "special delivery truck"), and by a different driver (hereinafter called the "special delivery driver").

126. No deliveries of fluid milk and milk products were made to store wholesale customers on Sundays during the period of the cost study.

127MD. The total quantities of fluid milk delivered on the various routes vary in amount. In some instances, the variations are rather wide. These variations are due to the complexion of the route area served. The density of population in a given district affects the amount of purchases in that district. For example, a city route serving an area with a dense population can have a much larger volume than a route in a suburban area where much time has to be spent in traveling rather than in the [fol. 783] distribution of products. Chain stores tend to be concentrated in the areas with denser population.

128. The wholesale delivery trucks are regularly driven by employees called "routemen." Forty hours constitutes a week's work of five days for all routemen. No work is performed on Sunday and routemen take different days of the week for a day off in addition to Sundays.

129. On the routeman's day off, the truck is driven over his route by a relief driver, called a "junior or assistant route foreman." Borden employs one junior or assistant route foreman for every five wholesale routes. Junior or

assistant route foremen perform no other duties than to act as relief drivers for routemen. Other relief drivers handle the routes during vacations. Junior or assistant route foremen and other relief drivers work five days a week.

130. Routemen, junior or assistant route foremen, and vacation relief drivers drive the trucks, make deliveries, collect empty milk bottles and cases, pick up returned products, collect payment for products delivered, prepare sales tickets, hear complaints, and keep records and make reports related to such activities. The work of routemen and junior or assistant route foremen is described more fully in subsequent paragraphs of this Order.

131. Routemen and junior or assistant route foremen do little, if any, selling, and rarely, if ever, solicit prospective customers.

132. Routemen and relief drivers report to work at the branches each morning when on duty in accordance with a [fol. 784] prescribed schedule. They punch a time clock when they report to work and again when they leave work.

133. The operation of the 134 wholesale routes is checked and supervised by employees called "senior route foremen," each of whom on an average supervises 19 wholesale routes. Senior route foremen check to see that trucks are properly loaded, that deliveries are made on schedule, that returned products are properly stored or disposed of, and that records and reports are maintained and made properly by the routemen and relief drivers. In the event no relief drivers are available on a given day, the senior route foremen may handle the route on that day.

134. Periodically, senior route foremen ride on the route trucks, checking the entire route delivery operation as well as verifying customers' account balances as shown by the route books maintained by the routemen.

135. The 134 wholesale routes covered by the cost study served varying numbers of locations, some serving as few as seven locations, and others serving as many as 25 locations. The number of locations on a route is determined by many factors, including distance from the branch, distance between customers, customer service requirements, traffic conditions, and number of deliveries a day required by the customers.

136. Routes are arranged to permit the routeman or relief driver to perform his duties within an eight hour day, plus eating time amounting to a total of five hours per week. In the assignment of wholesale routemen to particular routes, seniority governs in accordance with the union contract referred to in the next succeeding para- [fol. 785] graphs of this Order. The prior union contract in effect in December, 1954 and March, 1955 contained the same provisions.

137. The compensation of wholesale routemen, senior route foremen, junior or assistant route foremen, relief drivers, and numerous other employees at the time of the cost study and during September, 1955 was fixed by the terms of a contract between Borden and Milk Wagon Drivers Union, Local 753, effective May 1, 1955, which contract replaced one between the same parties effective May 1, 1953.

138. The union contract requires Borden to give each covered employee with less than ten years' service a two week paid vacation each year, and each covered employee having ten years or more service a three week paid vacation each year, and after twenty-five years service a four week paid vacation each year.

139. The union contract further required Borden to contribute to union severance, pension, and health and welfare funds. These contributions were $5.50 per covered employee and an additional $5.00 for each routeman handling a route delivering more than 12,000 points per week. The union contract further requires Borden to pay overtime at time and one-half for hours worked in excess of 40 hours per week.

140. The prior union contract in effect in December, 1954 and March, 1955 also provided for paid vacations, for payments to union severance and pension funds, and for overtime for hours worked in excess of forty (40) hours per week.

141. In accordance with the provisions of the union contract, wholesale routemen are paid a fixed weekly wage [fol. 786] plus extra compensation computed on the basis of points delivered to route customers per week in excess of a fixed amount. The weekly base wage of wholesale routemen is either $98 or $99.50 for a forty hour week.

Extra compensation, if any, is paid monthly, and is computed as follows:

a. For routemen receiving wages at the rate of $98 per week, extra compensation is calculated on all points delivered to route customers at $.75 per 100 points or points in excess of 2057 up to 5486 points per week, and at $.90 per 100 points on all points delivered over 5486 per week.

b. For routemen receiving wages at the rate of $79.50 per week, extra compensation is calculated on all points delivered to route customers at $.75 per 100 points on all such points in excess of 2400 points per week up to 5829 points per week, and at $.90 per 100 points on all such points delivered over 5829 per week.

c. On all package points delivered, extra compensation is calculated at $.01 per point.

(The union contract fixes the basic points for seven-day service, and provides that where six-day service is given, the basic points shall be six-sevenths of the figures stated in the contract. The basic points stated in this paragraph are six-sevenths of those stated in the contract.) The points delivered are computed for the full six days of each week, and include all points delivered to route customers, whether by the route truck driven by the routeman, relief driver, or by the special delivery truck. The extra compensation paid wholesale routemen is reduced by the amount of extra compensation paid to relief drivers operating the route trucks on the day or days the regular driver is off which is also computed on the basis of points delivered on the route, as described in the following paragraph.

[fol. 787]

142. In some cases, the routeman is guaranteed a minimum extra compensation, based on a guaranteed number of weekly points. The May 1, 1953 union contract which was in effect in December, 1954 and in March, 1955 provided for compensation on the same basis, except that during December, 1954 and March, 1955, the weekly base wages were $3.00 per week lower.

143. In accordance with the provisions of the union contract, junior or assistant route foremen and other relief

drivers operating route trucks receive wages at the rate of $105 per week. These employees also receive extra compensation calculated as follows: The total monthly extra compensation for each route is computed as provided in the preceding paragraph, and the average daily amount is then computed for each route by dividing the total by the days of the month on which the route was operated. The junior or assistant route foreman or other relief driver receives 60% of this daily average for each day on which he operated the route truck on each particular route. The extra compensation as to each route so computed is subtracted from that computed for the regular wholesale routeman. The prior union contract in effect in December, 1954 and March, 1955 contained the same provisions.

144. In accordance with the terms of the union contract, senior route foremen receive compensation of $119 per week, and special delivery drivers receive compensation of $97 per week. Neither senior route foremen nor special delivery drivers receive any extra compensation calculated [fol. 788] on points delivered except in those cases where they relieve the regular routeman. The prior union contract in effect in December, 1954 and March, 1955 contained similar provisions.

145. For purposes of the cost study, the store customers and other customers served by the 134 wholesale routes operated by the Englewood and Irving Park branches were divided into three main classifications:

(a) Stores owned and operated by the Great Atlantic and Pacific Tea Company and by Jewel Food Stores, Inc. These stores will hereafter be called "chain stores". These two companies were the only corporate chains served by Borden's Chicago Milk Division in the Chicago area during the period of the cost study.

(b) All other store wholesale customers. These stores will hereafter be called "independent stores".

(c) All other wholesale customers, being restaurants, clubs, drug stores, bakeries, or similar types of customers who purchase fluid milk and milk products primarily for consumption on the premises. These customers will hereafter be called "non-store customers".

Each store, and each place at which a non-store customer does business, will hereafter be called a "location".

146. In addition to the classifications set forth above, independent stores were in turn classified in four classes, based on whether the individual store received no discount, or received discounts of 2%, 3%, or 4% under the Borden discount schedule in effect at the time of the cost study. [fol. 789] The Borden discount schedule to independent stores in effect during the period of the cost study was that set forth in Exhibit A.

147. The Borden discount schedules to A & P and Jewel in effect during the period of the cost study were those set forth in Exhibits B and C.

148MD. To the recollection of Mr. Malone, A & P and Jewel were customers of Borden in the Chicago area prior to 1936, although Jewel did not become so until after Mr. Malone was first employed in 1927.

149MD. Representation of the Chicago Milk operations with the chain stores since 1936 has, to the knowledge of Mr. Malone, been the responsibility successively of Mr. W. A. Baril, since deceased, then vice president in charge of sales of the Chicago Milk Division, Mr. O. N. Koenig, then holding the same position, Mr. W. N. Waterstreet, then and now president of the Chicago Milk Division, and Mr. H. R. Fagerson, then vice president in charge of sales of the Chicago Milk Division. Other individuals, generally assistants to the top sales personnel, may from time to time review merchandising and sales programs with A & P or Jewel, and make other personal contacts.

150MD. No time studies were made of the time of the executive and administrative employees in contacting the executive officers and other representatives of the chain stores. It would have been possible to have had such executives and administrative officers record time spent in telephone calls and personal contacts with chain stores and independent stores. However, in the opinion of Mr. Malone, during the limited period of time covered by the survey, activities of such a type could be disproportionate [fol. 790] to what actually takes place over the regular course of business during longer periods of time. A study

lasting as long as a year would probably average out such inconsistencies.

151MD. Mr. Malone states that, according to his observation over a long period of time, the major portion of the time spent by Borden executives and administrative employees is spent on the general operating problems of the business rather than on any individual account, and that, with respect to the time spent on particular customer activities, a greater proportion of such time is spent on problems of independent stores than the sales to such stores bear to the sales to chain stores. While many problems of individual independent stores are delegated to branch management, solicitors, and others, major policy decisions which require the time and attention of executive and administrative employees with respect to independent stores occur from day to day at an accelerated rate.

152MD. In connection with the 1949 and 1950 studies, Mr. Malone discussed with the executives and others concerned the time spent on chain store accounts versus independent accounts, and these conversations disclosed that the time spent by these officials in regard to chain stores was less than the amount of time spent in connection with independent stores.

[fol. 791] 153MD. Mr. Malone states that among the matters relating to independent stores which take up the time of Borden executives are problems of competitive pricing, complaints from independent store customers, and consideration of graduated discount programs for independent store customers. The records of Borden show the following with respect to the trend of its business with independent stores in the Chicago area:*

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* Year is given as of December 31. Actual sales figures on which this table is based have been revealed to counsel for plaintiff but because of the confidential nature of the figures, volume sales figures are expressed in appropriate percentages using 1947 as the basic year. The volume percentage for years 1947 through 1951 are estimates based on the actual number of independent stores served. The volume percentage for years 1952 through 1956 are based on actual sales figures.

Year	Number of independent stores served	Volume of milk delivered to independent stores expressed in percentage
1947	2309	100 00%
1948	2358	105 81
1949	2267	102 63
1950	2258	102 22
1951	2113	95 65
1952	1925	87 14
1953	1728	78 92
1954	1520	68 24
1955	1357	60 19
1956	1224	54 20

[fol. 792] In Mr. Malone's opinion, this decrease in independent store business has increased the number of problems and time spent by Borden executives on independent store problems.

[fol. 793] 154. Store customers purchasing milk for resale are assigned a store number for identification on Borden records. Non-store customers are not assigned such numbers.

155. In the course of the cost study, analyses of the time spent on route activities were made on each of the 134 store wholesale routes operated by the Englewood and Irving Park branches. Each route was studied for a full week. Thirty-two routes were studied during the week beginning July 11, 1955; twenty-six routes were studied during the week beginning July 18; twenty-six during the week beginning July 25; twenty-five during the week beginning August 1; and twenty-five during the week beginning August 8.

156. The time studies of the individual routes were made by men (hereinafter called "time study men"), some of whom were employees of Haskins & Sells, some of whom were regular employees of Borden, and the rest temporary employees of Borden hired specially to perform this specific service. Haskins & Sells made the studies of 42 of the 134 wholesale routes, regular Borden employees made the studies of 39 routes, and the specially employed men made the studies of the remaining 53 routes.

157. For purposes of the time studies made by the time study men, special report forms were prepared and printed. Exhibit I, consisting of one page, Exhibit II, consisting of two pages, and Exhibit III, consisting of two pages,

are copies of the report forms prepared for and used in the time studies of the routes. The items on all three exhibits are numbered in sequence, beginning with the number 1 on Exhibit I through number 143 on Exhibit III. [fol. 794] 158. Exhibit I is a report form calling for the minutes spent each day of the week by the routeman, or relief driver of the route truck in various types of activities. Item number 9, "Time on Route Stops," calls for a total of all time spent on the stops made at all route customer locations, which time is itemized on Exhibit II. One report on the form Exhibit I was made for the entire week for each route studied.

159. Exhibit II is a report form calling for the minutes spent in making every delivery to each wholesale customer on the route, broken down into types of activities performed. A report on form Exhibit II was made for each route customer. In some instances, because of the number of deliveries, more than one form Exhibit II was required in order to record the activities of the week of the study with respect to a single route customer.

160. Exhibit III is a report form calling for the quantities delivered to each customer of each product in each size of container. A report on form Exhibit III prepared in the manner described in paragraph 167 of this Order was made for each route customer covering the deliveries to such customer for the entire week in which the route was studied.

SUMMARY SHEET RE: WHOLESALE ROUTEMAN TIME ANALYSIS
CHICAGO MILK DIVISION

Prepared By_____ Week Starting_____ Ending_____

Branch_____ 1. Route No._____

Truck No._____ Routeman's Name_____

Description of Operation — Insert Date -	Time in Minutes 1	2	3	4	5	6	7	Total
2. Time proceeding to Vehicle								
3. Time checking Preloaded Vehicle								
4. Time Icing Truck								
5. Time Picking up Special Requirements								
6. Time rearranging Load Before Leaving Branch								
7. Time for Breakfast								
8. Time for Lunch								
9. Time on Route Stops (From Store Route Delivery Time Analysis Exhibit II)								
10. Time Rearranging Load Before Checking in at Branch								
11. Time to Prepare - Waste Returns & Containers								
12. Time to Unload Empty Containers Returned								
13. Time to Unload & Receive Credit for Returned Mdse.								
14. Time to Store Stock Boxes								
15. Time for Gasoline Loading								
16. Time to Park Vehicle & Prepare Faulty Condition Report								
17. Time in Office to Prepare Daily Collection Slip								
18. Time in Office to Check Current Day's Sales								
19. Time in Office to Verify & Turn in Chain Store Tickets								
20. Time to Prepare Next Day's Order								
Time Required in Credit Office 21. On Independent Store Matters								
22. On Chain Store Matters								
23. Other Time Requirements (Specify)								
Time Lost to Vehicle Breakdown (24) Tires (25) Accidents (26) Motor Trouble (Insert appropriate number in small block)								24 25 26
27. Unaccounted for Time								
28. Totals								
Hr. & Min. Punched In								
Hr. & Min. Punched Out								
Elapsed Time (Must agree with "Totals" Above)								
29. % of Truck Capacity Used when Truck Ready for Route								

Remarks:

Exhibit I

[fol. 796]

EXHIBIT II

Week Starting_____ Ending_____
Prepared By_____
Routeman's Name_____
Truck No._____

WHOLESALE ROUTE DELIVERY TIME ANALYSIS
CHICAGO MILK DIVISION

Exhibit II
Page 1 of 2

30.
31. Independent Store (Single Store whose Management does not Control Another Similar Store) ☐ Check One
32. Chain Store (1 of 2 or more Stores Under Same Management) ☐
33. Miscellaneous (Single Estab. Other than a Store such as Club, Restaurant or Bulk Stop) ☐

Name_____
Address_____
Cust. No._____

Description of Operations — Insert Date -	Time in Minutes 1	2	3	4	5	6	7	Total
34. Time to Drive From Branch to Edge of Route Area								
35. Mileage From Branch to Edge of Route Area (Show in Tenths,i.e. 1.7)								
36. Time to Drive from Edge of Route Area to 1st Stop (If this is 1st Stop)								
37. Mileage From Edge of Route Area to 1st Stop (If this is 1st Stop)								
38. Time to Drive From Previous Customer Stop (If this is Not 1st Stop)								
39. Mileage From Previous Customer Stop (If this is Not 1st Stop)								
Time Waiting (40) To Park (41) For Store to Open (42) For Loading Platform (Insert appropriate number in small block)	☐	☐	☐	☐	☐	☐	☐	40 41 42
43. Time Assembling Mdse. to be Delivered to Store								
44. Time Delivering Mdse. to Store								
45. Time Assembling Additional Mdse. to be Delivered to Store								
46. Time Delivering Additional Mdse. to Store								
47. Time to Stack & Pack Mdse. in Store Ice Box								
48. No. of Trips from Truck to Ice Box to Complete Delivery Re. in 44 & 46								
49. Time to Collect and Verify Returned Mdse. in Store								
50. Time to Collect and Verify Empty Bottle Returns								
51. Time to Prepare Sales Ticket								
Time to (52) Secure COD (53) Collect Credit Pay't. (54) Customers Signature (Insert Appropriate Number in small block)	☐	☐	☐	☐	☐	☐	☐	52 53 54
55. Time to Remove Returned Mdse. from Store to Truck								
56. Time to Stack Returned Mdse. in Truck								
57. Time to Remove Empty Bottles from Store to Truck								
58. Time to Stack Returned Bottles in Truck								
Time to Further Service Cust.(59) Sales Promotion(60)Complaints(61)Gen.Conv. (Insert appropriate number in small block)	☐	☐	☐	☐	☐	☐	☐	59 60 61
62. Time to Enter Delivery in Route Book								
63. Time for Other Purposes (Specify Reason)								
64. Time from Last Stop to Branch (If this is Last Stop)								
65. Mileage from Last Stop to Edge of Route Area (If this is Last Stop)								
66. Mileage from Edge of Route Area to Branch (If this is Last Stop)								
Grand Totals - All Lines								
Total Minutes-Lines 34,36,38,40 through 47,49 through 64								
Total Mileage-Lines 35,37,39,65, & 66								
Total Trips, Line 48								
Total Minutes, Miles & Trips (Must Agree with Grand Totals Above)								

67. Number of Stops (No. of Times within Week that Routeman Called on Store) ____
68. Days Served (No. of Days within Week that Routeman Called on Store ____

Exhibit II
Page 2 of 2

Miscellaneous (Place check mark of figure where appropriate. ANSWER ALL ITEMS)

Item Wall Display Installed 69 Yes ☐ 70 No ☐

Neon Sign Installed 71 Yes ☐ 72 No ☐

Window Display Installed 73 Yes ☐ 74 No ☐

75. Number of Feet From Truck Unloading Point to Store Entrance Used_____Feet
76. Number of Feet From Store Entrance used to Ice Box_____Feet

Floor Level on which Store is Located 77 Basement ☐ 78 Ground Floor ☐ 79 Second Floor ☐

Type of Ice Box Used 80 Display Case ☐ 81 Walk in Cooler ☐ 82 Regular Ice Box ☐

Is this a Split Stop (Also Served by Another Milk Co.) 83 Yes ☐ 84 No ☐

85. Distance to Nearest A & P Store (If this is not an A & P Store)_____City Blocks
86. Distance to Nearest Jewel Store (If this is not a Jewel Store)_____City Blocks
87. Distance to Nearest Chain Store Other Than A & P or Jewel_____City Blocks 88 Name of Chain_____

How is Mdse. Delivered to This Store Handled:

89. Manually
90. Hand Truck
91. Dolly
92. Other (Specify)

Indicate on the Diagram Below the Locations of the Entrance to this Store, and that of the Ice Box. Use an "E" (93) for Entrance Location and an "X" (94) for Box Location.

F	1	2	3	4	5	6	7	8	9	10	11	12
R	13	14	15	16	17	18	19	20	21	22	23	24
O	25	26	27	28	29	30	31	32	33	34	35	36
N	37	38	39	40	41	42	43	44	45	46	47	48
T	49	50	51	52	53	54	55	56	57	58	59	60

95. What is the greatest width at any Point in the Aisle or Aisles used Proceeding from the Store Entrance to Ice Box_____ Feet

96. What is the Narrowest Width at any Point in the Aisle or Aisles Used Proceeding from the Store Entrance to Ice Box_____Feet

Instructions: The above data is to be recorded for each store on each route each day. If delivery is made to more than one store without moving the vehicle, record the time elements under description of operations for each store separately.

If more than one stop is made at one store in one day enter the time elements for each stop separately under description of operations and circle the figures covering the second stop.

Exhibit II - Page 2 of 2

[fol. 798]

EXHIBIT "I"

DAILY SALES RECORD

Relative to Wholesale Route Survey - Chicago Milk Division

Exhibit III
Page 1 of 2

Branch _____
Week Starting _____ Ending _____
Prepared By _____
97. Route Number _____
Routeman Name _____

Name _____
Address _____
98. Customer Number _____

Check One

99. Independent Store (A single store whose Management does not control another similar store) ☐
100. Chain Store (1 of 2 or more stores under same Management) ☐
101. Miscellaneous (single establishment other than a store such as Club, Restaurant or Bulk Stop) ☐

Product	Size	Sales														Returns													
		Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total		Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total	
		Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa
102. Homo. or V.D.	Qts.																														
103. " "	½ Gal.																														
104. " "	Gal.																														
105. " "	Pts.																														
106. " "	1/3 Qts.																														
107. " "	½ Pts.																														
108. Fortified Skim	½ Gals																														
109. " "	Qts.																														
110. Half & Half	Pts.																														
111. " "	Gal.																														
112. Triple Whip	Gal.																														
113. Super Whip																															
115. XX Cream	Qts.																														
116. "" "	½ Pts.																														
117. Cream	Gal.																														
118. "	Qts.																														
119. "	Pts.																														
120. "	½ Pts.																														
121. Sour Cream	12 Oz.																														
122. " "	8 Oz.																														
123. Chocolate	Qts.																														
124. "	1/3 Qts.																														
125. "	½ Pts.																														
126. Buttermilk	Qts.																														
127. "	1/3 Qts.																														
128. "	½ Pts.																														
129. Cottage Cheese	16 Oz.																														
130. " "	12 Oz.																														
131. " "	8 Oz.																														
132. " "	9 Oz.																														

Exhibit III - Page 1 of 2

[fol. 799]

Exhibit III
Page 2 of 2

Product	Size	Sales																Returns													
		Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total		Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total	
		Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.	Gl.	Pa.
133. Dry Curd Cheese	12 Oz.																														
134. Cottage Cheese	3 Lb.																														
135. " "	5 Lb.																														
136. Bakers Cheese	5 Lb.																														
137. Egg Nog	Qts.																														
138. Butter	Lbs.																														
139. Eggs	Doz.																														
140. Reddi Whip																															
142. Dollar Totals																															
143. Point Value																															

Exhibit III
Page 2 of 2

[fol. 800] 161MD. Exhibits I, II, and III were originally designed to obtain as complete information as possible for making cost allocations. At the time these Exhibits were prepared no decision had been made as to how the allocation of costs should be made for purposes of this study. These Exhibits were designed to implement the cost survey with records which would give the greatest amount of information. That portion of Exhibit III relating to merchandise returned was not completed by the time study men while on the routes.

162. The headings of the various report forms were filled in by the time study men. The headings so filled in included: the route number, truck number, branch, and routeman's name on Exhibit I; the name, address, and company number of each customer, the routeman's name, and the truck number on Exhibit II; and the branch, the name, address, and company number of each customer, the route number, the routeman's name on Exhibit III. Report forms (Exhibit II and Exhibit III) for all customers on a route were, after the headings had been filled in, assembled and placed in a bound folder, together with the report form (Exhibit I) for the entire route. An adequate supply of blank report forms was included in each folder.

163. All time study men attended an orientation meeting prior to their assignment to routes, at which meeting the report forms (Exhibits I, II, and III), the study procedures to be followed, the route books, sales tickets and other reports required to be prepared by routemen, and the operation of a route were explained to them orally. A stop watch was furnished each time study man.

[fol. 801] 164. Time study men were instructed at this meeting to complete the blank forms in the bound folder. Time study men were also instructed that they were to arrange the sequence of the sheets in the bound folders in the most efficient manner. Time study men were further instructed to record a complete breakdown of total time spent by routemen and other route drivers but that they were not to interfere in any way with the activities of the routemen or other route drivers.

165. Each routeman and relief driver was instructed by the branch manager or his assistant having supervision over him to serve his routes during the period of the time

study in a manner similar to his usual custom and practice.

166. For the six days of the week during which a time study man was assigned to a particular route, the time study man was with the routeman or his relief driver from the time when the routeman or relief driver reported for work until he left work and punched out on a time clock. By means of the stop watch, the various activities performed by the routeman or his relief driver was timed to the nearest full minutes, and the minutes contemporaneously recorded by the time study man on the report forms (Exhibits I and II).

167. The sales data for each store was entered by the time study man on the appropriate report form (Exhibit III), with the exceptions later noted. The data so entered was obtained from the sales tickets prepared by the routeman or relief driver in accordance with his regular procedure. However, in the case of chain stores, and of those independent stores which were on periodic billing basis, [fol. 802] the sales data was determined by branch clerks and later inserted on the report forms (Exhibit III) by Haskins & Sells. The data so entered by Haskins & Sells was compiled by Borden's branch clerical personnel from other records, including the route books. Furthermore, the time study man did not compute point values called for by the report forms (item 143 of Exhibit III).

168. Employees of Borden's divisional main office were assigned, one to the Englewood branch and one to the Irving Park Branch, to serve as supervisors over the time studies.

169. At the end of each day, the time study men submitted their report forms to these two supervisors for review of the procedures followed, and the correction of obvious errors. The time study supervisors at that time answered questions by the time study men relative to time study procedures.

170. At the end of each week, the time study men gave to these two supervisors the bound folders containing the report forms (Exhibits I, II, and III) which had been completed during the week.

171. Branch clerical personnel, under the direction of the branch clerical supervisors, computed the points daily on each sales ticket, and the time study men inserted the

amounts so computed on the report forms (item 143 of Exhibit III). (A copy of the sales ticket form constitutes Exhibit IV). Branch clerical personnel also prepared the sales data for chain stores and for those independent stores which were on a periodic billing basis which was later inserted on the report forms by Haskins & Sells.

[fol. 803]

EXHIBIT IV

THE BORDEN COMPANY

CHICAGO MILK DIVISION

STORE AND WHOLESALE SALES TICKET

Date_____

Route No._____ Page No._____

QUANTITY PAPER	QUANTITY GLASS	PRODUCT		
		Homo or V. D. Milk	Qts.	1
		Milk	½ Gal.	2
		Milk	Gal.	3
		Zeal	½ Gal.	4
		Fortified Skim Milk	Qts.	5
		Gail Borden	Qts.	6
		Gail Borden	½ Gal.	7
				8
		Sol Kwd Milk	Qts.	9
		Golden Crest	Qts.	10
		Half & Half	Pts.	11
		Triple Whip - Reddi Whip		12
		XXX Cream	Qts.	13
		XXX Cream	½ Pts.	14
		Cream	Qts.	15
		Cream	Pts.	16
		Cream	½ Pts.	17
		Sour Cream	12-Oz.	18
		Sour Cream	8-Oz.	19
				20
				21
		Chocolate	Qts.	22
		Choco. Handi-Pak	½ Pts.	23
		Buttermilk	Qts.	24
				25
		CREAM Cottage Cheese	8-Oz.	26
		CHIVE Cottage Cheese	8-Oz.	27
		PINEAPPLE Cottage Cheese	8-Oz.	28
		CREAM Cottage Cheese	12-Oz.	29
		CHIVE Cottage Cheese	12-Oz.	30
		PINEAPPLE Cottage Cheese	12-Oz.	31
		CREAM Cottage Cheese	16-Oz.	32

THE BORDEN COMPANY

CHICAGO MILK DIVISION

WHOLESALE SALES TICKET

3024 N. TRIPP AVE. CHICAGO 41, ILL.

AVenue 3-1200

Route No. Page No. Date

Glass	Paper	Product		Price	Amount
		Homo. or V.D.	Qts.		
		Homo. or V.D.	½ Gals.		
		Homo. or V.D.	Gals.		
		Homo. or V.D.	Pts.		
		Homo. or V.D.	½ Qts.		
		Homo. or V.D.	½ Pts.		
		Fortified Skim	½ Gals.		
		Fortified Skim	Qts.		
		Half & Half	Pts.		
		Triple Whip	Gals.		
		Super Whip			
		Reddi Whip			
		XX Cream	Qts.		
		XX Cream	½ Pts.		
		Cream	Gals.		
		Cream	Qts.		
		Cream	Pts.		
		Cream	½ Pts.		
		Sour or But. Crm.	12oz.		
		Sour or But. Crm.	8 oz.		
		Chocolate	Qts.		
		Chocolate	½ Qts.		
		Chocolate	½ Pts.		
		Chocolate Handi-Pak			
		Buttermilk	Qts.		
		Buttermilk	½ Qts.		

		AAA Cream	½ Pts.	14
		Cream	Qts.	15
		Cream	Pts.	16
		Cream	½ Pts.	17
		Sour Cream	12-Oz.	18
		Sour Cream	8-Oz.	19
				20
				21
		Chocolate	Qts.	22
		Choco. Handi-Pak	½ Pts.	23
		Buttermilk	Qts.	24
				25
		CREAM Cottage Cheese	8-Oz.	26
		CHIVE Cottage Cheese	8-Oz.	27
		PINEAPPLE Cottage Cheese	8-Oz.	28
		CREAM Cottage Cheese	12-Oz.	29
		CHIVE Cottage Cheese	12-Oz.	30
		PINEAPPLE Cottage Cheese	12-Oz.	31
		CREAM Cottage Cheese	16-Oz.	32
		CHIVE Cottage Cheese	16-Oz.	33
		PINEAPPLE Cottage Cheese	16-Oz.	34
		STRAWBERRY or CHERRY Drink	Qts.	35
		Cheese Drink	Qts.	36
		Dry Curd	12-Oz.	37
		Bakers Cheese	Lbs.	38
		Egg Nog	Qts.	39
				40
		Yogurt	½ Pts.	41
		Number of Bottles In		42
		Number of ½ Gal. In		43
		Number of Gal. In		44
		Number of Cases In		45
		Number of Bottles Out		46
		Number of ½ Gal. Out		47
		Number of Gal. Out		48
		Number of Cases Out		49
$		Retail Value Sales		50
$		Net Container Charge		51
$		Total Retail Value (Inc. Container Chg.)		52
$		Wholesale Value of Sales		53
$		Net Container Charge		54
$		Total Wholesale Value (Inc. Container Chg.)		55

D. F. 93 Spec. Rev. (9-58)

STORE STAMP HERE

Date Store Manager's Signature

		Super Whip		
		Redi Whip		
		XX Cream	Qts.	
		XX Cream	½ Pts.	
		Cream	Gals.	
		Cream	Qts.	
		Cream	Pts.	
		Cream	½ Pts.	
		Sour or But. Crm.	12oz.	
		Sour or But. Crm.	8 oz.	
		Chocolate	Qts.	
		Chocolate	½ Qts.	
		Chocolate	½ Pts.	
		Chocolate	Handi-Pak	
		Buttermilk	Qts.	
		Buttermilk	½ Qts.	
		Buttermilk	½ Pts.	
		Cheese	8 oz. Ctn.	
		Cheese	12 oz. Ctn.	
		Cheese	16 oz. Ctn.	
		Cheese	oz. Gl.	
		Cheese	3 Lbs.	
		Cheese	Lbs.	
		Bakers Cheese	Lbs.	
		Egg Nog	Qts.	
			SUB	TOTAL
		Butter	Lbs.	
				TOTAL
		CONTAINER CHARGE		
		Qt. Bottles	@ .02	X X X
		½ Gal. Bottles	@ .05	X X X
		Gal. Bottles	@ .15	X X X
		Boxes	@ .25	X X X
	TOTAL	Chg. Inc. CONTAINERS		
		CONTAINER CREDIT		
		Qt. Bottles	@ .02	X X X
		½ Gal. Bottles	@ .05	X X X
		Gal. Bottles	@ .15	X X X
		Boxes	@ .25	X X X
	TOTAL	CONTAINER CREDIT		
				NET

Date Customer's Signature

[fol. 804] 172. Comptometer operators working under the direction of the two supervisors of the time studies, thereupon computed and entered the footings and crossfootings called for by the report forms (Exhibits I, II and III).

173. The bound folders containing the report forms so prepared constitute Borden Bulk Exhibit 4.

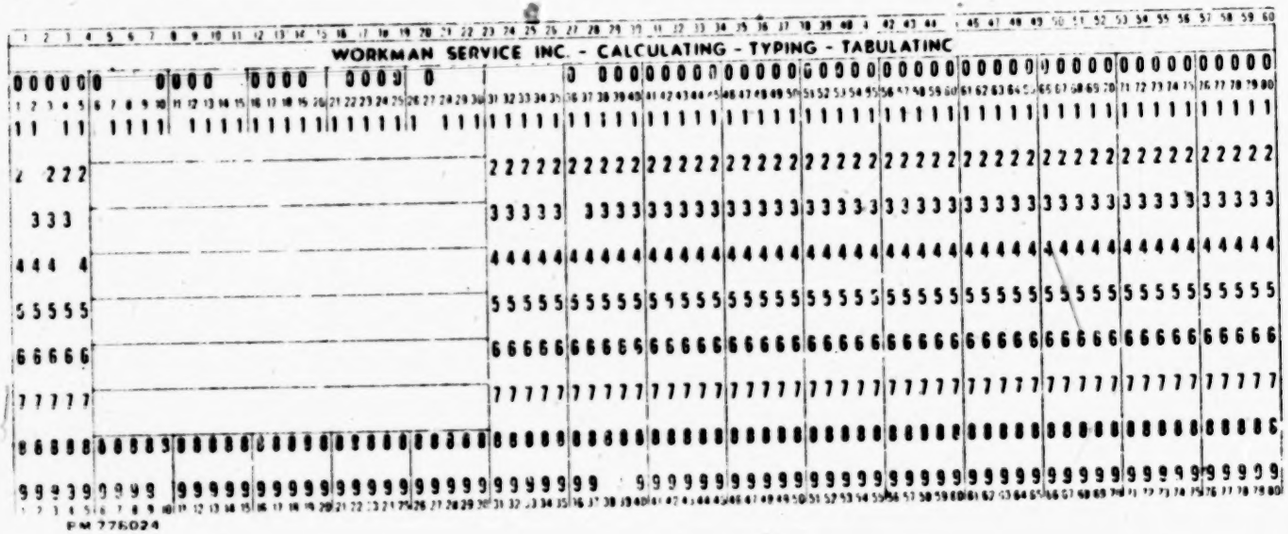
174. The sales tickets covering all deliveries by the routemen, relief drivers, or special delivery drivers to customers of each route during the week in which the route was surveyed constitute Borden Bulk Exhibit 5.

175. After the report forms (Exhibits I, II, and III) had thus been completed, the bound folders containing them were delivered to Workman Service, Inc., and independent organization providing clerical services. Employees of Workman Service then transferred the data contained in the report forms onto punched cards for use with International Business Machine Corporation equipment. (A copy of the card so used constitutes Exhibit VI).

[fol. 805]

EXHIBIT VI

2 143 1 0009 142 00234500 01 000000 003099



[fol. 806] 176. The punched cards so prepared constitute Borden Bulk Exhibit 6.

177. Punched cards were prepared for Exhibit I for each route showing on each card the branch and route number. One of these pre-punched cards was then punched showing the data set forth on lines 2 through 28 from Exhibit I for each route.

178. Punched cards were prepared for Exhibits II and III for each route showing the following data on each card:

a. Branch
b. Route number
c. Store classification (A & P, Jewel, Independent, and other non-store customers).
d. Store number, if any

One of these cards was used to record the data for each location covered by the Exhibits II and III for each route as reported on lines 34 through 68 on Exhibit II and lines 142 and 143 on Exhibit III.

179. The dollar sales reported on line 143 of Exhibit III disclosed the weekly sales to each store. The points shown on the Borden discount schedule there in effect were expressed in the terms of equivalent sales dollars. Each set of cards prepared from Exhibits II and III was gang-punched with the dollar-bracket code (i.e., $00.00 to $30.99, etc.)

180. The total elapsed time in minutes spent by all routemen and relief drivers accounted for on the report forms (line 28, Exhibit I) was then computed by use of the punched cards. The total time spent by the routemen and relief drivers for breakfast and lunch (lines 7 and 8, Ex-[fol. 807] hibit I) was also computed, and subtracted from the previous over-all total. The remainder was 376,864 minutes.

181. Schedule XXIV, "Computation of Extra Compensation Paid on the Basis of Points Delivered on Surveyed Routes," was computed as follows:

a. The total points delivered on each route, for the week during which the route was studied (line 143 of Exhibit III) were tabulated from the report forms by use of the punched cards. Also included

are the points delivered by the special delivery drivers as shown in the report forms (Exhibit III) constituting Borden Bulk Exhibit 8. These special delivery points were computed in the manner described in paragraphs 215-7 of this Order. The total for all 134 routes appears in line 1 of Schedule XXIV.

b. By reference to the payroll records, the identity of wholesale routemen receiving a guaranteed extra compensation, and the points upon which such guarantee was based, was ascertained by Haskins & Sells. The data so ascertained was as follows:

Week Ended	Route No.	Guaranteed Points	Points Sold
July 30, 1955	26	13,247	7,383
July 30, 1955	155	13,662	13,233
July 16, 1955	187	14,298	13,444
July 30, 1955	199	18,528	15,952
Total		59,735	50,012
Less Points Sold		50,012	
Points guaranteed over actual points delivered		9,723	

[fol. 807a] c. The weekly points delivered on each route which was covered by a guarantee was then compared with the number of points on which the guarantee was based. In those instances, where the total points delivered during the week were less than the guarantee, the guarantee prevailed. This guarantee was the equivalent of 9,723 points as shown on line 2 of Schedule XXIV.

d. The point guarantees were then added to the total points delivered. The total thus obtained appears at line 3 of Schedule XXIV.

e. The package points delivered on each route for the same weeks (lines 129 through 140 of Exhibit III) were manually computed direct from the report forms by Haskins & Sells. The total of the package points for all 134 routes appears at line 4 of Schedule XXIV.

f. The package points delivered, as set forth at line 4, was then subtracted from the total points, and the remainder appears at line 5 as the total number of compensation points.

g. By reference to Borden's payroll records, the basis for computing the extra compensation of each of the 134 wholesale routemen (wether by method a or method b as described in paragraphs 141 2 of this Order) was ascertained by Haskins & Sells. Thirty-six of the routes were on the basis of method [fol. 808] b, and the remainder were on the basis of method a.

h. The total amounts required to be delivered on each route before extra compensation under method a would be calculated (2057) was then multiplied by the number of routes (98) to obtain the total number of regular base points required to be delivered before extra compensation would be calculated. The resulting figure is that stated on line 6 of Schedule XXIV.

i. For the routes on which extra compensation was calculated under method b, the number of base points (2400) was multiplied by the number of routes (36) to obtain the total number of base points required to be delivered before extra compensation would be calculated. The resulting figure is that stated on line 6 of Schedule XXIV.

j. The total of basic points required to be delivered was calculated by adding lines 6 and 7 of Schedule XXIV, the total appearing at line 8. This last total was then subtracted from the total of compensation points delivered appearing at line 5 to obtain the total number of points (other than package points) on which extra compensation was calculated. This total appears at line 9.

k. Haskins & Sells then computed for each route the total amount of points delivered less package points, [fol. 809] and then for each route determined the excess of such points over the base points but less than 5486 or 5829 whichever was applicable. The results thus obtained route by route were then added. The total thus obtained appears at line 10, as the

total number of points on which extra compensation was calculated at $.75 per hundred points.

l. By subtracting the number of points subject to extra compensation at $.75 per hundred from the total number of points on which extra compensation was calculated, the number of total points on which extra compensation was calculated on the basis of $.90 per hundred was obtained. This figure appears at line 11.

m. The extra compensation payable at $.75 per hundred points and at $.90 per hundred points was then computed. These computations appear at lines 12 and 13 and the total at line 14.

n. Extra compensation was then figured on the package points (as shown at line 4) at $1.00 per hundred points. The result is given at line 15.

o. The total extra compensation payable on the 134 routes for the week on which each route was studied was then computed by adding lines 14 and 15. This total appears at line 16.

[fol. 809a]

Schedule XXIV

Computation of Extra Compensation Paid on the Basis of Points Delivered on Surveyed Routes

1. Total points delivered on all routes during week in which route was studied		1,470,326
2. Points guaranteed over actual points delivered on routes		9,723
3. Total		1,460,603
4. Package points delivered		93,864
5. Compensation points delivered		1,366,739
6. Regular base points: (98 times 2057)	201,586	
7. Regular base points: (36 times 2400)	86,400	
8. Total		287,986
9. Points on which extra compensation was calculated		1,078,753
10. Points subject to $.75 per hundred rate		449,486
11. Points subject to $.90 per hundred rate		648,714
12. Extra compensation at $.75 per hundred rate		$3,371.16
13. Extra compensation at $.90 per hundred rate		5,838.51
14. Total		$ 9,209 67
15. Extra compensation on package points		938 64
16. Total		$10,148 31

[fol. 810] 182. Schedule XXV, "Computation of Direct Labor Costs of Wholesale Route Operations," shows:

first: *Routemen's Wage Cost.* The total weekly wages paid the routemen for the week in which the routes were studied, exclusive of overtime, was ascertained from Borden payroll records. The amounts were as follows:

Week ended	July 16,	32	routes	$ 3,149.50
"	July 23,	26	"	2,558.50
"	July 30,	26	"	2,532.90
"	August 6,	25	"	2,462.00
"	August 13,	25	"	2,463.50
	Totals	134	routes	$13,166.40

This total appears at line 1 of Schedule XXV.

second: *Junior or Assistant Route Foremen's Wage Cost.* The wage cost for the driver of the truck on the relief day of the week was computed by taking the weekly wage rate of a junior or assistant route foreman or relief driver ($105) and dividing by five to obtain a daily rate ($21), exclusive of overtime. The total cost for the 134 routes for the week in which each route was studied was then computed as 134 times the daily rate ($21), or $2,814. This figure appears at line 2 of Schedule XXV.

third: *Senior Route Foremen's Wage Cost.* The wage cost for these employees was computed by taking the number of senior route foremen required to supervise the 134 wholesale routes (7), and multiplying by the weekly rate, exclusive of overtime ($110). The resulting figure ($770) appears at line 3 of Schedule XXV.

[fol. 811] *fourth*: *Contributions to union severance, pension, and health and welfare funds.* The contributions for wholesale routemen ($5.50 per routemen per week plus $5.00 per week for each route handling over 12,000 compensation points per week) were first computed by ascertaining from the report

forms (Exhibit III) the number of routes (37) on which more than 12,000 compensation points were delivered during the week the route was studied. The total contributions were then computed as 134 x $5.50, or $7.37, plus 37 x $5.00, or $185; or a total of $922. This amount appears at line 4a of Schedule XXV.

The contribution for junior or assistant route foremen (27) required to operate 134 route trucks on the sixth day of the week was computed as 27 times $5.50, or $148.50. This appears at line 4b of Schedule XXV.

The contribution for senior route foremen was computed at 7 times $5.50, or $38.50. This appears at line 4c of Schedule XXV.

The total of these three items ($1,109) appears at line 4d of Schedule XXV.

fifth: *Cost of vacations.* Haskins & Sells ascertained from Borden personnel records that 4 of the 134 wholesale routemen were entitled to two weeks vacation only, and that the remaining 130 were entitled to three weeks vacation. Of the four routemen entitled to two weeks vacation, three received weekly wages of $98 and one received [fol. 812] a weekly wage of $99.50. The total weekly wages of the four routemen were computed as 3 times $98, plus one times $99.50, or a total of $393.50. The total annual cost of the vacations for these four men was computed as 2 times $393.50, or $787. Of the remaining 130 routemen, 35 received a weekly wage of $99.50, and 94 received a weekly wage of $98 and one man earned $78.40. The total vacation cost for these 130 routemen was computd as $38,318.70.

All 27 junior or assistant route foremen were entitled to three weeks vacation. The total annual cost of these vacations was computed as 3 times the weekly wage rate of $105 times 27, or $8,505.

Senior route foremen are not replaced during their vacations, and no vacation cost was computed for these employees.

The total vacation costs were then computed by adding the three totals previously obtained ($787, $38,318.70, and $8,505), and dividing the grand total ($47,610.70) by 52 to produce a weekly vacation cost of $915.59. This figure appears at line 5 of Schedule XXV.

sixth: *Cost of state and federal unemployment insurance and federal old age and survivor's insurance, hereinafter called "social security costs."* All of the wholesale routemen, junior or assistant route foremen, and senior route foremen earn [fol. 813] more than $4,200 per year. The effective rate paid by Borden for federal and state unemployment insurance is .5%. Total annual social security costs per each of the above employees were computed as follows:

Federal and state unemployment insurance .5% of $3,000	$15
Federal old age and insurance benefits 2% of $4,200	84
Total yearly cost per employee	$99

This amount of $99 divided by 52 gives $1.90 as a weekly social security cost per employee.

The total number of routemen, junior or assistant route foremen, and senior route foremen was 168 (134 plus 27, plus 7). The total weekly social security costs were computed as $319.20 (168 times $1.90), which is shown at line 6 of Schedule XXV.

seventh: *Cost of extra compensation.* The total cost of extra compensation computed as set forth in paragraph 181 of this Order and set forth at line 16 of Schedule XXIV appears as line 7 of Schedule XXV.

eighth: *Total labor costs of route operations.* The sum of the various items listed above appears at line 8 of Schedule XXV, and amounts to $29,242.50.

ninth: *Total cost per minute of route activities.* The total minutes of route activities, computed as set forth

in paragraph 180, *supra*, appears at line 9 of Schedule XXV. The cost per minute of these activities, which appears at line 10 of Schedule XXV, was computed by dividing the total weekly [fol. 813a] cost of route labor by the total number of minutes of activities.

183MD. For purposes of this study, extra compensation has been treated as part of the overall wages earned by the men operating the routes during the survey period. In Mr. Malone's opinion, the method of computing extra compensation required by the union contract as explained in paragraphs 141-2 of this Order, is a device adopted by agreement after negotiation to determine the total overall wages earned by routemen in the performance of their total job responsibility, and is directly related to the total volume of deliveries to all stores on a route rather than to the volume delivered to particular individual stores. Each store naturally contributes to the total volume of deliveries made on the route which is the basis on which the extra compensation is calculated by the formula provided for in the union contract.

[fol. 814] SCHEDULE XXV

Computation of Direct Labor Costs of Wholesale Route Operations

1. Total weekly wages of Routemen		$13,166.40
2. Total weekly wages of Junior or Assistant Route Foremen		2,814.00
3. Total weekly wages of Senior Route Foremen		770.00
4. Weekly contributions to union funds:		
a. for routemen	$922.00	
b. for junior route foremen	148.50	
c. for senior route foremen	38.50	
d. Total weekly contributions		1,109.00
5. Weekly vacation costs for routemen, junior or assistant route foremen, and senior route foremen		915.59
6. Weekly social security costs		319.20
7. Total weekly extra compensation (from line 16 of Schedule XXIV)		10,148.31
8. Total direct labor costs		$29,242.50
9. Total minutes of route activities (from paragraph 180 of this Order)		373,864
10. Cost per minute of route activities ($29,242.50 divided by 376,864)		$.07759430

[fol. 815] 184. The cost of the time spent on each route activity has in subsequent paragraphs and schedules of this Order been allocated to different classes of customers on one or the other of the following three bases:

a. *Time basis.* In all cases where the time spent on an activity recorded in the report forms (Exhibit II) was spent at a specific customer location, the cost of the time spent has been directly allocated to that customer. This method of allocation will be hereafter identified as on a "time basis."

b. *Location basis.* In other cases, where time was spent in an activity which did not relate directly to a specific customer location, but which was involved directly with the route operation, the cost of the time spent has been allocated by dividing the total cost by the total number of customer locations served by the 134 routes. This method of allocation will be hereafter identified as on a "location basis."

c. *Stop basis.* In all other cases, where time was spent in an activity not directly related to a specific customer location, but which was involved directly with the route operation, the cost of the time so spent has been allocated by dividing the total cost by the total number of deliveries (other than special deliveries) made to customer locations during the weeks in which the routes were surveyed. This [fol. 815a] method of allocation will be hereafter referred to as on a "stop basis."

185. Set forth below are the specific activities of the routemen and relief drivers which were timed by the time study men, the item numbers given to these activities on the Schedules which follow, the line or lines of the report forms (Exhibits I and II) covering these specific activities, and the basis on which the cost of each activity was allocated. (Where the word "routeman" appears, it also applies to the junior or assistant route foreman or other relief driver.)

Item 1. *Proceeding to Vehicle.* (line 2 of Exhibit I) After punching the time clock, routemen proceed to their trucks. The cost of this activity was allocated on a location basis.

Item 2. *Checking Preloaded Vehicle.* (line 3 of Exhibit I) After arriving at his truck, the routeman checks the volume of milk and milk products in his truck against the "load sheet" prepared by him on the previous day. The cost of this activity was allocated on a location basis.

Item 3. *Icing Truck.* (line 4 of Exhibit I) After checking the preloaded vehicle, the routeman procures additional ice and places it in his truck for refrigeration purposes. The cost of this activity was allocated on a location basis.

Item 4. *Picking Up Special Requirements.* (line 5 of Exhibit I) After icing the truck, the routeman procures and places in his truck any additional products required. The cost of this activity was allocated on a location basis.

[fol. 816] *Item 5.* *Rearranging Load Before Leaving Branch.* (line 6 of Exhibit I) Before leaving the branch, the routeman rearranges the products in his truck to facilitate unloading at each location, taking into account the sequence of locations. The cost of this activity was allocated on a location basis.

Item 6. *Waiting to Park Vehicle.* (lines 40, 41, and 42 of Exhibit II) After arriving at a customer location, congestion on the street, failure of the store to be open, or previous occupancy of the customer's loading platform, may require the truck to stop and wait before parking to unload. The cost of this activity was allocated on a time basis.

Item 7. *Assembling Products to be Delivered to the Store.* (line 43 of Exhibit II) After parking to unload, the routeman assembles, at the side of the truck or on the loading platform, the products which he estimates will be required by the customer for that day. If a large volume of products is involved, the routeman will load them on a hand truck carried in the vehicle. Sometimes he will use a dolly truck if such is furnished by the store and if the volume justifies its use. Otherwise he manually carries the

products into the store. The cost of this activity was allocated on a time basis.

Item 8. *Delivering Merchandise to the Customer.* (line 44 of Exhibit H) After assembling the products as in Item 7, the routeman delivers them to the place in the store which the customer designates. [fol. 817] The cost of this activity was allocated on a time basis.

Item 9. *Assembling Additional Merchandise to be Delivered.* (line 45 of Exhibit H) Sometimes the customer will require more merchandise than the amount estimated by the routeman, or the amount to be delivered will require more than one trip from the truck. In either case, the merchandise required for the second trip must be assembled. The cost of this activity was allocated on a time basis.

Item 10. *Delivering Additional Merchandise to Store.* (line 46 of Exhibit H) This activity is the same in character as that of delivering the initial amount of merchandise. The cost of this activity was allocated on a time basis.

Item 11. *Stacking and Packing Merchandise in Store Icebox.* (line 47 of Exhibit H) Many customers require that the merchandise not only be taken to a designated place in the customer's store, but that it be packed or stacked in display cases or refrigerated cabinets. The cost of this activity was allocated on a time basis.

Item 12. *Gathering Returned Merchandise in Store.* (line 49 of Exhibit H) City health rules or ordinances place a time limit within which milk and milk products must be sold. Merchandise then unsold is returned to Borden. This merchandise, and merchandise returned for other reasons, must be gathered by the routeman before being carried to his truck. The cost of this activity was allocated on a time basis.

Item 13. *Gathering Empty Bottles.* (line 50 of Exhibit H) When milk is purchased by stores in glass [fol. 818] bottles rather than paper containers the bottles returned to the store by consumers

have to be gathered by the routeman before being carried to the truck. The cost of this activity was allocated on a time basis.

Item 14. *Preparing Sales Ticket.* (line 51 of Exhibit II) A sales ticket book is left with every customer. At the time of delivery, the routeman records in this book the quantities delivered, product by product. In the case of independent stores, he also computes the sales price of each product purchased, and the total sales price of each delivery, and enters these computed figures in the sales ticket book. In the case of the chain stores covered by this study, no such computations were made by the routeman; the necessary computations were made in the course of the centralized billing operation.

In all cases, the routeman removes one copy of the sales ticket, and leaves one copy in the book in possession of the customer.

The cost of this activity was allocated on a time basis.

Item 15. *Securing C. O. D. Payment.* (line 52 of Exhibit II) The large majority of independent retail store customers pay for the merchandise when delivered. The chain stores covered by the study pay weekly on a centralized billing basis. Some of the independent stores are on a periodic payment basis. When customers are on a C. O. D. basis, the routeman collects the sales price at the time of each delivery. The cost of this ac- [fol. 818a] tivity was allocated on a time basis.

Item 16. *Collecting on Credit Accounts.* (line 53 of Exhibit II) In the case of independent store customers to whom credit has been extended, the routeman makes periodic collections at the time of delivery. The cost of this activity was allocated on a time basis.

Item 17. *Securing Customer's Signature for Credit Deliveries.* (line 54 of Exhibit II) When products are sold on a credit basis, the signature of the customer or the customer's manager on a receipt must be secured by the routeman. The

cost of this activity was allocated on a time basis.

Item 18. Removing Returned Merchandise from Store to Truck. (line 57 of Exhibit II) The cost of this activity was allocated on a time basis.

Item 19. Stacking Returned Merchandise in Truck. (line 56 of Exhibit II) The cost of this activity was allocated on a time basis.

Item 20. Removing Returned Empty Bottles from Store to Truck. (line 57 of Exhibit II) The cost of this activity was allocated on a time basis.

Item 21. Stacking Returned Empty Bottles in Truck. (line 58 of Exhibit II) The cost of this activity was allocated on a time basis.

Item 22. Entering Deliveries in Route Book. (line 62 of Exhibit II) At the time of each delivery, the quantities delivered must be entered in the Route Book carried by each routeman. The cost of [fol. 819] this activity was allocated on a time basis.

Item 23. Complaints and General Conversation. (lines 59, 60 and 61 of Exhibit II) Routemen are often called upon to receive oral complaints from customers as to service or other matters, or to listen to discussions of store problems or other matters. The cost of this activity was allocated on a time basis.

Item 24. Rearranging Load. (line 10 of Exhibit I) At various times, routemen rearrange the location in the truck of undelivered products, and returned merchandise and empty bottles, in order to facilitate subsequent deliveries. The cost of this activity was allocated on a stop basis.

Item 25. Driving Time to and from Route Area. (lines 34 and 64 of Exhibit II) Time is required to drive the truck from the branch to the edge of the route area, and from the last customer location served back to the branch. The cost of this activity was allocated on a location basis.

Item 26. Driving Time on Route. (lines 36 and 38 of Exhibit II) Time is required to drive the truck from the edge of the route area to the first cus-

tomer location served, and from one customer location to another. The cost of this activity was allocated on a stop basis.

Item 27. *Report of Waste Returns and Containers.* (line 11 of Exhibit I) Upon returning to the branch after completing deliveries, the routeman fills [fol. 819a] out a report showing the number of units of the defendant's fluid milk and milk products returned by each customer. The cost of this activity was allocated on a location basis.

Item 28. *Unloading Empty Containers.* (line 12 of Exhibit I) The cost of this activity was allocated on a location basis.

Item 29. *Unloading and Receiving Credit for Returned Merchandise.* (line 13 of Exhibit I) After completing the report of waste returns, the routeman removes all returned merchandise from the truck. He then gives a branch employee (called a "checker") the completed report and waits for the checker to verify the report against the number of units unloaded. The cost of this activity was allocated on a location basis.

Item 30. *Storing Stock Boxes.* (line 14 of Exhibit I) Unsold merchandise left on truck at the end of the day must be put by the routeman in insulated boxes for over-night storage. The cost of this activity was allocated on a location basis.

Item 31. *Loading Gasoline.* (line 15 of Exhibit I) Routemen refuel their trucks at the end of the day. The cost of this activity was allocated on a stop basis.

Item 32. *Parking Truck.* (line 16 of Exhibit I) After refueling, the routeman parks his truck. The cost of this activity was allocated on a location basis.

Item 33. *Preparing Daily Collection Report.* (line 16 of Exhibit I) The routeman makes an entry on this report, showing his daily collections. The cost of this activity was allocated on a location basis.

[fol. 820] *Item 34.* *Preparing Order for Next Day's Requirements.* (line 20 of Exhibit I) The routeman next prepares a report estimating the number of units of each product which will be required

for delivery on the route next day. The cost of this activity was allocated on a location basis.

Item 35. *Checking Current Day's Sales Report.* (line 18 of Exhibit I) The routeman next checks the sales report, which shows the total products preloaded in the truck, the products returned by driver, and the remainder after the second item is subtracted from the first. The cost of this activity was allocated on a location basis.

Item 36. *Vehicle Breakdown.* (lines 24, 25 and 26 of Exhibit II) The cost of time spent because of tire trouble, motor breakdowns, or accidents was allocated on a stop basis.

Item 37. *Miscellaneous Time.* (lines 23 and 27 of Exhibit I and line 63 of Exhibit II) Time was spent on the routes due to happenings not covered by any of the items previously listed. The cost of this time was allocated on a stop basis.

Item 38. *Processing Chain Store Tickets at Branch Office.* (line 19 of Exhibit I) Sales tickets for chain stores are handled differently than sales tickets for other customers, due to the central billing of chain store customers. The cost of this activity was allocated entirely to the chain stores.

[fol. 821] *Item 39.* *Credit Matters—Chain Stores.* (line 22 of Exhibit I) Time was also spent at the branch office relative to credit sales to chain stores. The cost of this activity was allocated entirely to chain stores.

Item 40. *Credit Matters—Independent Stores.* (line 21 of Exhibit I) The cost of this activity was allocated to the independent stores on a location basis.

186MD. In Mr. Malone's opinion, all of the cost elements referred to in Items 1, 2, 3, 4, 5, 25, 26, 31 and 36 of paragraph 185 of this Order, and the costs of operating the trucks described in paragraphs 108 and 225-8 of this Order may, since they are not susceptible of direct allocation on a time basis to specific customers, be allocated to such customers in proportion to the costs directly chargeable to such customers on a time basis.

187MD. Actual mileage in the route areas is not extensive. In Mr. Malone's opinion the costs involved in starting and stopping vehicles and in parking them are directly related to the number of stops, because these costs include wear and tear and gasoline consumption, all of which are much greater in connection with such activities than in the continued running of the truck after it has started.

188MD. In Mr. Malone's opinion an allocation of the cost elements referred to in paragraph 186MD of this Order based on volume, or on mileage, or on volume times the distance transported, would not reflect actual cost differences in the delivery of fluid milk and milk products to different customers. One reason why allocations have not been made on a mileage basis is that the distances between [fol. 821a] customers are irregular, accidental, and not proportionate to the volume of products delivered to the customers or to the location of the customer from the original point of distribution. Among other factors, volume and distance do not take into account the considerable portion of vehicle cost involved in starting, stopping, and parking. Furthermore, while the quantity delivered to one of the last stores visited on the route may have been carried over all the route, the store may actually be no farther from the plant than the first store visited.

189MD. However, Mr. Malone recognizes that some of the costs of transportation are related to the movement of the quantity of product a given distance.

190MD. Item 3, described in paragraph 185 of this Order, covering the time of routemen in icing their trucks, refers only to the activities of the routemen themselves in adding such incidental ice to the already iced trucks as is required at the time the truck is ready to leave for the route. It does not cover the cost of the ice charged to accounts 721 and 723-23-2-5, or the labor of branch employees in originally icing the truck, (included in the charges to accounts 721 and 723-23-2-12). Since the study did not include such costs, it in effect treated such costs as allocated on a volume basis.

191MD. The ice used in icing trucks is only occasionally given to customers, and those would be "bulk wholesale customers."

192MD. The amount of ice used in keeping trucks at a sufficiently cool temperature remains generally the same [fol. 822] whether the truck is full or empty.

193MD. The report of waste returns and containers referred to in Item 27 of paragraph 185 of this Order is a pegged sheet with all the products down the side. One such report is filled out covering all returns from all stores; no individual report is filled out with respect to each store. When an unsold, filled container is returned by a store, it is replaced without charge, so that the store billings are net. The report simply shows the route number, the date, and the total number of each item which has been returned. This item does not refer to returns of empty glass bottles or boxes.

194MD. In Mr. Malone's opinion, one reason why the costs represented by item 27 of paragraph 185 of this Order, which is a clerical activity performed by the routeman, should be, for purposes of this study, allocated on a location basis was that if every store had contributed some returns, the time of making out the report would be no greater than if half the stores made returns.

195MD. With respect to Item 28, described in paragraph 185 of this Order, the time required would depend upon the amount of returned empty glass bottles or boxes which the driver would have to take off his vehicle. Most of the containers used in the store wholesale business are paper containers rather than returnable glass bottles. No separate summary records are kept as to store sales as between paper and glass containers, so that the records as kept do not disclose what stores return the empty containers. [fol. 823] 196MD. Mr. Malone states, with respect to items 34 and 35 described in paragraph 185 of this Order, that both relate to activities which are concerned with total requirements of the route without reference to the sales to individual stores. It is the practice of the wholesale routeman serving independent store customers to anticipate the total requirements of all his customers in preparing the route order covering the entire route for the next day. It is also the practice of the wholesale routeman to anticipate the requirements of each individual store customer and, at the time of delivery, to leave quantities which, in

the routeman's opinion, are sufficient to supply the daily sales needs of the customer. Mr. Malone states that there may be some minor exceptions to this practice but that this practice prevails in at least 95% of such locations served. There are no pre-orders by store customers.

197. Haskins & Sells prepared from the report forms (Exhibits II and III) a card for each customer served by the 134 routes, which showed the following information:

a. Type of customer (chain, independent, or other wholesale)
b. Dollars and points delivered
c. Total minutes spent in serving the customer
d. Number of deliveries ("stops") received by customer during the week the route was surveyed
e. Route number
f. Customer number (if a store customer)

198. These cards were first checked by Haskins and Sells' employees by balancing the total minutes with respect to [fol. 824] each customer against the totals appearing on the report forms at Line 9 of Exhibit I.

199. Haskins & Sells then sorted the cards by customer type and further sorted (as to independent stores) by stores falling within the different brackets set forth in Borden's published discount schedule.

200. The number of customer locations within each customer classification, and the total number of deliveries ("stops") made to customers within each classification were then computed from these cards and compared to the punched card tabulations for reconciliation purposes. The data on these cards and on the punched card tabulation was subsequently used in making all cost allocations on either a location or stop basis.

201. The cards so prepared by Haskins & Sells constitute Borden Bulk Exhibit 7.

202. The results of the computations made from the cards as reconciled to the IBM tabulations as to number of locations and stops by classification of customers were as follows:

Classification of Customer	Number of Locations	Number of Regular Stops
Chain Stores	254	2412
Independent Stores:		
0% bracket	392	2138
2% bracket	573	3596
3% bracket	277	1951
4% bracket	80	710
Total	1322	8395
Non-Store customers	374	2002
Totals	1950	12809

[fol. 825] 203. From the punched cards, the total minutes spent in activities designated as Items 6 through 23 (paragraph 185 of this Order) was ascertained for each classification of customer. The total cost of such time and the cost per classification of customers was then computed by multiplying the number of minutes by the cost per minute set forth in Schedule XXV.

204. From the punched cards, the total minutes spent by routemen in each of the activities designated as Items 1 through 5, and Items 24 through 40 (paragraph 185 of this Order) was ascertained. The cost of such time for each item was then computed by multiplying the number of minutes by the cost per minute set forth in Schedule XXV. The cost thus computed was then allocated to classifications of customers either on a location or on a stop basis by means of the total number of regular stops or locations per classification, computed as set forth in paragraph 202 of this Order.

205. Schedule XXVI, "Allocation of Labor Costs of Route Operation to Store Customers," sets forth part of the results of computations made as described in paragraphs 203-4 of this Order. Schedule XXVI shows:

a. The item number assigned to each activity as set forth in paragraph 185 of this Order.
b. The total minutes spent in each such activity as shown by the report forms (Exhibits I and II).
c. The total cost of the time spent on each activity.
d. The minutes spent on each activity specifically performed with respect to chain stores.

[fol. 826] e. The cost of the time so spent with respect to chain stores.

f. The minutes spent on each activity specifically performed with respect to independent stores.

g. The cost of the time so spent with respect to independent stores.

h. The costs allocated to chain stores on a location basis.

i. The costs allocated to independent stores on a location basis.

j. The costs allocated to chain stores on a stop basis.

k. The costs allocated to independent stores on a stop basis. Schedule XXVI does not set forth the costs allocated to non-store customers.

[fol. 827]

SCHEDULE XXVI

THE BORDEN COMPANY - CHICAGO MILK DIVISION
ALLOCATION OF LABOR COSTS OF ROUTE OPERATION TO STORE CUSTOMERS
JULY AND AUGUST 1955

(a) Item No.	(b) Total Minutes	(c) Total Cost	(d) Chain Stores Minutes	(e) Chain Stores Cost	(f) Independents Minutes	(g) Independents Cost	(h) Location Basis Chains	(i) Location Basis Independents	(j) Stop Basis Chains	(k) Stop Basis Independents
1	1,932	$ 140.91		$		$	$ 10.52	$ 101.63	$	$
2	5,601	440.81					57.63	298.85		
3	1,357	107.29					13.71	71.38		
4	2,978	231.07					30.10	156.65		
5	1,008	140.29					19.07	95.11		
6	7,891	618.20	5,170	401.16	2,512	194.92				
7	45,156	3,503.85	17,356	1,3 5.53	23,600	1, 31.23				
8	27,744	2,152.78	11,538	05.28	12,709	986.15				
9	13,223	1,026.03	6,822	529.35	5,873	455.71				
10	7,794	604.77	3,942	305.88	3,336	258.85				
11	26,355	2,045.00	3,367	261.26	20,959	1,626.30				
12	4,765	369.74	2,452	190.26	2,304	178.48				
13	5,342	414.51	2,555	198.25	2,534	196.62				
14	21,939	1,702.34	8,739	446.31	14,494	1,104.65				
15	12,114	939.98			11,021	854.39				
16	939	72.86			878	68.13				
17	6,447	500.25	5,245	406.98	1,202	93.33				
18	1,567	121.59	873	67.74	694	53.85				
19	1,337	103.74	740	57.42	597	46.32				
20	9,228	716.04	4,985	386.81	4,243	329.23				
21	11,069	858.89	6,100	473.32	4,969	385.57				
22	11,784	914.37	3,130	243.57	8,654	671.80				
23	2,901	225.10	401	31.32	2,069	160.54				
24	5,181	402.02							35.70	261.48
25	36,798	2,855.32					371.92	1,935.76		
26	50,933	3,952.11							744.20	2,790.20
27	4,698	364.54					47.48	247.14		
28	5,768	447.56					58.30	303.42		
29	1,558	120.89					15.75	81.96		
30	1,123	87.14					11.35	59.08		
31	1,282	99.48							18.73	65.20
32	3,605	279.73					36.44	189.64		
33	6,277	487.06					63.44	330.20		
34	6,036	468.36					61.01	317.52		
35	4,000	310.38					40.43	210.42		
36	300	23.28							4.38	15.06
37	15,620	1,212.02							228.23	784.49
38	2,107	163.49					163.49			
39	59	4.58					4.58			
40	168	13.04						13.04		
Total	376,864	$29,242.50	81,004	6,285.45	113,759	$8,253.82	$1,013.21	$4,411.80	$1,071.24	$3,728.53

[fol. 828] 206. Schedule XXVII, "Allocation of Labor Costs of Route Operations to Classes of Independent Stores on a Time Basis," sets forth additional results of computations made as described in paragraphs 202 4 of this Order. Schedule XXVII shows:

a. The item number assigned to each activity as set forth in paragraph 185 of this Order.
b. The total minutes spent in each activity specifically performed with respect to independent stores, as shown on Schedule XXVI.
c. The total cost of the time so spent with respect to independent stores, as shown on Schedule XXVI.
d. The total minutes spent on each activity specifically performed with respect to stores not entitled to any discount under Borden's discount schedule then in effect.
e. The total cost of each activity listed in d.
f. The total minutes spent on each activity specifically performed with respect to stores entitled to a 2% discount.
g. The total cost of each activity listed in f.
h. The total minutes spent on each activity specifically performed with respect to stores entitled to a 3% discount.
i. The total cost of each activity listed in h.
j. The total minutes spent on each activity specifically performed with respect to stores entitled to a 4% discount.
k. The total cost of each activity listed in j.

[fol. 828a]

SCHEDULE XXVII

ALLOCATION OF LABOR COSTS TO CLASSES OF INDEPENDENT STORES ON A TIME BASIS

(a) Item No.	(b) Total Minutes	(c) Total Cost	(d) 2% Bracket Minutes	(e) 2% Bracket Cost	(f) 3% Bracket Minutes	(g) 3% Bracket Cost	(h) 3% Bracket Minutes	(i) 3% Bracket Cost	(j) 4% Bracket Minutes	(k) 4% Bracket Cost
6	2,612	$ 194.92	168	$ 13.04	946	$ 77.28	486	$ 53.23	662	$ 51.37
7	23,600	1,831.23	3,273	253.97	4,700	750.66	6,992	542.54	3,635	282.06
8	12,709	986.15	2,232	173.11	4,728	366.09	3,719	288.57	2,041	158.38
9	5,373	416.71	148	11.48	1,487	109.35	2,497	209.27	1,361	105.61
10	3,336	258.75	199	15.44	999	77.52	1,385	107.47	753	58.42
11	20,359	1,626.30	1,624	126.17	7,112	551.85	7,355	570.71	4,566	377.57
12	2,094	162.48	234	18.31	842	65.33	455	35.82	361	28.02
13	2,534	196.62	145	11.25	855	67.12	965	74.88	559	43.37
14	14,494	1,124.65	2,818	218.18	6,222	482.79	4,066	315.50	1,988	154.24
15	11,611	94.39	2,000	17.14	4,134	335.48	2,809	217.65	1,367	106.07
16	479	37.43	74	5.71	314	24.07	299	23.20	95	7.36
17	610	47.33	66	4.85	873	13.42	187	14.51	194	15.05
18	607	43.65	78	6.05	300	23.28	184	14.28	65	5.04
19	541	41.98	49	3.80	232	18.00	187	14.51	73	5.66
20	1,438	366.77	148	11.48	1,006	78.06	1,265	98.16	1,019	79.07
21	4,276	331.80	193	14.98	1,266	98.23	1,748	135.64	1,069	82.95
22	7,648	597.32	1,334	101.51	3,568	276.86	1,953	151.54	843	65.41
23	2,069	160.54	434	33.68	750	58.20	605	46.94	280	21.72
Total	119,259	$9,253.82	14,684	$1,139.33	45,591	$3,537.59	37,759	$2,929.42	21,231	$1,647.4

[fol. 829] 207. Schedule XXVIII, "Allocation of Labor Costs of Route Operations to Classes of Independent Stores on a Location or Stop Basis," sets forth additional results of computations made as described in paragraphs 202-4 of this Order. Schedule XXVIII shows:

a. The item number assigned to each activity as set forth in paragraph 185 of this Order. The letter "L" or "S" following the item number indicates whether the allocation was made on a "location" or "stop" basis.
b. Total cost of each activity allocated to independent stores on a location or stop basis, as shown in Schedule XXVI.
c. Costs of each activity allocated to independent stores not entitled to a discount under Borden's discount schedule then in effect.
d. Costs of each activity allocated to independent stores entitled to a 2% discount.
e. Costs of each activity allocated to independent stores entitled to a 3% discount.
f. Costs of each activity allocated to independent stores entitled to a 4% discount.

[fol. 830] SCHEDULE XXVIII

Allocation of Labor Costs to Classes of Independent Stores on a Location or Stop Basis

a		b	c	d	e	f
			Allocation of Cost to Locations			
Item No.		Total Cost	0% Bracket	2% Bracket	3% Bracket	4% Bracket
1	L	$ 101 63	$ 30 14	$ 44 05	$ 21 29	$ 6 15
2	L	298 55	88 62	129 53	62 62	18 08
3	L	71 38	21 17	30 94	14 96	4 31
4	L	156 65	46 45	67 90	32 82	9 18
5	L	95 11	28 20	41 22	19 93	5 76
24	S	265 48	67 10	112 86	61 23	22 29
25	L	1,935 76	573 99	839 02	405 60	117 15
26	S	2,590 20	659 66	1,109 51	601 96	219 07
27	L	247 14	73 28	107 12	51 78	14 96
28	L	303 42	89 97	131 51	63 58	18 36
29	L	81 96	24 30	35 52	17 17	4 97
30	L	59 08	17 52	25 61	12 38	3 57
31	S	65 30	16 60	27 93	15 15	5 52
32	L	189 64	56 23	82 20	39 74	11 47
33	L	330 20	97 91	143 12	69 19	19 98
34	L	317 52	94 15	137 62	66 53	19 22
35	L	210 42	62 39	91 20	44 09	12 74
36	S	15 26	3 89	6 54	3 55	1 28
37	S	794 36	202 30	340 26	184 61	67 19
40	L	13 04	3 87	5 65	2 73	79
Total		$8,140 30	$2,257 74	$3,509 31	$1,790 91	$ 582 34
Sub-Totals	L	4,411 80	1,308 19	1,912 21	924 41	266 99
	S	3,728 50	949 55	1,597 10	866 50	315 35

[fol. 831] 208. The total labor costs allocated to classes of independent stores both on a time basis and on a cost basis were then computed by adding the totals appearing on Schedules XXVII and XXVIII, and were as follows:

Store Classification	Total Allocated Labor Costs
Stores entitled to no discount	$3,397.13
Stores entitled to a 2% discount	7,046.90
Stores entitled to a 3% discount	4,720.33
Stores entitled to a 4% discount	2,229.76

209. Schedule XXIX, "Allocation of Labor Costs of Route Operations to Non-Store Customers," sets forth the remaining results of computations made as described in paragraphs 202-4 of this Order. Schedule XXIX shows:

a. The item number assigned to each activity as set forth in paragraph 185 of this Order.
b. The minutes spent on each activity specifically performed with respect to non-store customers.
c. The cost of the time so spent with respect to non-store customers.
d. The costs allocated to non-store customers on a location or stop basis.

[fol. 832] SCHEDULE XXIX

Allocation of Labor Costs of Route Operations to Non-Store Customers

(a) Item No.	(b) Minutes Spent	(c) Cost of Time Spent	(d) Costs Allocated On Location or Stop Basis
1		$	$ 28.76
2			84.54
3			20.20
4			44.32
5			26.91
6	209	16.21	
7	3,700	287.09	
8	3,497	271.35	
9	528	40.97	
10	516	40.04	
11	2,029	157.44	
12	219	17.00	
13	253	19.64	
14	1,706	132.38	
15	1,103	85.59	
16	61	1.73	
17	592	45.94	
18	67	5.20	
19	56	4.34	
20	805	62.46	
21	693	53.76	
22	947	73.48	
23	351	27.24	
24			62.84
25			547.64
26			617.71
27			69.92
28			85.84
29			23.18
30			16.71
31			15.55
32			53.65
33			93.42
34			89.83
35			59.53
36			3.64
37			189.43
Total	17,332	$1,344.86	$2,133.62

[fol. 833] 210. The equivalent of seven employees were engaged at the two branches to make special deliveries. Such employees are paid for an eight-hour day. Overtime is paid when a sixth day is worked. Clocked hours are shown on the payroll records. The special delivery drivers at the Englewood branch worked six days a week; the drivers at the Irving Park branch worked five days a week.

211. During each of the five weeks of the time study, the special delivery drivers were furnished with report forms (Exhibits I, II, and III). The drivers recorded the time spent on these various activities on the appropriate report forms (Exhibits I and II) and recorded each delivery made to a customer on the appropriate report form (Exhibit III), except that Haskins & Sells inserted the elapsed time for each special delivery driver at the appropriate line of the report forms (Exhibit I). The time so inserted was that shown by the Borden payroll records. The difference between the time reported for specific activities and the elapsed time was computed and entered on line 27 of Exhibit I ("unaccounted for Time").

212. Haskins & Sells footed the daily sheets by customers, established and recorded on the report forms the classification of customers as between chain stores, independent stores, and non-store customers, established the discount bracket for each independent store customer, and recapped both the time specifically accounted for and the balance of the elapsed time.

213. The report forms so prepared constitute Borden Bulk Exhibit 8.

[fol. 834] 214. The report forms (Exhibits I, II, and III) prepared by the special delivery drivers, as set forth in paragraph 211 of this Order and constituting Borden Bulk Exhibit 8, were manually recapped by Haskins & Sells for the entire five weeks of the survey. All data shown on the forms was tabulated in detail except the data on Exhibit III of which only lines 142 and 143 and the package points were tabulated. The deliveries to customers were grouped by type of location and by the discount bracket in which the independent stores fell based on regular deliveries. The five-week totals for each category of store were divided by five to compute an average week's activity.

215. Haskins & Sells ascertained from Borden payroll

records the total compensation paid the special delivery drivers for the five weeks of the cost study. This was divided by five to produce a weekly average wage cost.

216. The vacation period applicable to the special delivery drivers was ascertained by Haskins & Sells from Borden payroll records. The weekly base wage rate of each of the employees involved was also ascertained from these records. The annual vacation cost was then computed by multiplying the applicable weekly base wage by the number of weeks' vacation to which the employee was entitled. The costs of vacation per employee thus computed were added to obtain a total annual cost. The total was divided by 52 to produce a weekly average cost, which is shown on line 2 of Schedule XXX.

217. The weekly cost of contributions to union severance, pension, and health and welfare funds was computed as $5.50 per week for each of the special delivery drivers. [fol. 835] Each of the special delivery drivers was receiving more than $4,200 a year in compensation. Weekly social security costs were computed as $1.90 per man per week.

218. Schedule XXX, "Weekly Labor Cost of Special Deliveries," records the results of computations described in paragraphs 215-7 of this Order. Schedule XXX shows:

Line 1 Weekly average wage cost
Line 2 Weekly average vacation costs
Line 3 Weekly average costs of contributions to union severance, pension, and health and welfare funds
Line 4 Weekly average social security costs
Line 5 Total average weekly costs

[fol. 836] SCHEDULE XXX

Weekly Labor Cost of Special Deliveries

1.	Average weekly wages	$756 62
2.	Average weekly vacation costs	24 82
3.	Weekly contributions to union funds	38 72
4.	Weekly social security costs	13 18
5	Total weekly cost	$833 34

[fol. 837] 219. The total hours worked by special delivery drivers during the five weeks of the survey, as shown by the payroll records, was 1,504 hours. This number of hours was then multiplied by 60 to obtain the total minutes worked, and this result was divided by five to determine the average minutes per week—18,048 minutes. The cost per minute ($.046174) was ascertained by dividing the total weekly cost as shown by Schedule XXX ($833.34) by the average minutes worked per week (18,048).

220. By manual computations from the report forms (Exhibit II) filled out by the special delivery drivers, the total number of minutes spent on activities related to store customer deliveries as shown on such report forms was ascertained as 37,280 minutes, which, divided by five, amounted to a weekly average of 7,456 minutes. The cost of the time applicable to store customer deliveries ($344.28) was then determined by multiplying the minutes devoted thereto (7,456) by the cost per minute previously ascertained ($.046174).

221. In all cases where the time spent in an activity was specifically related to a particular customer, the cost of the activity was allocated on a time basis. In all other instances, the cost of the activity was allocated on a stop basis.

222. Haskins & Sells computed from the report forms (Exhibit II) the number of special deliveries ("stops") made to each classification of customer during the five weeks' period, and also the number of deliveries made to each classification of independent stores.

223. The number of special delivery stops by classification of customers was as follows:

[fol. 838] Chain stores		99
Independent stores:		
0% bracket	5	
2% bracket	14	
3% bracket	22	
4% bracket	27	
Total		68
Non-store wholesale customers		28
Total		195

224. Schedule XXXI, "Allocation of Costs of Special Deliveries," shows the results of the computations made as described in paragraphs 219-23 of this Order. Schedule XXXI shows:

a. Classification of customers.
b. Costs allocated to different classifications of customers on a time basis.
c. Costs allocated to different classifications of customers on a stop basis.
d. Total costs allocated to each classification of customer.

[fol. 839] SCHEDULE XXXI

Allocation of Costs of Special Deliveries

a	b	c	d
Customer Classification	Costs Allocated on a Time Basis	Costs Allocated on a Stop Basis	Total of Allocated Basis
Chain stores	$36 66	$137 94	$174 60
Independent stores:			
0' bracket	1 29	6 97	8 26
2' bracket	3 28	19 51	22 79
3' bracket	4 53	30 65	35 18
4' bracket	9 10	37 61	46 71
Total independent stores	$18 20	$ 94 74	$112 94
Non-store Wholesale Customers—Other locations	$17 73	$ 39 01	$ 56 74
Total	$72 59	$271 69	$344 28

[fol. 840] 225. The trucks used by Borden making wholesale deliveries out of the Englewood and Irving Park branches are all substantially of the same capacity.

226MD. Borden owns the trucks used on the routes studied with the exception that in recent years Borden has entered into lease arrangements with truck leasing firms for some of the trucks used. Freight costs incurred in bringing leased vehicles from their source to the place in the Chicago area where they are used has been treated on Borden's books as a recurring expense rather than a capital charge. The freight costs on leased equipment were excluded from the computations made in the study because, in Mr. Malone's opinion, it was not a normal cost for the

period covered by the survey, being the result of a new venture as to which the company had not had sufficient experience to determine what was a normal rate of expense.

227MD. With respect to owned trucks depreciation is computed annually on a straight line basis, which recognizes the estimated life expectancy of each vehicle. This estimated life expectancy is revised annually based on the condition of the vehicle, use to which put, area traveled and any other factor which contributes to wear and tear. Trucks are constantly subject to change in location, area traveled and mileage in the normal course of operation.

228. Borden accounting records show that all charges to sub-accounts numbered 721 or 723-71-2, exclusive of charges to accounts 721 or 723-71-2-251 (Freight on leased equipment), for the twelve months ended July 31, 1955, totaled $390,461.95. "Freight on leased equipment" covers freight [fol. 841] costs in the shipping of the leased trucks to Borden prior to their use by Borden, and amounted to $17,520.17 in the twelve months period. This total of $390,461.95 was then divided by 52 to produce an average weekly cost of $7,508.89. This average weekly cost was allocated to various classifications of customers on a stop basis.

229. The total number of stops by classification of customers computed as described in paragraph 202 of this Order, was added to the weekly average number of special delivery stops by classification of customers computed as described in paragraphs 219-23 of this Order. The total number of stops for each classification of customer thus computed was as follows:

Chain stores		2,511
Independent stores:		
0% bracket	2,143	
2% bracket	3,610	
3% bracket	1,973	
4% bracket	737	
Total		8,463
Non-store customers		2,030
Total all stops		13,004

230. The average weekly wholesale truck costs computed as above, was then allocated to classifications of customers in the ratio established by the stops as set forth above. Schedule XXXII, "Allocation of Wholesale Truck Costs," shows the results of these computations.

[fol. 842] SCHEDULE XXXII

Allocation of Wholesale Truck Costs

Chain Stores		$1,149.93
Independent Stores:		
0% bracket	$1,237.43	
2% bracket	2,081.52	
3% bracket	1,139.27	
4% bracket	425.56	
		4,886.78
Non Store Customers		1,472.18
Total Wholesale Truck Costs		$7,508.89

[fol. 843] 231. A time study of the activities of the 42 clerical employees at the Englewood and Irving Park branches was made during the five weeks of the cost study. A form "Branch Office Time Analysis" was provided for that purpose. Exhibit V is a copy of this form. Daily during the five weeks of the cost study each clerical employee informed his supervisor as to how his time was spent which information was recorded by the supervisor on the report form (Exhibit V). The report forms (Exhibit V) prepared at the branches constitute Borden Bulk Exhibit 9.

[fol. 844]

Exhibit V

Name _____

Department _____

Person _____

Date _____

Type of Machine	Description of Operations																			
	Check and Activate Main Store Console	Check Customer Tickets (other than Main Store)	Cashier's Function	Checking Transactions	Post Sales to Office	Post, Check, Summarize Waste Returns	Post quantities Returned (weight in vehicle check out)	Balance Routemen's Orders Against Stock	Distributing Deduction in Routemen's Trays	Distributing Addition to Routemen's Trays	Recap. of Daily Sales & Product	Prepare Load Summaries	Bill	Pay	Be Out Items	Withdrawal and Top-up	Wait and		Miscellaneous (Specify)	
Total Minutes																				
Minutes Applicable To: Retail Wholesale: Ind.Stores Chain Stores Others Vendors Handlers																				
Total Minutes as Above																				

147

NOTE: To be completed for each day during survey period.

[fol. 845] 232. The branch accounting clerks at the two branches designated on the completed employee report forms (Exhibit V) the type of business (retail, wholesale, etc.) to which the activity reported by the employee pertained.

233. Haskins & Sells then computed from the employee reports (Exhibit V) the weekly totals of time spent on each of the various wholesale activities thus reported, and also the five-week totals. The minutes spent on wholesale activities by the 42 clerical employees during the five-week period so computed totaled 259,747. This total was divided by five to produce an average weekly time spent of 51,950 minutes. This was equivalent to full time of 22 employees (40 hours times 60 minutes times 22 equals 52,800).

234. Haskins & Sells then ascertained from Borden payroll records the weekly rates of the 42 clerical employees, and computed the weekly cost of the time spent by such employees by applying the weekly rate to the total weekly time spent by each employee in wholesale activities as shown on Exhibit V and dividing the total by five to determine the average weekly clerical wage cost by function during the period of the survey. This computation produced a weekly wage cost of $2,113.37.

235. Haskins & Sells next ascertained from Borden payroll records that 16 of the 42 employees were entitled to two weeks' vacation, 24 to three weeks' vacation, and two to no vacation. The total vacation cost of the 40 employees was then computed by multiplying the hourly rate of each employee by 40 times the number of weeks' vacation to which each employee was entitled. The total thus obtained [fol. 846] ($10,012.14) was divided by 52 to produce a total weekly cost of $192.54. Of this total, twenty-two forty-seconds ($101.34) was treated as applicable to wholesale activities.

236. Weekly contributions to union funds were computed as $4.50 times 22, or $99.00. Weekly social security costs were computed as $1.90 times 22, or $41.80.

237. These weekly costs applicable to wholesale activities were than added to obtain a total:

Weekly wage costs	$2,113.37
Weekly vacation costs	101.34
Weekly contributions to union funds	99.00
Weekly social security costs	41.80
Total	$2,355.51

238. The ratio of costs other than wages ($242.14) to total wage costs ($2,113.37) was then calculated. The result was 11.4575%. The wage cost by functions was increased the percentage in all subsequent computations of the total cost by functions.

239. The weekly average minutes spent in checking and calculating chain store tickets were 6,800. The computed cost of this activity was $290.75, all of which was allocated to chain stores.

240. The weekly average minutes spent in checking customer tickets other than chain store tickets were 624. The computed cost of this activity was $31.91, which was allocated to independent stores and non-store customers on a location basis.

241. The weekly average cost of billing, $61.37, and [fol. 847] credit and collection, $64.73, a total of $126.10, was charged directly to non-store customers.

242. The cost of all other activities reported was computed and allocated to all classifications of customers on a location basis.

243. Schedule XXXIII, "Allocation of Branch Office Clerical Costs," shows the results of these computations and allocations. The functions listed on Schedule XXXIII correspond in description and sequence to the function set forth on the report forms (Exhibit V).

[fol. 847a]

Schedule XXXIII

ALLOCATION OF BRANCH OFFICE CLERICAL SALARIES

Function No.		Average Minutes Per Week	Total Cost Per Week	Allocation of Cost						
				Chain Stores	Independent Stores By Discount Bracket					
					Total	0%	2%	3%	4%	Others
1	Check and calculate chain store tickets	6,800	$ 200.75	3290.75	$	$	$	$	$	$
2	Check customer tickets other than chain store	624	31.91		24.87	7.37	10.78	5.21	1.51	7.04
3	Cashier function	2,875	142.74	18.59	96.77	21.89	41.94	20.28	5.86	27.38
4	Checking transfers	34	1.75	.23	1.19	.35	.52	.25	.07	.33
5	Post sales to office ledger	2,177	95.20	12.40	64.54	19.14	27.97	13.52	3.91	18.26
6	Post, check, and surmarize waste returns	2,531	110.15	14.35	74.68	22.14	32.37	15.65	4.52	21.12
7	Post quantities returned overnight in vehicle stock box	21	.91	.12	.62	.18	.27	.13	.04	.17
8	Balance routemen's orders against sales	3,092	131.41	17.12	89.09	26.42	38.61	18.67	5.39	25.20
9	Distributing reduction in routemen's order	473	20.73	2.70	14.05	4.17	6.09	2.94	.85	3.98
10	Distributing addition to routemen's order	1,162	51.89	6.76	35.19	10.43	15.25	7.37	2.13	2.95
11	Recapitulation of daily sales by products	3,598	149.91	19.53	101.63	30.14	44.05	21.29	6.15	28.75
12	Prepare load schedules	2,325	101.76	13.25	68.99	20.46	29.90	14.46	4.17	19.52
13	Billing time	1,428	61.37							61.37
14	Payroll time	1,016	48.56	6.33	32.92	9.76	14.27	6.90	1.99	9.31
15	P ' Platform time	339	14.90	1.94	10.10	2.99	4.38	2.12	.61	2.86
16	Switchboard and typing	4,125	177.89	23.17	120.60	35.76	52.27	25.27	7.30	34.12
17	Credit and collection	1,315	64.73							64.73
18	Supervision	3,143	161.94	21.09	109.79	32.55	47.59	23.00	6.65	31.06
19	Miscellaneous	14,872	697.01	90.79	472.54	140.13	204.81	99.01	28.59	133.68
		51,050	$2,355.51	$539.12	$1,317.56	$390.68	$571.07	$276.07	$79.74	$498.83

[fol. 848] 244. At the division main office, the following specific functions are performed which relate directly to chain stores or independent stores, or both: (1) preparation and sending of weekly centralized billings to chain customers; (2) preparation and sending of monthly discount checks to independent stores; (3) preparation and sending of monthly or quarterly discount checks to chain customers; and (4) activities of the main office credit department relating to chain or independent stores. Studies of these costs were made, and allocations computed, as set forth in paragraphs 245-57 of this Order.

245. Exhibit VII is a copy of this report form used in recording the activities of employees of the division main office billing department during the five week period of the cost study. Daily reports were made by such employees to the department supervisor, and recorded by the supervisor on the report forms. The forms so prepared constitute Borden Bulk Exhibit 10.

[fol. 849]

Exhibit VII

THE BORDEN COMPANY - CHICAGO MILK DIVISION

MAIN OFFICE TIME ANALYSIS

Department_____

Supervisor_____

FOR SURVEY DURING PERIOD JULY 11, 1955 TO AUGUST 13, 1955

Date_____

	DESCRIPTION OF OPERATION														
		Chain Store Billing				Discounts				Credit & Collection		Chain Store Statistics			
Name of Employee	Check Extensions	Figure Sales at Retail Prices	Sort Tickets By Store Number	Post Sales By Commodity On Chain Store Form	Super-vision	Chain Store	Independent Store	Other Customers	Super-vision	Credit Matters	Super-vision	Developing Statistics	Super-vision	Other Time Requirements (Specify	Total In Minutes
Total In Minutes															
Minutes Applicable To:															
Retail															
Wholesale:															
Chain Stores															
Ind.Stores															
Others															
Vendors															
Handlers															
Total As Above															

NOTE: To be completed for each day during survey period.

153

[fol. 850] 246. The total minutes applicable to wholesale activities as shown by the report forms (Exhibit VII) were 80,070, which was divided by five to produce a weekly average time of 16,014 minutes. The hourly rate of each employee was then ascertained and applied to the average weekly number of minutes spent by that employee in wholesale activities. The sum of the costs per employee thus computed was $524.66.

247. Of the average wholesale minutes, 12,121 at a cost of $397.07 was applicable to chain stores, 1,834 at a cost of $60.11 was applicable to independent stores, and the remainder, 2,059 minutes at a cost of $67.48, was applicable to non-store customers. In the subsequent paragraphs and schedules of this Order, this cost has been allocated to the stores served by the 134 routes being studied on the basis of the number of each type of location to the total number of each type of location served by Borden's Chicago Milk Division.

248. During July, 1955 Borden's Chicago Milk Division served 29 chain locations and 424 independent locations not located in the Chicago area in addition to those included in the branches surveyed.

249. This computation resulted in an allocation of $356.38 to chain stores, $42.29 to independent stores, and $67.48 to non-store customers. The costs to independent stores was then allocated to classifications of independent stores on a location basis.

250MD. It has been the general practice to bill chain store accounts once a week. The billing is made in a single total invoice to each of the two chain store customers.

[fol. 851] 251. The division main office Credit Department consists of a credit manager and assistants. The department maintains credit files on each independent store customer, secures credit ratings when required, collects delinquent accounts, and audits and controls balances on open accounts.

252. The report forms (Exhibit VII) were also used in recording the activities of employees of the Division Main Office credit department during the five week period of the cost study. Daily reports were made by such employees to the department supervisor, and recorded by

the supervisor in the report forms. The report forms so prepared constitute Borden Bulk Exhibit 11.

253. The total cost of the activities of the credit department was computed by reference to Borden payroll records for the employees involved for salaries and by adding the applicable social security costs for the five-week period of the cost study and dividing that cost, $1,816.35, by the total minutes expended, 45,000, to calculate a cost per minute of $.04036 applicable to all activities. The minutes spent on exclusively wholesale functions totaled 1,606 which multiplied by the cost per minute results in a cost of $64.82.

254. This cost was allocated to classifications of customer locations on a time basis and to the stores served by the 134 routes being studied out of the Divisional Total on the same basis as that of the billing department. The weekly costs thus allocated to the stores studied was $60.72, of which $1.30 was allocated to chain stores, $9.37 to independent stores, and $50.05 to non-store customers. The costs to independent stores was then allocated to classifi [fol. 852] cations of independent stores on a location basis.

255. The division main office accounting department supervises the preparation of sales data used in calculating discounts payable to store customers. The actual compilation of this data from company records, so far as it relates to independent stores, is done by employees of Robert F. White & Company, Clerical Service.

256. The report forms (Exhibit VII) were also used in recording the activities of Borden employees of the Division main office accounting department during the five week period of the cost study. Daily reports were made by such employees to the department supervisor, and recorded by him on the report forms. The report forms so prepared constitute Borden Bulk Exhibit 12.

257. The average weekly time spent on this activity (721 minutes), and the average weekly cost of this time ($28.34) was computed in the same manner as in the case of the billing department. The proportion of this cost applicable to the store customers served by the 134 routes surveyed ($21.72) was computed by taking the proportion which the total number of customers served by those routes to the total store customers in the Division as set forth under

the heading "Billing Department." On a time basis, $8.25 of this cost was applicable to the chain stores and $13.47 to the independent stores.

258. The cost of Robert F. White & Company, for this work during July, 1955 was ascertained from the invoice rendered by that organization. The average weekly cost applicable to Englewood and Irving Park ($140.83) was then computed by taking 6/26 of the monthly cost. (July, [fol. 853] 1955, had 26 working days.) This amount was charged to the independent stores and added to the $13.47 computed as described above, making a total of $154.30 charged to the independent stores. This amount was allocated to classes of independent stores on a location basis.

259. Employees of Borden's district main office tabulating department prepare the discount checks for the Chicago Milk Division's independent store customers and perform statistical tabulations relating to all customers. Employees of the tabulating department were given report forms and instructed to complete them daily during the five weeks of the cost study. Exhibit VIII is a copy of the report form used in recording the activities of employees of this department during the five week survey period. Daily reports were made by such employees to the tabulating department supervisor, and recorded by him on the report forms. The report forms so prepared constitute Borden Bulk Exhibit 13.

[fol. 854]

Exhibit VIII

THE BORDEN COMPANY - CHICAGO MILK DIVISION

TABULATING DEPARTMENT TIME ANALYSIS

Supervisor_____ FOR SURVEY DURING PERIOD JULY 11, 1955 TO AUGUST 13, 1955 Date_____

Name of Employee	Store Discount Checks				Chain Store Statistics					Other Time (Specify)	Total Time (In Minutes)
	Keypunch Time	Machine Operator's Time	Machine Time	Supervision	Keypunch Time	Machine Operator's Time	Machine Time	Supervision			
Total Minutes											

NOTE: To be prepared for each day during survey period.

158

[fol. 855] 260. The total minutes spent in each of the activities named in the report forms, the weekly average of the minutes spent in each activity, the cost per minute, and the average weekly costs were computed in the same manner as in the case of the devision main office billing department (paragraphs 245-50 of this Order). The added cost of machine rentals was ascertained from accounting records showing rental charges and reduced to a weekly figure. The total weekly cost ($57.20) was allocated to the activities reported on the forms (Exhibit VIII) in proportion to the time the machines were used in such activities, this time being reported on and computed from the report forms (Exhibit VIII).

261. The total weekly labor and machine costs allocated to chain stores was $12.12, and to independent stores was $45.08. The costs allocated to independent stores were in turn allocated only to the store classifications receiving discounts in proportion to the number of locations in each classification.

262. All bad debt losses of the Chicago Milk Division from store customers for the six years ended December 31, 1954 have occurred only in the case of independent stores and non-store customers and never in the case of chain store customers.

263. The average bad-debt charge-offs for the six years ended December 31, 1954 were $1,642.25. This figure was divided by 52 to produce a weekly average cost of $31.58, of which $31.42 was applicable to independent stores and $.16 to non-store customers. The cost to independent stores was allocated on a location basis, with the following result:

[fol. 856] Independent stores:

0% bracket	$ 9.32	
2% bracket	13.62	
3% bracket	6.58	
4% bracket	1.90	
Total		$31.42
Non-store customers		.16
Total		$31.58

264. The total net charges to accounts 721 and 723-23-2-126 and 127 for the twelve months ended July 31, 1955 amounted to $115,118.40. These charges represent the loss on fluid milk and milk products returned by store customers not sold by them. Such milk is used in the production of cheese and similar milk products, and cannot be resold as fluid milk or milk products. The total wholesale price of returned milk is charged to these accounts, and are credited with amounts resold or with the current market price for milk used in the production of cheese or other milk products.

265. The total of the net charges to these accounts ($115,118.40) was divided by 52 to obtain a weekly average cost ($2,213.82). This cost was then allocated to wholesale customers on a time basis in proportion to the time spent by routemen and relief drivers in gathering returned merchandise, as computed from the report forms (Exhibit 11). The result of these computations was as follows:

[fol. 857] Chain stores		$1,139.20
Independent stores:		
0% bracket	$109.65	
2% bracket	391.19	
3% bracket	304.31	
4% bracket	167.72	
Total to Independent stores		972.87
Non-store customers		101.75
Total		$2,213.82

266MD. The charges for loss on products returned, described in paragraphs 264-5 of this Order, have been allocated, for purposes of this study, on the basis of direct actual time spent at the stores in handling the merchandise returned, because, in Mr. Malone's opinion, there was a direct relation between the time so spent and the quantities of the returns. In Mr. Malone's opinion, allocation could also have been made on the basis of the quantities returned by each store had records been kept of such quantities. The

manner in which quantities to be left at individual stores is determined is described in paragraph 196MD of this Order.

267MD. Since the majority of the returns are of homogenized milk, and some milk in the Chicago area has to be resold within a brief period of time after pasteurization, the returned milk is not resold as fluid milk. Some such milk is sold for animal feed purposes.

268MD. The federal marketing order in the Chicago marketing area establishes class prices for all milk purchased, [fol. 858] which prices are based upon what utilization is made of the milk. Waste milk is usually utilized in ways which place it in the lowest priced class, unless there is excess waste which is placed in Class I.

269MD. The costs described in paragraphs 264-5 of this Order are the differences between what Borden has to pay for the milk which becomes waste, and what Borden receives for it when sold for uses other than human consumption, such as for animal feed.

270. The total points and total dollar sales of fluid milk and milk products to each class of wholesale customers on the 134 routes studied were computed for the week in which each route was studied. The totals so computed are set forth in Schedule XXXIV.

[fol. 859] SCHEDULE XXXIV

Total Points and Total Dollar Sales by Classes of Wholesale Customers

	Total Points	Total Dollar Sales
Independent Stores:		
0% bracket	30,773	$ 6,554 77
2% bracket	157,501	33,051 13
3% bracket	171,310	35,899 27
4% bracket	110,891	23,167 35
Total Independent Stores	470,475	98,672 52
Chain Stores	913,536	195,262 07
Other Wholesale Customers	86,315	18,579 38
Grand Totals	1,470,326	$312,514 97

[fol. 860] 271. In the course of the study, employees of Haskins & Sells reviewed the classification of accounts and the methods employed by Borden for the charging of expense to the various classifications and accounts bearing the number 23 and 71, and tested the charges actually made to ascertain if they had been made in accordance with standing instructions.

272. The total charges made to accounts 721 and 723—23-2-8, 9, 10, 34, 47, 49, and 227 for the months of July and August, 1955 were ascertained from the books of account. These months contained 53 working days. An average weekly charge was computed by taking 6/53 of the total charges for the two months. The figures thus obtained were as follows:

721 and 723—23	2 8	Salaries—senior route foremen	$ 984 80
	9	Salaries—junior route foremen	2,805 84
	10	Salaries—routemen	14,136 44
	34	Salaries—extra compensation to routemen	10,040 74
	47	Salaries—additional vacation labor	1,620 35
	49	Severance—retirement expense	2,108 36
	227	Insurance—unemployment compensation and federal insurance	657 30

273. Haskins & Sells made sample tests and examinations of the accounts 721 and 723—23-2 and 721 and 723—71-2 and of the charges to these accounts for the month of July, 1955, and of the charges to each of these accounts for at [fol. 861] least one other month in the year 1955. Among the matters tested or questioned were:

a. the basis of allocation of costs between types of operation (wholesale, retail, etc.)
b. the type of expense charged to each specific account.

274. Beginning with the third week of the cost study, two employees of Haskins & Sells were assigned to the branches, one to Irving Park and one to Englewood. These two men:

a. Prepared a weekly recap of routes surveyed.
b. Established control figures for dollars and points for each route from the data recorded in Exhibit III.

c. Verified elapsed time as shown on report forms (line 28, Exhibit I) by comparison with Borden payroll records.

d. Checked and verified the posting of dollars and points from the sales tickets to the report forms (Exhibit III). Approximately 50% of these postings were checked.

e. Checked the footings and cross-footings entered on the report forms (Exhibits I, II, and III) by the comptometer operators. Approximately 30% of these computations were checked.

f. Checked the entries of quantities on the report forms (Exhibit III) against entries in the route books. [fol. 862] Approximately 25% of the entries were thus checked.

g. Reviewed the forms (Exhibits I, II, III) for reasonableness and consistency.

275. Haskins & Sells checked the accuracy of the punched cards in the following manner:

a. The punched cards were tabulated to obtain the totals, route by route, for each of the entries on the report forms (Exhibit II) except lines 35, 37, 39, 48, 65 and 66. The totals by routes so obtained were then compared with the totals obtained by tabulating the punched cards with respect to the entries on line 9 of the report forms (Exhibit I). Corrections called for as a result of this check were made either in the punching of the data from line 9. (Exhibit I) or in the punching of the data from the report forms (Exhibit II).

b. The detail punching was checked line item by line item on the cards representing approximately 20 routes and the customers served by those routes.

c. The total dollars and points tabulated from the punched cards were reconciled to the control figures previously established by Haskins & Sells as described in paragraph 274 of this Order and made necessary corrections.

d. The cards as to individual customers prepared by Haskins & Sells as described in paragraphs 197-202 [fol. 863] of this Order (Borden Bulk Exhibit 7).

were balanced to the figures obtained by tabulations from the punched card entries representing line 9 of the report forms (Exhibit I) as to number of minutes. The cards were further balanced to the dollars and points by customers obtained by tabulating the punched card entries representing lines 142 and 143 of the report forms (Exhibit III).

e. The totals obtained by tabulations from the punched cards as to dollars, points, minutes, locations, and stops were compared to the totals obtained from the cards as to individual stores prepared by Haskins & Sells (Borden Bulk Exhibit 7). Corrections were made wherever necessary in the punched cards.

276. The cards prepared by Haskins & Sells from the report forms (Exhibits II and III) as described in paragraphs 197-202 of this Order (Borden Bulk Exhibit 7) were further checked by Haskins & Sells in the following manner:

a. The cards were checked against the accumulated sales tickets (Borden Bulk Exhibit 5) to establish what discount was earned by each independent store.

b. The cards representing all independent stores with customer numbers appearing on the report forms were checked against the discount lists maintained [fol. 864] in Borden's divisional main office to check customer classifications, and corrections were made in the cards.

277. Haskins & Sells checked the report forms (Exhibits I, II and III) filled in by special delivery drivers as described in paragraphs 210-4 of this Order (Borden Bulk Exhibit 8). These report forms were manually tabulated by Haskins & Sells as described in paragraphs 197-202 of this Order.

278MD. In making the cost study described in paragraphs 82 through 279 of this Order, special expenses were incurred by Borden for the accounting and auditing services of Haskins & Sells, for tabulating services and various other office services and for the employment of time and motion men. For these specific charges and

other expenditures in connection with the cost survey, exclusive of attorneys' fees, Borden has expended the sum of $45,896.61. This sum does not include the cost of the time of regular Borden employees which additional cost has been substantial. For example, Mr. Malone and his staff, as well as the regular Borden employees used as time study men (see paragraph 156 of this Order), devoted a great deal of time to making the cost study.

279. Exhibit IX is the letter of Haskins & Sells to Borden dated February 29, 1956.

[fol. 865] EXHIBIT IX

Haskins & Sells Certified Public Accountants
Board of Trade Building, Chicago 4

February 29, 1956.

The Borden Company,
Chicago Milk Division,
3638 North Broadway,
Chicago 13, Illinois.

DEAR SIRS:

In accordance with the request of Mr. J. F. Malone, District Controller of Chicago-Central District of The Borden Company, we have participated in and reviewed the costs compiled in the survey of the costs of distribution to wholesale customers which was conducted during the five-week period ended August 13, 1955 at the Englewood and Irving Park branches of Chicago Milk Division of The Borden Company. To the extent we deemed appropriate in the circumstances, we reviewed the determination and accumulation of the time (minutes) expended on the various wholesale activities at the branches and the Division main office as more particularly set forth in this additional pre-trial order. We also assisted in compiling the costs relative to the distribution function as encompassed in the survey, which were taken from the records of the Company, and reviewed the compilation of costs so determined.

In our opinion, the presentation of the time (minutes) and cost relating to the distribution of milk and milk products at wholesale, presents fairly the total costs as set forth in

this additional pre-trial order involving the distribution of fluid milk at wholesale on the routes surveyed during the five-week period ended August 13, 1955 at the Englewood and Irving Park branches of Chicago Milk Division of The Borden Company.

Yours truly, /s/ Haskins & Sells.

[fol. 866] 280. As is set forth in paragraph 26 of this Order, Borden operates 28 bulk wholesale routes out of Chestnut Street. A cost survey of the bulk wholesale business comparable to that prepared with respect to the store wholesale business would have required a complete analysis of the cost of delivery on each of the 28 bulk wholesale routes. Such a survey, in Mr. Malone's opinion, could not have been made without incurring costs similar to those incurred in the making of the survey on store wholesale. In view of the fact that we are dealing with, at most, the costs of delivery to five bulk wholesale customers, the cost of making the survey would, in Mr. Malone's opinion, be disproportionate to the amount of the total sales involved.

281MD. In Mr. Malone's opinion, no assumption can be made, from the results of the store wholesale survey, that the cost of distribution in the bulk wholesale field would be much lower in the case of customers buying larger amounts per location. His opinion is based upon the different purchasing practices of different bulk wholesale customers, the dissimilarity of establishments (e.g., basement, ground floor, and upper flood locations, etc.) and the variety of customer facilities, elevators, refrigerators, receiving docks, etc.), all of which factors would tend to distort cost allocations.

II. Additional Agreements as to Issues

1. Plaintiff does not contend in this proceeding that differences between prices charged store wholesale customers and prices charged hotels, restaurants and other public eating places are evidences of a violation of Section 2(a) of [fol. 866a] the Clayton Act as amended.

2. Plaintiff does not contend in this proceeding that the added discounts of 1½% allowed by Borden in December, 1954 and in September, 1955 to store customers Schubert, Popik and Arthur Cartan, which discounts are referred to in paragraphs 3 and 13 and Schedule II of the Supple-

mental Pre-Trial Order entered in this action on November 8, 1955, are evidences of a violation of Section 2(a) of the Clayton Act as amended. Borden does not intend to offer evidence of any prices offered by Lake Valley Dairy to Schubert, Popik and Arthur Cartan.

Enter: Campbell, Judge.

Dated: September 19, 1957.

[fol. 867] EXHIBIT G

Borden's—Chicago Milk Division
The Borden Company

3638 Broadway, Chicago 13, Ill.

June 2, 1954.

DEAR GROCER:

Effective June 2, 1954, our prices to you will be as follows:

Gal. Homo V.D. Milk	64
Qts. Homo V.D. Milk	175
½ Gals. Homo V.D. Milk	34
½ Gals. Gail Borden Signature Quality Milk "Glass"	36
½ Gals. Zest Modified Skim Milk "Paper"	31
Qts. Chocolate Drink	195
½ Pts. Chocolate Drink, Handi-Pak	63 per doz.
Qts. Vitamin Fortified Skim Milk	15
Qts. Buttermilk	175
Pts. Rich Cream	46
½ Pts. Rich Cream	235
12 Oz. Sour Cream	34
8 Oz. Sour Cream	225
Pts. Half & Half	255
½ Pts. Whipping Cream	315
Borden's Triple Whip or Reddi-Wip—7 Oz. Can	43
8 Oz. Creamed Cottage Cheese (plain)	125
12 Oz. Creamed Cottage Cheese (plain)	175
16 Oz. Creamed Cottage Cheese (plain)	205
8 Oz. Chive Creamed Cottage Cheese	135
12 Oz. Chive Creamed Cottage Cheese	185
16 Oz. Chive Creamed Cottage Cheese	215
8 Oz. Pineapple Creamed Cottage Cheese	145
12 Oz. Pineapple Creamed Cottage Cheese	195
16 Oz. Pineapple Creamed Cottage Cheese	225
Dry Curd Cheese (12 Oz.)	185
Yogurt (8 Oz.)	17

The bottle deposit plan which we announced on December 10 remains in effect. Your advertising allowance of ½ of 1% on purchases of fresh dairy products will also remain in effect as per our letters of June 30, 1949, June 11, 1951 and August 1, 1952.

Very truly yours, The Borden Company, Chicago Milk Division. S/H. R. Fagerson, Vice President.

HRF:SP

[fol. 868] EXHIBIT H

Dean's Discount Schedule
Effective Tuesday, June 1, 1954

The following discount schedule will be applied to all purchases of Dean's fresh milk products.

Average converted units per day	% Discounts
0- 24	0
25- 74	2
75-149	3
150 and over	4

Discounts will be computed as follows:

1. Your total monthly purchases of Dean's fresh Milk products will be converted to units. This total will be divided by the number of days during the month that our trucks are on the street making normal store deliveries. This figure becomes your average converted units per day.

2. From your average converted units per day your discount can be found from the above discount schedule.

3. Your discount for the month will then be applied to your total dollar sales of Dean's fresh milk products.

	units		units
Gallons	4	Buttermilk	1
½ Gals.	2	Half and Half	1
½ Gal. Vim	2	Whipping Cream	1
Qts.	1	Sour Cream	1
Skimmed Milk	1	Cottage Cheese	1
Chocolate Drink	1	Super Whip	1
		Yogourt	1

Discount checks will be mailed to you during the month following the month in which they were earned.

This Discount Schedule Applies To Dean Owned Chicago Area Routes Only.

Dean Milk Company, Franklin Park, Illinois. Phones TUxedo 9-1800—GLadstone 5-1680.

[fol. 869] EXHIBIT J

Dean's
Prices Effective Wednesday, June 2, 1954

To You	
$ 64	Dean's Homogenized Milk—Gal. (Plus Bottle Deposit)
34	Dean's Homogenized Milk—½-Gal.
17 ½	Dean's Homogenized Milk—Qts.
31	Dean's Vim—½-Gals.
15	Dean's Skimmed Milk—Qts.
19 ½	Dean's Chocolate Drink—Qts.
17 ½	Dean's Buttermilk—Qts.
25 ½	Dean's Half and Half—Pts.
31 ½	Dean's Whipping Cream—½ Pts.
22 ½	Dean's Sour Cream—8 oz.
	Dean's Creamed Cottage Cheese
17 ½	12-oz. Package
95	5-lb. Carton
43	Super-Whip—6 Oz. Can
17	Yogourt—8 oz. Carton

Above Products carry our graduated discount schedule effective June 1, 1954.

Dean Milk Co., 3600 N. River Road, Franklin Park, Illinois. TUxedo 9-1800—GLadstone 5-1680.

[fol. 870] **EXHIBIT K**

Dean Milk Company
3600 River Road
Franklin Park, Illinois

August 29, 1955.

DEAR DEAN CUSTOMER:

Effective today, we are discontinuing all store discounts and the 4¢ handling allowance on gallon jugs.

Yours very truly, Dean Milk Company, Sales Department.

[fol. 871] **EXHIBIT L**

Dean Milk Company
Price List
Effective: 8/29/55

Gals. Milk	.69	.15
½ Gals. Milk	.35	
Qts. Milk	.18	
½ Gals. Vim	.32-½	
Qts. Skim	.17	
Qts. Chocolate	.23	
Qts. Buttermilk	.18	
Pts. Half & Half	.27	
½ Pts. Ready Shake	.10	
½ Pts. Whipping Cream	.29	
8 oz. Sour Cream	.25	
8 oz. C. Cheese	.16	
1# C. Cheese	.24	
2# C. Cheese	.42	
6 oz. Super Whip	.42	
8 oz. Yogourt	.18-½	

These Prices Net
.04 handling charge on gallon jugs discontinued

[fol. 872] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

[Title omitted]

Transcript of proceedings—December 23, 1957

Transcript of proceedings had at the pre-trial conference in the above-entitled cause before Honorable William J. Campbell, one of the Judges of said Court, in his chambers, United States Courthouse, Chicago, Illinois, on Monday, December 23, 1957, at 2:00 o'clock, p.m.

PRESENT:

Mr. Earl Jinkinson, Mr. Bertram Long, and Mr. Elliott B. Wooley, on behalf of the Government;

Mr. Edward L. Hart, Jr. and Mr. John P. Stevens, on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

Mr. H. Blair White, and Mr. Joseph Greaves, on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 873] The Court: How are we getting along? Are we all set, fellows? What is the situation?

Mr. Jinkinson: We are all set except for three paragraphs of the proposed Bowman order.

The Court: Well, we will set time for the filing of briefs so that we get this out of the way.

What are the three paragraphs, the ones that we discussed in the last pre-trial where we were going to agree on putting in depositions I think pretty well?

Mr. Hart: We agreed on the three we were discussing. Those were the last ones.

Mr. Long: About meeting competition.

Mr. Hart: We redrafted those in a way that was agreeable.

These paragraphs that Mr. Jinkinson refers to now are paragraphs far prior to that that previously had been agreeable.

The Court: Oh! Now, who finds them disagreeable?

Mr. Jinkinson: The Government, your Honor, as usual.

The Court: What happened? Have we had another change of administration?

Let us see now, where is the original 28 that was agreed to, 28 here?

Mr. Long: 28.

The Court: Yes.

Mr. Hart: 28.

[fol. 874] Mr. Wooley: For your information, the word that we suggested to change was——

The Court: All right. I do not need to read that one.

Mr. Jinkinson: You don't. The first word, we just inserted the world "principal."

The Court: You object very much to that?

Mr. Hart: Well, I do, only as the sense of the thing comes out later on, of course, as you get onto the——

The Court: I think that is proper. It is an adjective and not a noun. I don't think your proposed additions are any more than argument; and even assuming now, taking the defendant's situation, even assuming that I permit them to be made, I don't think it weakens the effect of the stipulation by adding argument, because when I am considering the stipulated facts, I am going to consider them as fact and regard the argument more or less as part of the brief.

Mr. Wooley: You mean Paragraph 28 is argument?

The Court: No. I mean the additional material is argument. I think what you are doing is putting part of your argument in here in the stipulation. I address myself now to the Government.

[fol. 875] I think the entire addition here towards the bottom as to whether you accept the validity of the assumed mathematical relationship between driver time and volume for certain items of driver's service becomes pretty largely a matter of argument when you stipulate as to the basic facts.

Now, whether you add this in here as part of the stipulation or whether you argue it as certainly you will have to fully in your brief, is immaterial. It isn't anything that I can rule in favor of the Government on the basis of the added material. It is something that I am going to have to consider and what you are adding here is essentially argument.

Mr. Jinkinson: Here is what we don't want to do, your Honor: We don't want to be under this order. We don't want to say the meaning of the word principal would read that plaintiff makes three objections. We don't make three. We make more than three.

The Court: I am jumping right down to here because I think the addition of principal or the addition of wages, or the substitution of the word compensation for wages——

Mr. Jinkinson: Wages were substituted for compensation.

The Court: Yes. All they have done here is underlined [fol. 876] the added material.

Mr. Jinkinson: Yes.

The Court: So I have this before me now.

Mr. Jinkinson: What we would like, of course, is we wanted to reserve, the Government wants to reserve the right to raise the legal question as to whether or not Bowman's cost studies are within the scope of the meaning of the section of the Clayton Act.

The Court: I don't see how you waive it by stipula'ing the cost studies.

Mr. Jinkinson: Just so we don't.

The Court: Do you think they do, by stipulating the cost studies? I mean, that is like saying that because you permit a witness to testify that you admit the weight of his testimony. The weight of his testimony is still subject to argument before the jury or before the Court. All you are saying here is that along with his testimony you want to put into the record the fact that you want to argue the weight of it. That is in effect what you are saying here. I don't see that it makes any difference whether you add this or not. I would expect you to argue the weight of it anyway.

Mr. Jinkinson: That is what we want to do.

Mr. Hart: It would make a difference to me, if the Court please.

[fol. 877] The Court: How does it make a difference to you?

Mr. Hart: Well, here is the situation: If this objection is raised to the cost study as such, then I feel that I ought to come forward with additional evidence to show the underlying basis for Mr. Bergfeld's treating, for instance, to give one example of it, commissions as a part of the drivers' compensation.

The Court: The drivers' compensation?

Mr. Hart: Yes. There is an awful lot of actual factual background. If they don't stipulate that it goes as a——

The Court: I would like to keep it out to hold down the cost here, as well as everything else, as well as my time. I think as a matter of fact that this does not go to the validity of the stipulated testimony at all.

Mr. Hart: No, I agree with you.

The Court: I think it is purely argumentative.

Mr. Wooley: Now, over here, if the Court please,——

The Court: You stipulate that this is the survey, too?

Mr. Long: That is right.

The Court: You stipulate that this is what he would [fol. 878] testify if he were put on the stand.

Mr. Long: Over here on this next page plaintiff does not concede that the defendant Bowman's cost studies are within the meaning of Section 2-A of the Clayton Act.

The Court: That is also argumentative. If I were sitting in the trial of this case I would permit the cost studies in evidence and tell you to argue the validity of it in your brief.

Mr. Long: That is fine.

The Court: Whether or not I was with you or whether they are within that provision.

Mr. Long: That is fine.

The Court: Certainly I would not keep that on the trial of this case in open Court, I would not keep them from introducing these cost studies. As a matter of fact, as to the admissibility of the cost studies, I would overrule your objection if we were actually in the trial of the case and then I would say "Argue the weight of it."

All of the facts now being in the record argue the weight and the conclusions to be drawn from those facts in your brief.

Mr. Jinkinson: We have the right to incorporate in our rebuttal more fully all of the factual accounting in legal [fol. 879] objections to Bowman's cost.

The Court: The only restriction that I would put on you on that is this: That I am trying in the interest of both of you to hold the record as low as I can. Now, if your rebuttal is going to go too far into detail then I have got to

permit them to put more detail into the original stipulation.

Anticipating what is in your mind, I don't think it is a tactical advantage either way, and I think that is what is concerning you.

Now, I cannot be any fairer or more honest with you, with both sides, than to say that I don't think it constitutes a tactical advantage to either one of you to go more greatly into detail. If, when I read your argument on these cost studies, I find that I would like greater detail I would send for both of you and say, "Well, bring in the thing and I want to ask him a few questions and when I am through then both of you can ask him something." Other than that, I don't see that it is helping or hurting either of you, either to add this or to leave it out. And since we had agreed on it, heretofore, and since by putting this in they may want to add more detail——

Mr. Hart: That is right.

The Court: —if they add more detail then you are going [fol. 880] to have to go more fully into rebuttal. I think both of you are borrowing trouble.

Mr. Hart: In other words, I feel this way, if the Court please: I am afraid to rest with the amendments they have in there. I feel that I have to go on.

The Court: Even with my assurance that it does not give them a tactical advantage?

Mr. Hart: Because I have not really put in all the facts that I might.

The Court: I understand.

Mr. Hart: That is just my suggestion.

The Court: Then, of course, if you put the rest of it in then you open it up pretty largely to rebuttal.

What did you want to tell me?

Mr. Wooley: I want to make clear that in our thinking in the formulation of Paragraph 28 we were assuming to start with that there were certain detailed criticisms we were going to make of their cost study which even though you should rule in our favor on these particular major points, we could show there are differences resulting from their study which would be reduced by virtue of the correction of the technicalities in the system I find in error.

The Court: Yes, but of course, that you intended to do in your brief.

[fol. 881] Mr. Wooley: We will do that in rebuttal.

The Court: As a matter of argument.

Mr. Wooley: I want to make sure we were not precluded from doing that.

The Court: Not only are you not precluded but I would expect you. I would regard that pretty largely as a matter of argument.

Mr. Long: Yes, sir.

The Court: Rather than stipulation in rebuttal.

Mr. Jinkinson: With that understanding we ought to enter this order.

The Court: I don't see how the Government is prejudicing its position at all.

Mr. Jinkinson: All right.

The Court: I certainly expect you to argue fully what you would be putting in the smallest capsule form. If I permitted this addition to the stipulation I would expect you to argue fully in your brief. Is that clear?

Mr. Long: That is clear.

The Court: Are there any questions about it?

Mr. Hart: All that order has added to it, Earl, is this list of exhibits which I have given to Bert.

The Court: Was there one more change in 31?

Mr. Long: 31 is within that same category.

The Court: In the same general—

[fol. 882] Mr. Long: Yes, Paragraph 29, your Honor.

The Court: 29 was down lower here.

Mr. Long: Yes. That we talked about——

Mr. Wooley: That is merely affecting the status of the record as it now exists with respect to 29.

Mr. Hart: That we have no objection, isn't that right, John?

Mr. Stevens: That is right. My suggestion was that you change it right on the Court's copy. That was the only change.

Mr. Wooley: There is another correction.

Mr. Long: That doesn't make any difference. We were going, as I recall the record, your Honor, we objected to those last two sentences and you said, "I will overrule your objection but your objection will be noted."

The Court: That is right.

Mr. Long: I think Mr. Jinkinson is going to renew that objection here when this is ended formally.

The Court: Yes, that doesn't require any change in the order.

Mr. Long: No.

SUPPLEMENTAL PRE-TRIAL ORDERS AS TO BOWMAN TO BE ENTERED

The Court: All right. Then with the undertanding that I have just stated to counsel, the supplemental pre-trial [fol. 883] order will enter.

Mr. Jinkinson: We would like, of course, to enter the following objections in seriatim order to the paragraphs, Bowman supplemental pre-trial order at the time said order is entered, and I have a list of them here for Mr. Ruhe.

The Court: Yes.

Mr. Jinkinson: I will hand them to him so that he can incorporate them.

The Court: Yes. Those were the ones we discussed heretofore?

Mr. Long: Yes.

The Court: Let the record show that they may be submitted at this time and having been previously discussed and argued are for the reasons at that time indicated here now overruled.

Mr. Jinkinson: I will just hand Mr. Ruhe the list and let him enter it in the record.

The Court: Just hand him those for the record.

(The objections referred to is in words and figures as follows:)

[fol. 884]

"Paragraph Numbers	Grounds of Objection
1 to 18	Immaterial
27	Immaterial as to 1st-3rd Cost Study Assignment, pp. 13-15
29	Object to the last two sentences as being argument and not facts.

36 through 56	Immaterial
58 through 60	Irrelevant
62 through 74	Immaterial
77	"
78 and 79	Irrelevant"

Mr. Hart: We will hand him all the exhibits.

The Court: Yes.

Mr. Jinkinson: That the Bowman order has been entered, we will now give Borden his proposed—we have typed the proposed rebuttal of Borden and Bowman and will get to you. We will try to get it to you by the last of January.

The Court: All right. You will deliver Bordens now and Bowmans at the end of January.

Mr. Jinkinson: Yes, by the end of January.

The Court: Now, we better give them a short time to digest it and then come in for a further conference at [fol. 885] which time we will set brief filing dates.

Mr. White: Your Honor, could I ask one question here?

The Court: Yes, certainly.

Mr. White: Won't the same cost experts the Government expects to use also be used with respect to the Bowman order?

The Court: I think so.

Mr. White: Then wouldn't it be appropriate——

The Court: Is that right?

Mr. Jinkinson: Yes.

Mr. White: Wouldn't it be appropriate if we find it necessary to take depositions to wait until Bowman has theirs and do it all at one time?

The Court: And save the Government's time and expense, I think so.

Mr. Jinkinson: We can take them all at one time.

Mr. White: I suggest that we establish a date sometime after Bowman receives their material.

The Court: Probably the early part of February. Does that sound right?

Mr. Jinkinson: Yes.

The Court: Sometime, let us say then between the 10th and 20th of February these further depositions are to be taken and then shall we allow a reasonable time for the [fol. 886] writing of the depositions and the redrafting of

the rebuttal evidence and set a further pre-trial for around March 10th? Does that sound satisfactory?

Mr. Jinkinson: That is satisfactory.

The Court: What day of the week does that happen to fall on?

Mr. Jinkinson: I have a calendar.

The Court: March 15th is on a Friday, or on a Saturday.

Mr. Wooley: The 14th would be all right.

The Court. The 14th at two o'clock, how would that suit you gentlemen?

Mr. Jinkinson: Fine.

The Court: For further pre-trial, at which time we ought to set the filing of briefs, which ought to hit it just about right.

Mr. Jinkinson: You mean so we have something for the summer.

The Court: Yes, because next summer is my Sabbatical.

Mr. Jinkinson: It is?

The Court: Every five or seven years around here I get the summer off. So I will devote it to the milk industry.

That ought to hit it just about right. Then we will allow a reasonable time for briefs which should get it to me about [fol. 887] the middle or end of June.

Mr. Jinkinson: That is right.

The Court: That would be just a good time and then I will be ready for you in the fall. One or the other of you will then be heading to the Supreme Court again. This doesn't go to the Court of Appeals. It could if the Government asked for it to go to the Court of Appeals?

Mr. Jinkinson: We have such complete confidence in this case that we have not looked that far ahead.

Mr. Hart: We will go wherever they want us to.

The Court: Well thank you very much. I think this is moving along very well and you will certainly save us a lot of time.

(Which were all of the proceedings had at the pre-trial conference.

[fol. 888] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 889] In United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America, Plaintiff,

vs.

The Borden Company, et al., Defendants

Supplemental Pre-Trial Order as to Bowman Dairy—December 23, 1957

The Court having met with counsel for the parties from time to time subsequent to the entry of the supplemental pre-trial order of November 8, 1955, the defendant Bowman Dairy Company having submitted its defensive material to the plaintiff, the plaintiff having had an opportunity to take depositions and otherwise to analyze and review said defensive material, and the plaintiff and the defendant Bowman Dairy Company having come to certain further agreements,

It is Ordered:

1. This order is a supplement to the pre-trial order entered in this cause on November 8, 1955;

2. The provisions of paragraphs 2, 3, and 4 of the supplemental pre-trial order entered on November 8, 1955 are applicable to this supplemental pre-trial order.

[fol. 890] Agreements of Fact Between Plaintiff and the Bowman Dairy Company

1. The *Local Community Fact Book for Chicago, 1950*, was compiled and published through the facilities of the Community Inventory of the University of Chicago. Active participation in the planning of the fact book was the work of a research committee selected from representatives of the following agencies and including the following persons:

Frank Bauer	Chicago Department of Health
Mrs. Linn Brandenburg	Community Fund of Chicago
John Gandy	Welfare Council of Metropolitan Chicago
Mrs. Louise Gilfillan	Chicago Department of Welfare
Philip M. Hauser (Chairman)	Chicago Community Inventory
Mrs. Evelyn M. Kitagawa	Chicago Community Inventory
Ray G. Nelmer	Chicago Tribune
Robert L. Seidner	Chicago American
Miss Ethel Shanas	Office of the Housing and Redevelopment Coordinator
DeVer Sholes	Chicago Association of Commerce and Industry
Miss Doris Strail	Tuberculosis Institute of Chicago and Cook County
Miss Barbara Wallace	Welfare Council of Metropolitan Chicago

2. Most of the data contained in the Fact Book have been compiled from published United States census materials or [fol. 891] from summary punch cards and photostatic copies of detailed census tract tabulations purchased from the U.S. Bureau of the Census. Data from sources other than the Bureau of the Census are included, however, as a result of cooperation of local agencies, including the Chicago Department of Health, the Cook County Department of Welfare, the Chicago Department of Welfare and the Tuberculosis Institute of Chicago and Cook County.

3. The first eight paragraphs of the introduction to the *Local Community Fact Book for Chicago, 1950*, read as follows:

> "In his introduction to the first *Local Community Fact Book*, published in 1938, the late Professor Louis Wirth observed that: 'The modern metropolis is a city of local communities, each one differentiated from the others by its characteristic function in the total economy and cultural complex of city life.'

"Certainly this observation is verified in the experience of all the inhabitants of a great city. For in addition to identification with the city as a whole, each person is also identified with various sub areas within the metropolis—the specific community in which he lives, the area in which he works, the various areas in which he shops, seeks recreation, visits friends, and pursues the manifold activities that fill the life space of the urbanite.

"To action agencies within the city—business, industry, labor, government, welfare, health, education, and the like—no less than to the individual, the city is also a congeries of economic, political and social worlds. Problems of day-to-day functioning—whether they be seeking markets, employing labor, distributing newspapers, administering the schools, providing public housing, conducting welfare programs, conserving deteriorating areas, or selecting industrial sites—necessarily involve consideration of specific communities within the city.

"For more than a generation various agencies within Chicago ha e viewed the city as comprising 75 Local Community Areas. These areas were delineated [fol. 892] through the work of the Social Science Research Committee of the University of Chicago, building upon the years of research activity of its predecessor, the Local Community Research Committee, with the cooperation and concerted effort of many local agencies and the United States Bureau of the Census. The boundaries of the 75 Community Areas within the city were based on several considerations, chief among which were: (1) the settlement, growth and history of the area; (2) local identification with the area; (3) the local trade area; (4) distribution of membership of local institutions; and (5) natural and artificial barriers such as the Chicago River and its branches, railroad lines, local transportation systems, and parks and boulevards. The actual boundaries drawn for each Community Area were necessarily a compromise of these several factors, and involved also consideration of the tabulation requirements of the U.S. Bureau of the Census which tended to restrict the total num-

ber of such areas. Moreover, in designing the Community Areas it was also necessary that they comprise complete census tracts, so that census statistics could be compiled to study the characteristics and changes in the characteristics of the local communities.

"In consequence, the Community Area may be regarded as a statistical unit for the analysis of internal changes within the City of Chicago, made up of census tracts but having, in the main, a history of its own as a community, a name, and an awareness on the part of its inhabitants of some common interests. The Community Areas are in one sense, therefore, arbitrary statistical units for effecting comparability in a study of population, land use and other changes within Chicago; but most of them are also historical entities and contain persons aware of common community interests.

"*Previous Statistics for Community Areas.* Statistics for the 75 Community Areas were first published in the volume *Census Data of the City of Chicago, 1930*, edited by Ernest W. Burgess and Charles Newcomb (The University of Chicago Press, 1933). Professor Burgess, it should be noted, was chiefly responsible for the research activities which produced the census tract grid of the City of Chicago for the 1920 Census, and the planning of the special tabulation of census tract statistics based on the 1920 Census and published in *Census Data of the City of Chicago, 1929*, edited by Ernest W. Burgess and Charles Newcomb.

[fol. 893] "Additional statistics for the 75 Community Areas, subsequent to those which appeared in *Census Data of the City of Chicago, 1930*, appeared in the *District Fact Book*, published in 1935 by the Chicago Board of Education, the Chicago Recreation Commission and the Illinois Emergency Relief Commission. The *District Fact Book* was compiled as a manual for civic and social agencies interested in facts about subareas within the City of Chicago and contained 1934 and 1930 census data. The first *Local Community Fact Book*, 1938, edited by Louis Wirth and Margaret Furez, was in fact a revised edition of the District Fact Book containing in addition to revisions in form, more detailed statistical data and expanded histories of the

Community Areas. The second *Local Community Fact Book of Chicago*, edited by Louis Wirth and Eleanor H. Bernert, was published in 1949, under the auspices of the Chicago Community Inventory, and contained largely comparative statistical data for each Community Area based on the 1940 and 1930 Censuses, together with other selected statistics.

"Between the publication of the first and second *Local Community Fact Books*, the Chicago Plan Commission and Works Projects Administration published separate pamphlets, *Housing in Chicago Communities*, for each of the 75 Community Areas containing some of the data collected in the Land Use Survey of 1939 and also selected census data from the 1934 and preceding census. To complete the references to comprehensive source data published for all local areas within the City, mention should be made of the volume *Census Data of the City of Chicago, 1934*, edited by Charles Newcomb and Richard O. Lang and based on the special 1934 Census of Chicago which was compiled as a project of the Civil Works Administration. This volume presented statistics for the 935 census tracts but did not summarize the Areas."

4. The Local Community Area known as Englewood is bounded on the north by Garfield Boulevard, on the west by Racine Avenue, on the south by the Belt Line Railroad and 76th Street, and on the east by the Chicago Rock Island and Pacific Railroad. The boundaries of Englewood are more clearly delineated on the map attached hereto as Bowman Exhibit 1.

5. The *Local Community Fact Book for Chicago, 1950*, states that there were 309 retail food stores in Englewood in 1948, and that the population of Englewood in 1950 was 94,134.

[fol. 894] 6. The Bowman store customer identified as "Charlie's Market stop" on page 43 of Plaintiff's Exhibit 5 and sometimes referred to as "Goldenstern's", is located in Englewood.

7. The Local Community Area known as Greater Grand Crossing is an irregularly shaped area bounded generally on the west by the Chicago, Rock Island, Pacific Railroad tracks, generally on the northeast by the New York Central

Railroad tracks (except that it also includes the Oakwood Cemetery and certain adjacent territory to the north of said railroad tracks and east of Cottage Grove Avenue), on the east by the Illinois Central Railroad tracks, and on the south by 79th Street. The boundaries of Greater Grand Crossing are more clearly delineated on the map attached hereto as Bowman Exhibit 1.

8. The *Local Community Fact Book for Chicago, 1950*, states that there were 200 retail food stores in Greater Grand Crossing in 1948, and that the population of Greater Grand Crossing in 1950 was 61,753.

9. The Bowman store customers identified as "A & P stop" and "Kroger stop" on page 43 of Plaintiff's Exhibit 5, are located in Greater Grand Crossing.

10. The Local Community Area known as Brighton Park is bounded on the west by the Atchison, Topeka and Santa Fe Railroad, on the north by the Illinois-Michigan Canal, on the east by the Pittsburgh, Chicago, Cleveland and St. Louis Railroad and by Western Avenue, and on the south by the Chicago River and the Indiana Railroad. The [fol. 895] boundaries of Brighton Park are more clearly delineated on the map attached hereto as Bowman Exhibit 2.

11. The *Local Community Fact Book for Chicago, 1950*, states that there were 226 retail food stores in Brighton Park in 1948, and that the population of Brighton Park in 1950 was 41,345.

12. The Bowman store customer identified as "Psomakos's stop" on pages 36-37 of Plaintiff's Exhibit 5, is located in Brighton Park.

13. The Local Community Area known as Gage Park is bounded on the west by the Grand Trunk Western Railroad and the Atchison, Topeka and Santa Fe Railroad, on the north by the Chicago River and Indiana Railroad, on the east by the Pittsburgh, Chicago, Cleveland and St. Louis Railroad, and on the south by 59th Street. The boundaries of Gage Park are more clearly delineated on the map attached hereto as Bowman Exhibit 2.

14. The *Local Community Fact Book for Chicago, 1950*, states that there were 121 retail food stores in Gage Park in 1948, and that the population of Gage Park in 1950 was 30,149.

15. The Bowman store customer identified as "A & P stop" on pages 36-37 of Plaintiff's Exhibit 5, is located in Gage Park.

16. The A & P store at 2601 West 51st Street is located on the south side of 51st Street approximately four blocks east of California Avenue and four blocks west of Western Avenue; none of the streets between California and Western Avennes crosses the railroad yards and manufac- [fol. 896] turing district which lie north of 50th Street and south of 48th Street; there is no parking lot adjacent to, or in the immediate vicinity of, the A & P store at 2601 West 51st Street.

17. Prior to October 8, 1949, the Kroger Company operated a store at 2602 West 47th Street; the Bowman Dairy Company delivered approximately four cases of dairy products per day to said store; prior to October 8, 1949, the Bowman Dairy Company delivered approximately five cases of dairy products per day to the Psomakos store at 2414 West 7th Street; the Kroger Company closed its store at 2602 West 47th Street on October 8, 1949, and did not thereafter reopen said store.

18. The Manual Entitled "Establishing and Operating a Grocery Store—Industrial (Small Business) Series No. 21" published by the United States Department of Commerce, Bureau of Foreign and Domestic Commerce, in 1946, stated, at page 28:

> "From practical experience many neighborhood grocers in congested city areas have determined that most of the business comes from within a quarter of a mile of the store and a fair amount from the second quarter-mile area. The average small store can expect little business beyond the half-mile limit, unless, of course, the location is rural."

A copy of this manual is available in the library of the offices of the U.S. Department of Commerce, in Room 1302, at 226 West Jackson Boulevard, Chicago, Illinois.

19. Elrick & Lavidge, Inc., is a firm of marketing consultants with its office at 176 West Adams Street, Chicago, Illinois. Elrick & Lavidge, Inc. is the successor of Elrick, Lavidge & Company.

[fol. 897] 20. Elrick & Lavidge, Inc. is engaged in the business of doing market planning and research for business organizations. As a part of its regular duties, it explores new market opportunities for new and existing products, appraises sales methods and procedures, and evaluates advertising and promotion activities. In connection with its work in appraising sales methods, Elrick & Lavidge, Inc. frequently measures and analyzes competitive situations. It conducts studies of retail competition in the regular course of its business.

21. Elrick & Lavidge, Inc. has a regular staff of men who have had long experience and professional training in marketing planning and research. Robert F. Elrick, the president of Elrick & Lavidge, Inc., has been continuously engaged in this work since 1934.

22. The clients served by Elrick & Lavidge, Inc. include manufacturers, distributors, retailers, trade associations, publications and professional organizations. These clients are located in all parts of the United States, in Canada and also in Europe. Prior to October 15, 1955, Elrick & Lavidge, Inc. had never done any work for the Bowman Dairy Company or its attorneys.

23. If called as a witness for the purpose of direct examination on behalf of defendant Bowman Dairy Company, Robert F. Elrick would testify that Elrick & Lavidge, Inc. was employed by the attorneys for the defendant Bowman Dairy Company to conduct a survey to measure the extent [fol. 898] of possible customer competition, if any, between the Bowman store customers identified on pages 36, 37 and 42 of Gorand's 1951 Edition Street Map of Chicago and Suburbs (Plaintiff's Exhibit 5); that thereafter such a survey was conducted under the personal supervision and direction of Robert F. Elrick; and that the results of that survey are summarized in the report which is identified as Bowman Exhibit 3, together with the maps which are identified as Bowman Exhibits 3A, 3B, 3AA, and 3BB.

24. Plaintiff stipulates that Robert F. Elrick is qualified, by reason of his professional training and experience, to conduct such a survey and to testify as an expert with respect to it; that the survey described in Bowman Exhibit 3 was in fact conducted; and that, for the most part, the persons interviewed in connection with said survey do in

fact reside at the addresses given to the interviewers. Plaintiff does not accept the results of said survey as a correct measurement of the extent of competition between the customers identified therein.

25. If called as witnesses, each of the interviewers used by Elrick & Lavidge, Inc. in conducting said survey, would testify that he has had prior experience conducting such interviews; that in connection with this survey, he was instructed to use the same methods of obtaining interviews that he had customarily used in the past; that he did not know that the survey was to be used in connection with pending litigation; that he did not know the identity or even the type of company for which the survey was being [fol. 899] conducted; and that in working on this survey he in good faith endeavored to obtain as many interviews as possible from persons over 18 years of age making purchases at the designated locations.

26. The maps which have been marked as Bowman Exhibits 3AAA and 3BBB respectively, were prepared under the direction of Robert F. Elrick for the purpose of providing the Court and counsel with a convenient summary description of the more complete presentation depicted by the maps identified respectively as Bowman Exhibits 3AA and 3BB. These exhibits (unlike Exhibits 3A and 3B) do not show residences of all customers interviewed, but show residences of only those living within a quarter-mile radius of each store.

27. If called as a witness for the purposes of direct examination on behalf of defendant Bowman Dairy Company, A. J. Bergfeld would testify as follows:

> I was graduated from Antioch College in 1934 and immediately made a connection with my present firm of Stevenson, Jordan & Harrison, whose principal offices are in New York City, as a junior staff man. With the exception of approximately two years, during which I served in the Navy, I have been connected with that firm ever since. I am a senior partner at this time and have been for the last six years.
>
> This firm has engaged in the analysis of cost and management problems of the dairy industry since 1938. These activities have included consultation service with [fol. 900] individual dairy managements, associations

of dealers, university research groups, state milk market administrators and state agricultural commissions, as well as associations representing the manufacturers of products used by the dairy industry.

In our experience in connection with such analyses of cost and management problems of the dairy industry over those 17 years, we have had occasion to study 107 dairies in 19 cities. We have made time study analyses of 280 retail routes making 43,749 home delivery calls and 187 store routes making 7,694 deliveries to separate stores. In addition, we have applied standard time data and made time studies on cost determinations on 1,960 routes serving 502,650 home delivery customers, 439 routes serving 17,109 store customers and 27 routes serving 1,069 so called wholesale customers. These studies have covered at least segments of the whole of the dairy industry serving the following cities: New Haven, Connecticut, Waterbury, Connecticut, Bridgeport, Connecticut, New York City, Buffalo, New York, Birmingham, New York, Amsterdam, New York, Philadelphia, Pennsylvania, Newark, New Jersey, Wilmington, Delaware, Baltimore, Maryland, Fort Wayne, Indiana, Cleveland, Ohio, Akron, Ohio, Detroit, Michigan, Chicago, Illinois, River Forest, Illinois, St. Louis, Missouri, and Washington, D. C.

[fol. 901] Our work has included the following types of services: product cost determination, establishing standard cost procedures for processing and bottling plants, analysis of processing and bottling methods, time study analyses of route distribution functions on store and home routes, determination of distribution costs on routes by functions and by products, analyses of price-cost relationships, establishment of volume discount plans based upon delivery costs to retail store and wholesale customers, establishment of control procedures for route administration, synthesis of model dairy plants and distribution systems, including equipment and operating costs, and study of alternative costs and distribution methods.

Our first assignment with Bowman Dairy Company was in connection with an analysis of their costing pro-

cedures undertaken first in the latter months of 1947 and terminating in a report submitted in January, 1948. This analysis included the determination of actual product costs for products distributed through the Englewood Division of that Company according to the techniques and cost procedures which we have found to be most logical and most directly applicable to the dairy industry. These costs, determined by our techniques, were then compared with the costs determined by Bowman Dairy Company and the differences were pointed out and discussed. This study began with the receipt of milk at the Englewood Divi [fol. 902] sion distributing point and included all costs created at the division and on the routes. Unit product costs of distribution were determined by time studies under our supervision of actual routes in operation, an analysis of expenses incurred in the operation of routes and the serving of customers and the distributing of products. No analysis of plant processing and bottling costs was included.

The second assignment for Bowman Dairy Company was undertaken early in 1948 and a report was submitted in April of 1948. The purpose of this study was to determine whether costing methods established by that company in the past yielded accurate product costs and adequate cost controls by the company's current operating methods. The analysis was based upon detailed studies of operating methods and procedures in the plant by stop watch and the expenses incurred for the operations within the plant. Complete unit product costs were determined for all products processed and handled in the River Forest Plant of Bowman Dairy Company with all items of cost determined by our techniques except for the determination of raw milk costs and the costs of conveying the raw milk to the city plant.

The third assignment given Stevenson, Jordan & Harrison by Bowman Dairy Company was to install a standard cost procedure in a subsidiary plant of Bowman Dairy Company. This involved a complete analysis of all operations in the plant, the development [fol. 903] of standard time data upon which labor costs

were based, and an analysis of expenses to determine the amount of each item of expense which should be born by each product. Following this determination of costs for product cost, controls were set up on the basis of the studies made in the plant. Following the completion of this standard cost installation, time studies were undertaken in three other plants in the company leading to the determination of standard labor costs for each operation in these plants and a total unit product cost and cost controls.

The next assignment undertaken by our firm for Bowman Dairy Company was to assist in developing volume service discount plans to home delivery customers and to store customers. We also prepared the cost data needed in formulating these plans. This first required time standards for delivery operations. Time study observations were accumulated by supervisory personnel at distributing divisions under our supervision and the time standards were developed from data by our staff members. These standards were the basis for computing accurate delivery costs and eventually became the basis for developing discount schedules. We have further studied route performances and measured them with time standards to analyze and improve loss routes. In conjunction with this, there has been development of new control techniques which will supplement present route administration procedures.

[fol. 994] All of the assignments given our firm by Bowman Dairy Company have been carried out under direct supervision and control by myself. With some few exceptions, men from our firm have been assigned to various types of studies carried on on behalf of Bowman Dairy Company since the year 1948. Immediately after a decree was signed by Judge Igoe of the District Court for the Northern District of Illinois in December of 1952, we began developing cost data for the Bowman Dairy Company for the purpose of the classification by that Company of its store customers under certain permissive portions of that decree. In developing cost data to be used in the establishment of discount and rebate schedules we eliminated from our

considerations the costs of placing a package of milk on the delivery platform of the company, and confined our studies to the costs of delivery from the platform to the customer. In connection with the assignment, we have developed a manual for the determination of cost to particular customers based upon our previous studies, time analyses and experience. [A copy of which manual is marked Bowman Exhibit 4 and is hereto attached and by reference made a part hereof.] As will appear in that manual, we determined certain curves which show the cost of serving customers buying certain specified quantities of dairy products converted to quart standards. Based upon these cost curves, the limits of margin available for the purpose of paying discounts have been determined for use by the manage-
[fol. 905] ment of the company. [Discount schedules published since January 1953, hereto attached and marked "Discount Schedules 1 to 9", inclusive, have from time to time been turned over to us for study. These discount schedules are marked Bowman Exhibits 5 through 13, inclusive.]

From time to time thereafter, we have been asked to apply the current discount schedule then in force to certain specified segments of the Bowman Dairy Company delivery system to determine whether or not the discount schedules so published, when compared to the discount being allowed to the so-called corporate chains, represented an equitable system which reflected actual cost savings. [Examples of such studies are hereto attached, marked respectively Bowman Exhibits 14, 15 and 16. Bowman Exhibit 14 bears the title "Tests of Two Specific Routes Investigated by the Government", and includes four specific tests each for the month of March, 1955. Bowman Exhibit 14 is sometimes referred to as the "March, 1955 Tests". Bowman Exhibit 15 bears the title "Test of Bracket Discount Plan Effective September 26, 1955". Bowman Exhibit 16 bears the title "Test of Store Discount Plan Effective January 2, 1956".] These reports have been designed to determine the equity of the discount schedule when compared to the discounts or prices granted to the various corporate chains and also to determine the equity of the classification of the sales to independ-

[fol. 906] ent stores based upon their volume of purchase.

The last page of the Manual for Establishing and Testing a Store Discount Schedule, Bowman Exhibit 4, is entitled "References". The forms therein referred to by number are Bowman Dairy Company forms used in the ordinary course of business in connection with the functions of the accounting department either at Divisions or in the Head Office. They had, in connection with the data used in the establishment of the Manual, been used in the ordinary course of business for the month of November 1954, and the data supplied on the said forms had been entered on the forms in the course of such business. The Company made available to us their general accounting records in their entirety audited yearly by Arthur Andersen & Company, Certified Public Accountants. We had occasion from time to time to refer to these general accounting records for the purpose of checking items included in sales delivery and collection expenses. We found proper verification of the summary of data from the forms used by us.

The last page of Bowman Exhibit 14 (the Discount Schedule Tests for March 1955) is also entitled "References". The forms therein referred to by number are Bowman Dairy forms and used in the ordinary course of business, as were those in connection with the preparation of the Manual. There were available to us in connection with the performance of these tests [fol. 907] all of the accounting records of the Company used in the ordinary course of business, and we had occasion from time to time to check the summary of sales delivery and collection expenses against the general accounting records of the Company and found that the entries showed accounting agreement.

The additional tests, particularly that of the store discount plan effective January 2, 1956 (Bowman Exhibit 16), contain a similar reference page and the same situation remained true throughout this period of time in connection with the test of the discount schedule then in effect and our method of procedure did not vary from that described in the test for the discount

schedules for March 1955 (Bowman Exhibit 14). We have at all times had available to us all of the accounting records of the Company, together with the audits made by Arthur Andersen & Company for each year that they had been completed. Our check of the records which we used against the general accounting records of the Company and the audits satisfied us that the records which we were specifically using for the establishment of the Manual and the making of the tests were accurate and used in the ordinary course of business by the Company for the sake of determining the operations and profit and loss of the Company.

28. Plaintiff makes three objections to the method of testing discounts described in the basic manual (Bowman [fol. 908] Exhibit 4) and employed in the March 1955 tests (Bowman Exhibit 14). These three objections are: (1) Plaintiff does not agree that an adequate sample of routes was used for the purpose of making the time studies used to develop the standard time allowances for the work elements described in Appendix A to the basic manual (Bowman Exhibit 4). The basis of plaintiff's objection is that the 55 time studies which were used in obtaining time data were all taken on routes operating out of the Elston Division. (2) The method of testing discounts described in the basic manual (Bowman Exhibit 4) and employed in Bowman Exhibit 14, assumes that the total cost per route per day, calculated as shown on Schedule 6 of the basic manual (Bowman Exhibit 4) and Schedule 1 of Bowman Exhibit 14, reasonably may be apportioned among different Bowman store customers on the basis of the standard time required by Bowman drivers to perform the services received by those different customers. Plaintiff takes the position that the total cost per route day may not be apportioned among customers on the basis of route drivers' time. Plaintiff would accept an apportionment of drivers' compensation among different customers on the basis of drivers' time, but plaintiff contends that it is not acceptable to apportion the total cost per route day among different customers on the basis of drivers' time because the total cost per route day includes items of cost in addition to drivers' compensation (see Schedule 6 of Bow-

man Exhibit 4 and Schedule 1 of Bowman Exhibit 14). (3) Plaintiff takes the position that the cost studies should [fol. 909] have included an analysis of the Central Office overhead, including such items as executives' salaries and other costs incurred in the Central Office of the Bowman Dairy Company, and that such additional elements of cost should have been apportioned among the different customers of Bowman Dairy Company.

29. The second of the three objections made in paragraph 28 is plaintiff's principal objection to the cost defense offered by the defendant Bowman Dairy Company. Defendant concedes that if the Court accepts plaintiff's second objection to the cost studies, the Court could find that the price differences identified on Schedule 1 of the pre-trial order have not been shown by the evidence proffered by the defendant Bowman Dairy Company in this case to be fully and completely cost justified by cost differences. Defendant Bowman Dairy Company further concedes that if the Court should accept the plaintiff's position on either the first or the third of the above objections, and if it should further find that these objections constitute material defects in the Bowman cost defense which tended to establish a greater cost differential than would have been established if these claimed defects had been corrected, the Court might find that the price differences identified on Schedule 1 of the pre-trial order have not been shown by evidence proffered by Bowman Dairy Company in this case to have been fully and completely justified by cost differences. Both parties agree that cost accounting is not and can never become an exact science because of the [fol. 910] inherent element of judgment. For this reason, it is stipulated that the cost accounting and cost analysis submitted on behalf of the defendants should be accepted as reasonable approaches to accuracy and not as precise measurements.

30. Bowman Dairy Company represents that in order to base prices and sales policies on anticipated costs, assumptions are required as to basic operating and delivery conditions. The discounts shown on Schedule 1 of the pre-trial order and the exhibits thereto attached are discounts [illegible] determined on the basis of anticipated costs. The accounting principles relied on in the basic manual (Bowman Exhibit 4) and thereafter employed in the various tests

(Bowman Exhibits 14, 15 and 16) were actually used by the Bowman Dairy Company during the period since February 19, 1953 as the basis for establishing discounts.

31. Except for the foregoing three objections, and one further objection to the test of the store discount plan effective January 2, 1956 (Bowman Exhibit 16) based on its analysis of sales of glass and fiber containers, which objection will be set forth in the plaintiff's rebuttal material, plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case. If the Court finds and concludes: (1) That the 55 time studies of Elston Division Routes provided an adequate sample of Bowman [fol. 911] store routes for the purpose of developing time standards; (2) that the total cost per route day may be apportioned among store customers on the basis of driver's time; and (3) that the omission of Central Office overhead from the cost studies is not a material defect in those studies, then the Court should find and conclude that the price differences identified on Schedule 1 of the pre-trial order were fully justified by cost differences.

32. Plaintiff agrees that Schedule 6 of Bowman Exhibit 4 contains an accurate statement of expenses, number of route days, and cost per route day for the Elston Division of the Bowman Dairy Company for the month of November, 1954, and that Schedule 1 of Bowman Exhibit 14 contains an accurate statement of expenses, number of route days, and cost per route day for the South Division of the Bowman Dairy Company for the month of March, 1955.

33. If called to the stand for the purpose of cross examination by the plaintiff, A. J. Bergfeld would testify that the additional time studies of routes in the Forest, Englewood and South Divisions were taken to determine whether or not substantial differences in delivery methods or times existed in other divisions of the Bowman Dairy Company which would require a broader sampling of routes than that provided by routes operating out of the Elston Division; that on the basis of his review of the data obtained from these additional studies (which were made in 1949), he formed the opinion that delivery time standards [fol. 912] developed on the basis of the studies of Elston Division routes would be valid for all store routes operated

by the Bowman Dairy Company. Comparisons of time data recorded on routes of the other divisions with that recorded in Elston Division, did not disclose any significant differences which required a modification of his judgment that the Elston time standards are valid for all store deliveries.

34. If called to the stand for the purpose of redirect examination on behalf of the defendant Bowman Dairy Company, A. J. Bergfeld would testify that in his opinion, the apportionment of the total cost per route day among different customers on the basis of driver's time is in accord with sound and accepted principles of cost analysis. In support of this conclusion, he would point out that expenses, other than drivers' compensation, incurred at the distributing division (see Schedule 6 of Bowman Exhibit 4 and Schedule 1 of Bowman Exhibit 14) are necessary to create the environment for the driver to deliver milk and should be included in the cost per route day. They are directly related to selling and delivering milk and milk products, and without such supporting expenses, the selling and delivery functions could not operate effectively. The principal purpose of these expenses therefore, is to make the driver's time for selling and delivering milk as effective as possible. Before the defendant Bowman Dairy Company can earn profit, or even pay for its general administrative expenses, it must first recover these divisional expenses. The only means of recovering them is through the [fol. 913] application of drivers' time in delivering milk and performing the associated necessary elements of work and the optional customer services at customers' premises as described in the basic manual (Bowman Exhibit 4). The recovery is limited by the number of transactions completed and the amount of merchandise which can be delivered into the store within the drivers' route time that is available for delivering milk. Therefore, since all of the divisional expenses are incurred to make the driver's time effective and are recovered through the use of his time, they bear a direct relationship to the time spent in the delivery function.

Mr. Bergfeld would further testify that the apportionment of the total cost per route day on the basis of driver's time is sound since that is the only common denominator for measuring and comparing the many factors that comprise

each customer transaction. These factors vary widely and create widely varying costs and complex costing problems. The basic manual (see pages 3, 7, and 8) details the factors, some of which are (1) distance traveled to the first customer stop, from the last customer stop, and between customers on the route, (2) volume delivered, and (3) type of delivery service rendered at a customer stop. Mr. Bergfeld would explain that the driver's time required to perform these functions is a theoretically sound and all-inclusive element to measure transactions, because time is common to all of the aforementioned factors, that it permits prac- [fol. 914] tical administration, and that it is predictable through time standards.

A. J. Bergfeld would further testify that he has advocated this approach for management in the milk industry. In a speech to the Milk Industry Foundation Convention at the Sheraton Plaza Hotel in Boston, Massachusetts on October 27, 1953, A. J. Bergfeld stated, in part:

> "In the distribution of milk as in most other service functions, the cost of the service bears a direct relationship to the time required. Management spends money for trucks, gas, oil, tires and maintenance; base wages for routemen; operating costs for branch offices, including salaries, rent, and supplies; and for the other costs of maintaining a distribution system.
>
> "This money is recovered when the routeman distributes his products and brings back sales revenue. The entire operation comes to a focus in this distribution function. What the money buys, actually, is a certain number of hours in which products are distributed and sales revenue returned."

35. If called to the stand for the purpose of redirect examination on behalf of the defendant Bowman Dairy Company concerning the subject of Central Office overhead, A. J. Bergfeld would testify that nearly all of that overhead which could be allocated would have to be done *on a time basis* of the Central Office personnel involved since it is comprised largely of salaries and wages, and that any other basis for allocating salaries and wages would be unsatisfactory.

He would also testify that an allocation of Central Office overhead would require several allocation steps, as explained in more detail in sub-paragraph (1) following, since few job duties are specifically related to transactions with either chain stores or independent stores.

[fol. 915] He would also testify that the amount of Central Office overhead allocated to chain store transactions and to independent store transactions, and thence to products, would have a minor effect on cost and price differentials for two principal reasons. The first is the fact that total Central Office overhead is small compared to the total expenses of those distribution divisions to which it might be allocated. In support of this, he would point out that in November, 1954, which is the period used for explanation purposes in the basic manual (Bowman Exhibit 4), the total expenses of the distribution divisions was $1,278,078.10 (source: statements of expense, November, 1954), while the total Central Office overhead was only $279,715.59 (source: Form #51, November, 1954). The second principal reason for Central Office overhead having only a minor effect on cost and price differentials is the fact that only a small portion of that Central Office overhead would be allocated to selling and delivery functions. In support of this, he would point out: (1) that some executives and their staffs are directly related to activities other than the sale and delivery of milk (Head Office Building Maintenance, Procurement, Research, Motor Transportation, Production, By-Product and Surplus Sales, Dry Milk Sales, and Country Distributor Sales); (2) that some executives and their staffs are partly related to the sale and delivery of milk and also to other functions (Accounting, Addressograph, Credit, Industrial Relations, Personnel, and Safety and Claim); (3) that some executives and [fol. 916] their staffs are remotely related to the sale and delivery of milk (Engineering, Executive Office Staff, Legal Department, Purchasing, and Special Duties); and (4) that only a few executives and their staffs are directly related to the sale and delivery of milk (Sales, Advertising, Public Relations, and Sales Fleet Supervision).

He would also testify that in his opinion it was proper to omit any analysis of Central Office overhead from the cost studies submitted on behalf of the Bowman Dairy Company for the following reasons:

(1) There would be three allocations of Central Office Personnel required. One is the allocation between (a) duties relating to sale and delivery of milk and (b) duties relating to other activities such as procurement of milk from farmers, management of country collection points and city bottling plants, investment opportunities, process and product development, etc. as previously described. The second allocation is of the time spent on selling and delivery activities, as to the portions applicable to store sales, retail sales, and bulk wholesale sales. The third allocation is of the time spent on selling and delivery activities for sales to stores, as to the portion applicable to chain store transactions and that applicable to independent store transactions. In each of the three allocations, the portion assigned to each function fluctuates drastically from time to time and is not susceptible to reliable predic- [fol. 917] tion; hence the inability to predict the expenses which would be assigned to chain store transactions and to independent store transactions.

(2) An allocation of time spent by all central office personnel on transactions with chain stores and with independent stores would be arbitrary and could result in inequitable costing, even if each person was questioned individually.

(3) The most accurate way of determining an allocation of time spent by Central Office personnel would be to time study each person's activities, or to maintain daily records of actual time spent in performing those activities. Such a study would take a long time since nearly every Central Office job includes duties that are different from another job's duties. There is no bloc of Central Office personnel that could be studied which is representative of all duties performed by the Central Office staff. Such an allocation would be an expensive procedure for assigning a relatively small amount of money to chain store and independent store transactions. It would have been impracticable to include an allocation of these expenses in the cost studies which he has made from time to time for Bowman Dairy Company.

(4) Even if an accurate an comprehensive study of the time allocation of Central Office personnel was made, it would not be valid for future use because the [fol. 918] allocation would not be static and could not be predicted. Mr. Bergfeld believes that a strong advantage of the procedure used by defendant Bowman Dairy Company lies in its use to predict the cost differences between various customer transactions. A record of actual time or time studies of Central Office personnel varies daily and can change appreciably with a week's time, and is particularly prevalent at the supervisory and executive level.

(5) If Central Office expense could be reliably predicted, the portion allocated to selling and delivery would be reallocated among distributing divisions and the portion charged to each would be added to the route day cost. The result would be greater cost differences between deliveries to chain stores and to independent stores because the delivery minute would then be more expensive (see explanation on pages 4 and 5 of the basic manual, Bowman Exhibit 4) while the delivery time for different customers would remain unchanged.

(6) If instead of adding an allocated portion of Central Office expense to the route day cost, such expenses were allocated directly to chain store cost and to independent store cost, A. J. Bergfeld would state that in his opinion, based upon his experience in the milk industry, the Central Office cost per unit sold to chain stores would be *less* than the Central Office cost per unit sold to independent stores.

* * * * * * *

[fol. 919] 78. On or about August 29, 1955, the Jewel Food Stores, a corporate chain, changed its source of supply of dairy products in the Chicago area from The Borden Company to the Dean Milk Company.

79. On or about September 1, 1955, the Hawthorn-Mellody Farms Dairy announced that its prices to independent store customers, effective September 1, 1955, for quarts, half gallons and gallons of milk respectively, would be 18½,

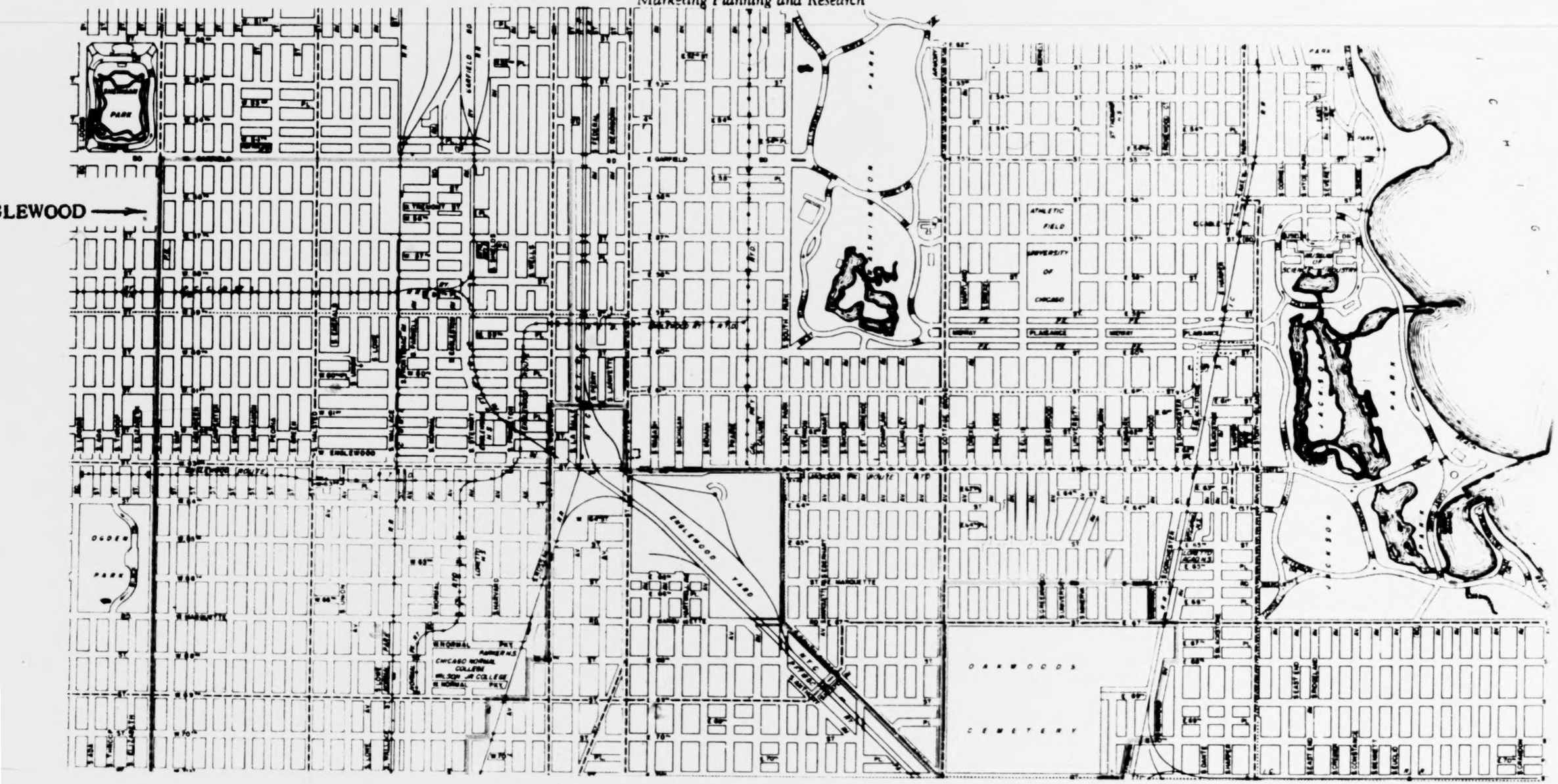
36, and 69 cents, and that its discounts would be 2% for purchases of 25-49 points per day, 3% for purchases of 50-[fol. 920] 149 points per day, 4% for purchases of 150-249 points per day, and 5% for purchases of 250 points or more per day.

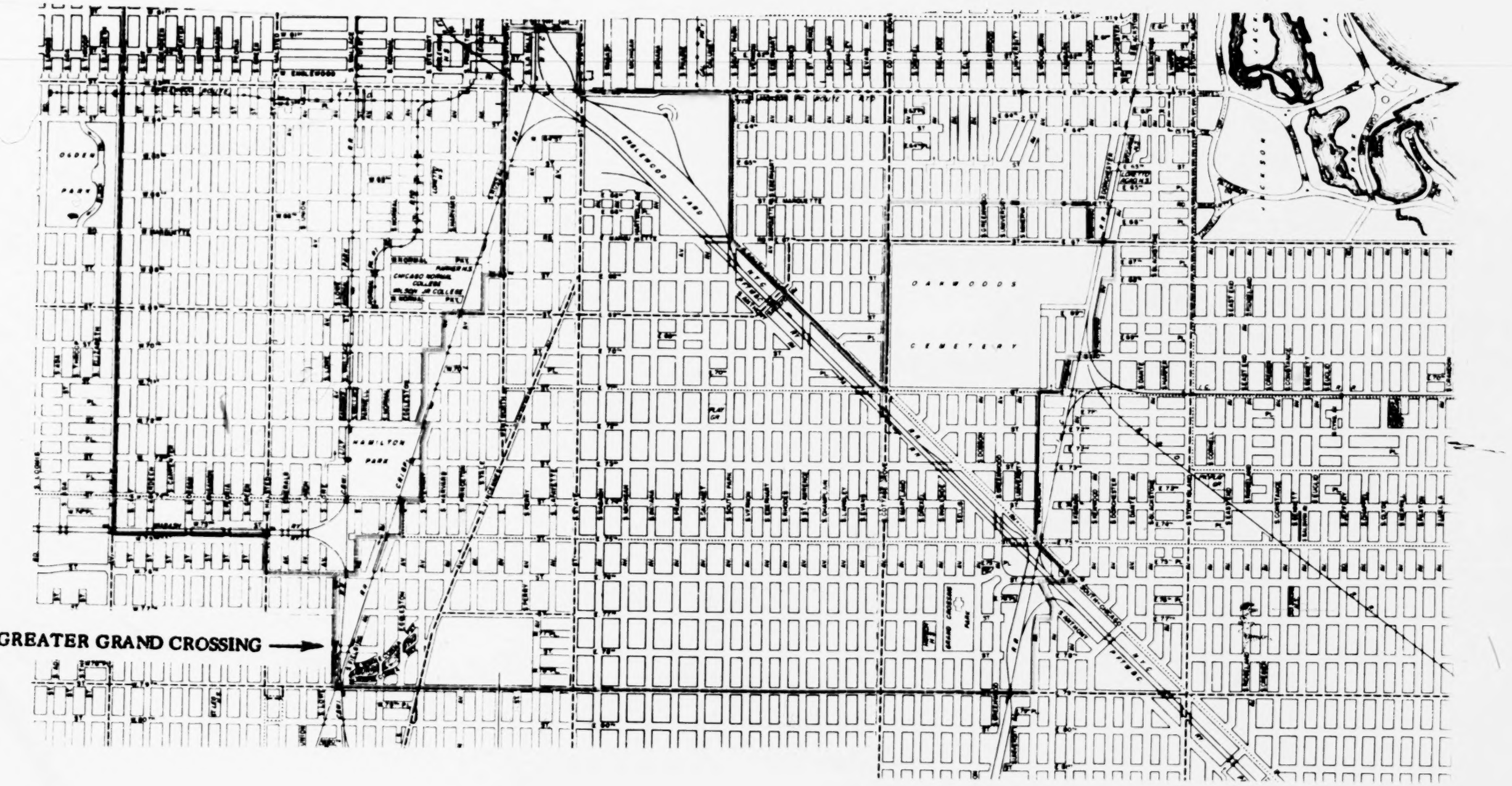
Enter:

Campbell, Judge.

ELRICK and LAVIDGE, Inc.

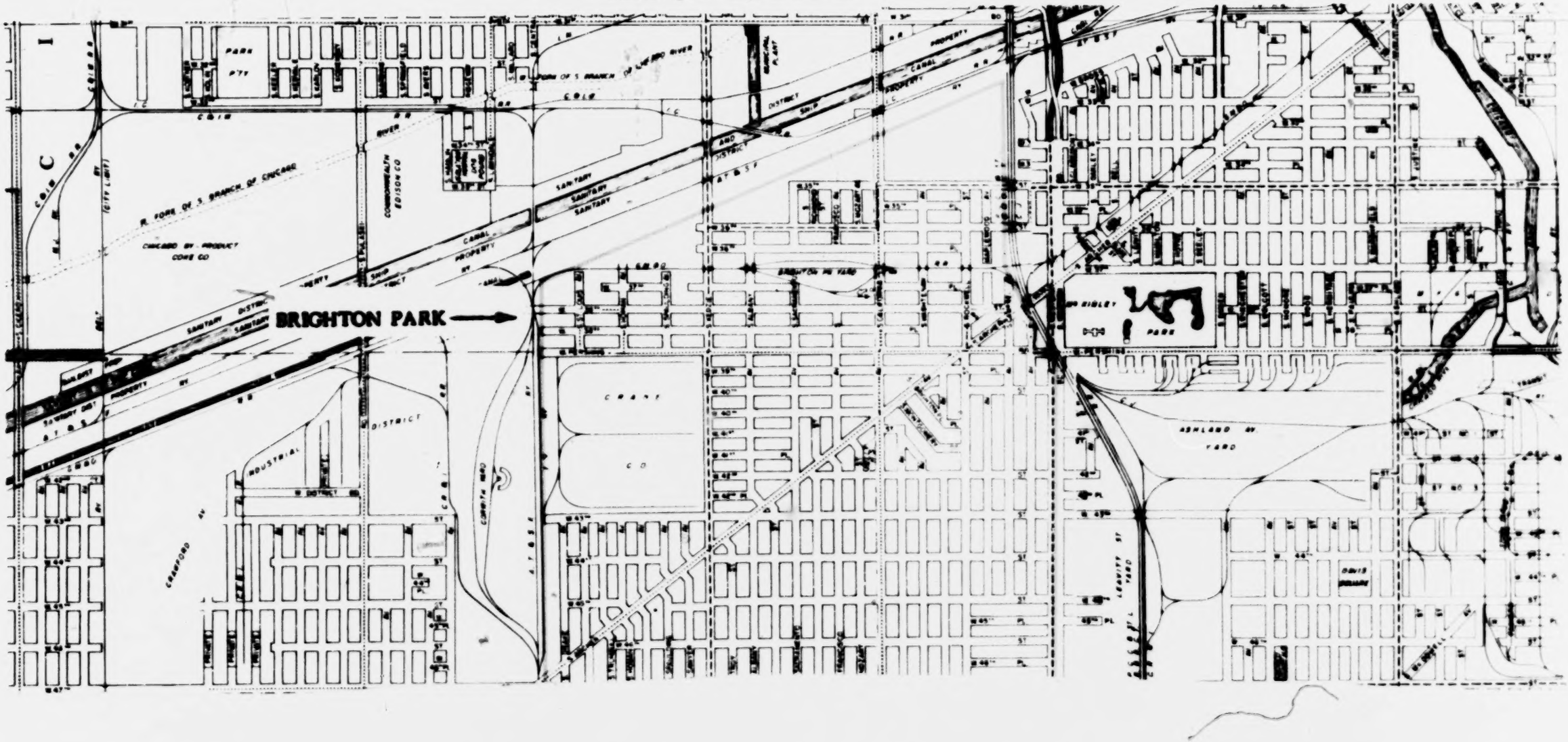
Marketing Planning and Research

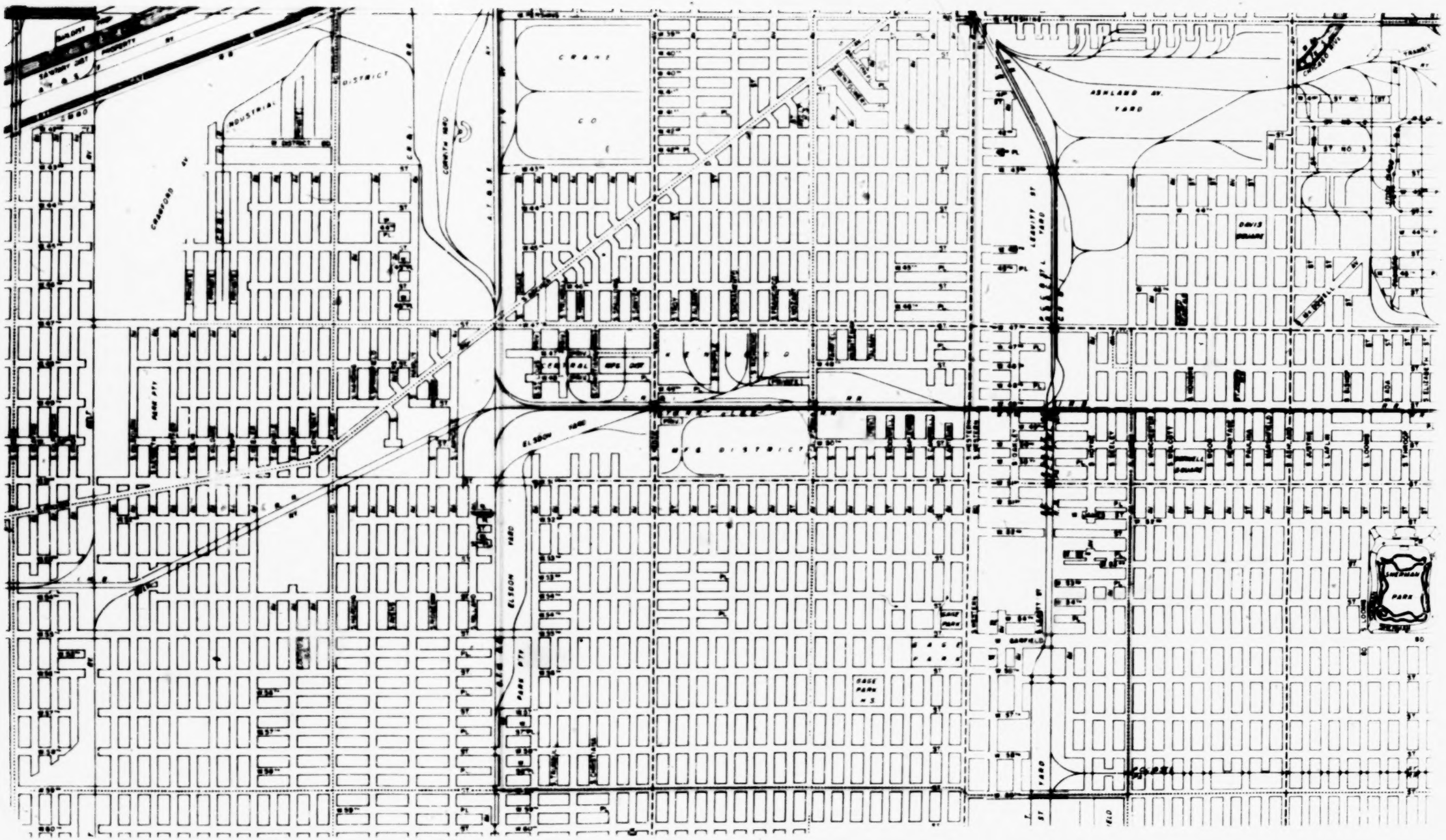



GREATER GRAND CROSSING
ENGLEWOOD YARD
CHICAGO NORMAL COLLEGE
HAMILTON PARK
OAKWOODS
CEMETERY
GRAND CROSSING PARK

ELRICK and LAVIDGE, Inc.

Marketing Planning and Research




INDUSTRIAL DISTRICT
ASHLAND AV. YARD
DAVIS SQUARE
ELSDON YARD
GAGE PARK
PARK

[fol. 923] IN UNITED STATES DISTRICT COURT

BOWMAN EXHIBIT 3

Survey of Food Store Competition
Conducted for Rothchilds, Hart, Stevens & Barry

Chicago, Illinois

December 8, 1955

#217-1
RFE

Elrick, Lavidge and Company, Marketing Counsel and Research, 176 West Adams Street, Chicago 3, Illinois

[fol. 924] Survey of Food Store Competition

Purpose

The purpose of the survey was to measure the extent of possible customer competition, if any, between selected food stores in Chicago.

Method

Two groups of stores were used in this survey as follows:

Group A

1. Goldenstern's (Charlie's Market), 427 W. 69th, Chicago, Illinois.
2. A & P Store, 6702 Wentworth, Chicago, Illinois.
3. Kroger Store, 7260 Wentworth, Chicago, Illinois.

Group B

4. Psomakos Store, 2416 W. 47th, Chicago, Illinois.
5. A & P Store, 2601 W. 51st St., Chicago, Illinois.
6. Goldblatt's Department Store, 47th & Ashland, Chicago, Illinois.

Interviewers on the Elrick and Lavidge, Inc. resident field staff were assigned to interview all persons who could be contacted coming out of each store after shopping for groceries. Two interviewers were assign d to each store.

Interviewing was conducted on October 27, 28 and 29 and November 4 and 5, 1955.

Each person interviewed was asked a series of questions from a mimeographed questionnaire form covering their means of transportation to the store, distance from home [fol. 925] to store, whether or not respondent worked or attended school nearby and the address of same, and types of groceries purchased. In addition, persons interviewed were asked to state their street address, telephone number and name. The interviewer recorded verbatim responses on the form and indicated by observation the sex, age group and race of respondent. The time and date of each interview was recorded and the interviewer signed his or her name. A copy of this questionnaire form is included in the Appendix to this report.

At the close of each day of work, the interviewers signed a separate work completion record certifying the hours worked and interviews completed in front of each store. Copy of this form is included in the Appendix to this report.

The accuracy of the interviewing work was checked by mailing return post cards to a random selection of persons interviewed. A total of 223 cards were sent out and 96 or 43% were returned. An inspection of these returns indicated that the addresses were correct and that the persons were interviewed at the time and place recorded on each questionnaire form. See Appendix for copy of post card.

Completed questionnaires for each store were sorted and arranged by street addresses. The location of these addresses was then plotted on an enlarged reproduction of the Gorand's 1951 Edition Street Map of Chicago. Store customers from stores in Group A were plotted on Map A. Stores customers from stores in Group B were plotted on Map B.

[fol. 926] Maps A and B are separate exhibits accompanying this report.

Inspection of the plottings on these work maps A and B indicated that the great majority of customers for each store (with the exception of the Goldblatt Department Store) lived within one-quarter of a mile from the store or less. Inspection also indicated that railroads, school

grounds, etc. formed natural barriers to food store shopping.

On the basis of our observations, Maps AA and BB were prepared. Map AA shows primary trading areas and map BB shows primary and secondary trading areas for each store. These maps, AA and BB, are additional and separate exhibits accompanying this report. Plotted on these smaller size maps are the home locations of all persons interviewed residing within the primary trading areas of each store.

Map BB also shows the home locations within the secondary trading areas.

A statistical summary showing the number of interviews completed and the location of the customers is included on the following pages.

[fol. 927] Store Trading Areas

Map "A"

Customers Within	Store #1 Goldenstern's		Store #2 A & P		Store #3 Kroger	
Primary trading area (within ¼ mile)	161	93%	77	88%	213	83%
Outside primary trading area (within ¼ mile)	1	*	–	–	–	–
¼ to ½ mile area	8	5	6	7	21	8
½ to ¾ mile area	3	2	2	2	4	2
Over ¾ mile area	1	*	3	3	19	7
Total customers	174	100%	88	100%	257	100%

Map "B"

Customers Within	Store #4 Psomakos		Store #5 A & P		Store #6 Goldblatt's	
Primary trading area (within ¼ mile)	204	79%	344	85%	35	12%
Outside primary trading area (within ¼ mile)	–	–	–	–	–	–
¼ to ½ mile area	24	9	43	11	75	27
½ to ¾ mile area	11	4	1	*	26	9
Over ¾ mile area	20	8	18	4	145	52
Total customers	259	100%	406	100%	281	100%

*Less than 1%

[fol. 928]

Store Customers
From Each Primary Trading Area**

Map "A"

	Store #1 Goldensters's		Store #2 A & P		Store #3 Kroger	
#1 Primary Trading Area						
Total store customers	174	100%	88	100%	257	100%
Within #1 area	161	93%	0	–	0	–
#2 Primary Trading Area						
Total store customers	174	100%	88	100%	257	100%
Within #2 area	1	*	77	88%	3	1%
#3 Primary Trading Area						
Total store customers	174	100%	88	100%	257	100%
Within #3 area	0	–	1	1%	213	83%

Map "B"

	Store #4 Psomakos		Store #5 A & P		Store #6 Goldblatt's	
#4 Primary Trading Area						
Total store customers	259	100%	406	100%	281	100%
Within #4 area	204	79%	2	*	4	1%
#5 Primary Trading Area						
Total store customers	259	100%	406	100%	281	100%
Within #5 area	0	–	344	85%	3	1%
#6 Primary Trading Area						
Total store customers	259	100%	406	100%	281	100%
Within #6 area	0	–	0	–	35	12%

*Less than 1%
**Persons interviewed at Store #1, 2, 3, 4, 5 and 6 who live within primary trading area designated.

[fol. 929]

Store Customers
From Each Secondary Trading Area**

Map "B"

	Store #4 Psomakos		Store #5 A & P		Store #6 Goldblatt's	
#4 Secondary Trading Area						
Total store customers	259	100%	406	100%	281	100%
Within #4 area	24	9%	0	–	10	4%
#5 Secondary Trading Area						
Total store customers	259	100%	406	100%	281	100%
Within #5 area	2	*	43	11%	4	1%
#6 Secondary Trading Area						
Total store customers	259	100%	406	100%	281	100%
Within #6 area	2	*	0	–	75	27%

*Less than 1%
**Persons interviewed at Stores #4, 5 and 6 who live within secondary trading area designated.

[fol. 930] APPENDIX

[fol. 931]

Elrick and Lavidge, Inc. 176 W. Adams, Chicago 3 Phone: FInancial 6-5555
Project #217-1 October, 1955 #_____

Transportation—Shopping Survey

1. We are making a survey of what means of transportation people use to go shopping for groceries. How did you get here today?

Walk	( )
Auto	( )
Bus-St. Car	( )
Other	( )

2a. How far do you live from here? _____ blocks

b. Do you work or go to school near here? Yes ( ) No ( )

c. Where? _____

3. What types of groceries did you buy today?

Canned and Packaged Foods	( )	Dairy Products	( )
Frozen Foods	( )	Bakery Products	( )
Meats	( )	Drug Items	( )
Produce	( )	Household Goods	( )

4a. What is your home address?

_____

b. Telephone Number _____

c. Name of Respondent _____

Male ( ) Female ( ) Under 18 ( ) 18–25 ( ) 26–50 ( ) Over 50 ( )

White ( ) Negro ( ) Other ( ) Date _____, 1955

Time _____ a.m. p.m.

Interviewer's Signature _____

Edited _____ Coded _____

[fol. 932]

Miss Shirley Sandkam
Elrick and Lavidge, Inc.
176 W. Adams Street
Chicago 3, Illinois

Dear Respondent:

We very much appreciate your fine cooperation with our recent Transportation—Shopping Survey.

So that we can be sure that we have the right information, we must check the answer to one of the questions which you were asked.

You were interviewed the other day in front of the —— I'll appreciate it a great deal if you will fill in the answer to the question on the attached card, tear off that card and put it in a mail box. It already has a stamp and is addressed to me. Thanks again for your help.

Cordially, Shirley Sandkam.

Transportation—Shopping Survey

Here is the question:

How did you get to the store that day?

Walk	( )
Auto	( )
Bus—St. Car	( )
Other	( )

Name ——, ——.
Address ——, ——.

[fol. 933]

Elrick and Lavidge, Inc.
Marketing Planning and Research
Chicago 3, Illinois

176 W. Adams Street Telephone FInancial 6-5555

Date —, 1955.

This is to certify that on this date, between the hours of
a.m. — a.m. — a.m.
— p.m. and — p.m. and also between the hours of — p.m. and
a.m.,
— p.m., I personally interviewed all available persons 18 years of age and older who appeared to have made a grocery item purchase at

Store Name _____

Address _____

City, Chicago State, Illinois.

Attached are — individual interview forms completed by me on this date.

Interviewer _____

Address _____

City _____ State _____

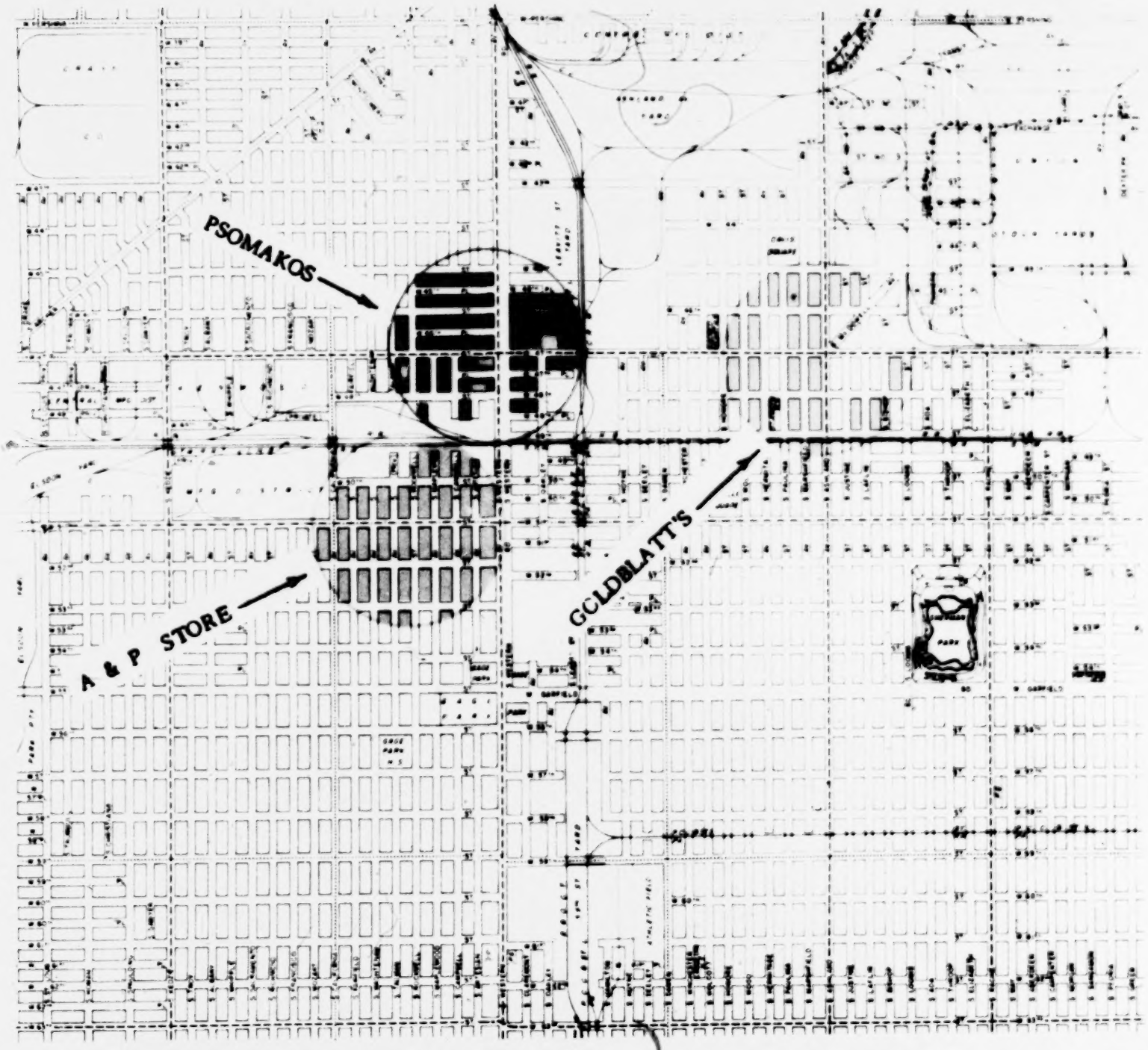
Telephone _____

A & P STORE
GOLDENSTERN'S
KROGER
HAMILTON PARK
FOSTER PARK
PARK DTY

BOWMAN EXHIBIT 3BBB

ELRICK and LAVIDGE, Inc.

Marketing Planning and Research



[fol. 935a] [File endorsement omitted]

[fol. 936] IN UNITED STATES DISTRICT COURT

BOWMAN EXHIBIT NO. 4

Manual for Establishing and Testing a Store Discount Schedule

Foreword

This manual reviews the considerations that directed the formulation of Bowman Dairy's resale store discount schedule, and illustrates procedures for testing it with current cost data.

The principles and method used throughout are intended to devise a balanced discount schedule which will return an equitable discount to all customers. It is good business policy to have a schedule which is fair to each store owner. In the long run, unbalanced net prices, where some customers are overcharged to absorb the low return from others who are undercharged, can only result in a lower sales volume. The overcharged customers will soon be vulnerable to the offers of other distributors. Subsequent price increases to the remaining business in an effort to counterbalance the other losses will create dissatisfaction among that group, and prompt some to contact other dealers.

The plan established in this manual should minimize charges of unfairness, because the net prices reflect the cost of a product delivered at the store.

[fol. 937] Differences in net prices are warranted by differences in costs resulting from combinations of volume purchased and delivery services rendered by the Bowman driver. Rather than determine discounts to store customers by pre-guessing these combinations, they are determined by after-the-fact calculations based on actual quantities purchased by each store. Therefore, the customer's net price is the result of:

a. Billing based on list prices for merchandise received, at the time of the transaction, and,

b. a discount rebated at the end of each month for the combinations of volumes purchased and regular services received during that month.

The last section of the manual details a method of testing the schedule. This procedure remains valid regardless of changes in prices, costs, and discounts.

[fol. 938] Section I

[fol. 939] I. Delivery Services and Route Costs

Facts indicate that the cost of a product, uniform in chemical and physical properties, and in similar containers, is the same up to the time it is loaded on a truck ready for delivery, regardless of the type of store receiving it. Cost differences of the delivered product are created during delivery, and any elements of cost occurring prior to this operation are not considered in this manual.

Delivery is a complex function, principally due to the wide varations in quantity delivered and services performed at each store. However, when this information and the time to make the delivery are known, cost differences can be calculated.

How are these differences created? Once the driver arrives at a customer stop, there are some necessary work elements that he must perform. Beyond this, there are some optional delivery services that the driver may be requested to do, such as deliver the order inside, place the containers in a refrigerator, rearrange containers so that any product remaining unsold from yesterday will be sold first today, leave cases of products at different spots in the store, etc. The type of service performed varies greatly, [fol. 940] as does also the extent of the service requested. Very few stores are rendered exactly the same service, but yet this extensive pool of services must be available for all to draw upon. In addition, most store customers pay the driver in cash daily, rather than paying by check monthly or semi-monthly.

The delivery function is further complicated by the fact that the time required for some of these elements is relatively "constant" in that the performance time is unaffected by volume delivered. Other elements are variable

because their performance time is directly affected by volume. Others are a mixture of these characteristics, having a constant portion and a variable portion.

The following table shows examples of these elements, grouping them by "necessary" and "optional," and also indicating their relationship to volume.

The same explanation is shown in graphical form in Schedule 1.

[fol. 941] Table of Work Elements

Element Name	Characteristic
1. Necessary work elements	
a. Get order, and a delay to get order	Constant
b. Select merchandise	Mixed
c. Unload order from truck	Variable
d. Deliver order to store	Mixed
e. Make out delivery slip and have the slip checked	Constant
f. Route bookkeeping	Constant
g. Sort glass bottles (if customer takes glass containers)	Variable
h. Pick up empties and load empties on truck	Mixed
i. Arrange load	Variable
j. Drive on route, between customers	Constant
k. Load cases on truck at plant and unload cases from truck at plant	Variable
2. Optional customer services	
a. Delivery services beyond a sidewalk drop	Variable
b. Collect cash and delay to collect cash	Constant

[fol. 942] Due to varying combinations of order quantities purchased by each store owner and the mixture of necessary and optional services performed for him, the driver's time at each store is different. As Bowman incurs a cost during delivery operations due to the time that its driver and equipment are used, the company can determine the cost to deliver if it knows the time to deliver.

To convert time to cost those expenses incurred by the dairy's distributing division must also be known. This includes the driver's wages, truck expenses, division administrative and clerical expenses, and other overhead expenses at the division. They do not include expenses at the company's central office, although they are in part incurred in the administration of the distribution system. Some central office expenses could properly be charged to distribution, but in the interests of conservative costing they are omitted. There is also the possibility that the allocation of expenses might be inaccurate and thereby cause some inequities in determining delivery costs.

The direct expense at the Elston Division (a store division), for example, during November, 1954 was $84,657.55 for 1507 route days, or $56.18 per route per day. (1) This daily expense should be charged only to the time spent in [fol. 943] serving customers. The remainder of the day is preparatory and not directly employed in delivering milk.

An analysis of a driver's time during a day might be the following example:

	Minutes	
	Make Ready and Personal Time	Time for Customer Services
Get and garage truck	5 2	
Prepare for delivery	11 6	
Drive to and from route	23 4	
Time serving customers		
Delivery services to stores		347 6
Drive between stores		69 7
Office bookkeeping and turn in cash	50 8	
Miscellaneous and personal time	43 7	
	134 7	417 3
Total time	552 0	

The cost of providing service on this route is $13\frac{1}{2}$¢ per customer service minute ($56.18/417.3 minutes.)

All routes do not have the same amount of time available for serving customers, and the several distributing divisions do not incur the same total expenses; consequently, the cost rate per minute varies from route to route.

[fol. 944] The combinations of varying cost rates, order quantities, and delivery services, were considered in the careful preparation and analysis of cost data to formulate an equitable discount plan.

To derive the plan, delivery costs at various volume levels are calculated for those customers receiving the same general type of service. The sum of delivery cost and product platform cost is subtracted from list price. When there is a margin remaining after subtracting these costs, it is available for administrative expenses, taxes, company profit, and a discount that can be rebated to the store customer.

Details of these calculations are shown in the following sections of this report.

[fol. 945] Section II

[fol. 946] II. Classification of Store Services and Their Time Measurement

In the preceding section, the Table of Work Elements listed those which are necessary to every delivery. If a driver stops at a store and delivers any merchandise at all, each of the elements in this category is included. Up to this point, all stores are equal in that they all receive these services; but beyond this point there is a variation. Nearly all stores require the optional delivery services and daily cash payment and therefore have the most expensive type of delivery. A relatively few number of stores require only the necessary work elements and, consequently, have the cheapest type of delivery.

Experience has shown that the independently-owned stores generally want the optional services, which may include some of the following work elements:(2)

Deliver to the rear of the store.

Leave some merchandise at a refrigerated showcase and deliver remainder of the order to a storeroom.

Rearrange merchandise in showcase so that the earliest dated containers are sold first.

Check showcase as to quantity of merchandise remaining from previous delivery and advise store owner.

[fol. 947] Remove containers from Bowman's wooden cases and place on shelves in walk-in cooler or arrange in refrigerated showcase.

Advise and assist owner in arranging dairy products' display.

Call back later in the day to deliver more merchandise if the refrigerated equipment cannot accommodate the entire order at once.

Drive additional distance if store owner requires delivery at a specified time and disrupts regular route schedule.

Receive daily cash payment for quantity delivered.

Cash checks for store owner, etc.

Of course, these requests vary widely and there is no standard set of options, but any movement of merchandise beyond a point just inside the store door is considered additional service. It is mutually understood that the driver's time is available for rendering that service, and the corresponding cost of providing it is calculated as part of the delivery cost to this general type of store.

On the other hand, the limited service of floor delivery and central billing on a credit basis is part of the arrangement made with the corporate chains in arriving at their net prices, and they do not expect services beyond a floor delivery. (3) As a result, time spent for additional service is unavailable to chain outlets and is omitted from the delivery charge.

[fol. 948] As previously noted, the availability of a route driver's time and use of companion equipment is Bowman Dairy's cost in distributing its products, and, if the delivery time is known, the delivery cost can be calculated.

Acceptable time standards are the first requisite in establishing accurate delivery costs as the basis for pricing. Standards were derived by conducting time studies for deliveries in Elston, Forest, Englewood, and South Divisions, with the bulk of the study in Elston. There were 55 time studies taken on 32 Elston store routes from which standard time allowances were developed. As route foremen are familiar with normal methods and sequence of operations required to make deliveries to stores, several were selected and trained in the procedure of recording time observations. The selection of standard time allowances from the accumulation of recorded time data followed accepted techniques. Details of this work are shown in Appendices A and B.

Therefore, at this point the standard time to perform the various work elements involved in delivery operations was known and the services and elements were classified as follows:

[fol. 949] 1. Service requirements

1.1 Necessary services

1.2 Optional services

2. Characteristic of work element
   2.1 Constant element
   2.2 Variable element
   2.3 Mixed element

3. Service classification by type of store
   3.1 Independently-owned stores—necessary plus optional services
   3.2 Corporate-chain outlets—necessary services only

The delivery-cost calculations, which are the bases of a discount schedule, are explained in Section III.

[fol. 950] Section III

[fol. 951] III. Establishing the Discount Schedule

The calculations in Schedules 2 and 2A demonstrate the method of establishing an equitable discount schedule to stores. The intention of this procedure is to establish a schedule which is balanced and therefore returns an equitable discount to each customer. To ensure fair net prices, the increases in discounts should be accounted for by savings in cost. In this manner we minimize the danger that customers paying a higher price are compensating for the dairy's low return on transactions with customers paying a lower price.

This has been accomplished for independent stores by the following procedure:

1. Apply delivery time standards to customer service requirements at various volume levels.
2. Determine a cost rate per route minute as shown previously; a representative 15¢ per minute used in this example.
3. Apply the cost rate to total delivery time at various volume levels.
4. Calculate unit delivery cost at those volume levels.
5. Add the platform cost, 14¢ in this example, to the delivery cost for services rendered, at those volume levels.

[fol. 952] 6. Sub-tract the total unit cost from list price, 20½c in this example. Where price exceeds cost, there is a margin available, part of which can be distributed to customers in the form of a rebated discount. Express this difference as a percentage of list price. These results are shown in tabular and graphical form in Schedules 2, 3, and 4.

The discount curve in Schedule 4 is the maximum discount that could be granted to independents. For simpler administration of a routine procedure, the curve shape is approximated either by a series of steps or by a series of joined lines. The latter method appears to be more logical because customers buying any greater volume are allowed a greater discount.

It is obvious that the company cannot grant the entire margin represented by this line, since there must be a remainder after discount, for administrative expenses, taxes, profit, etc. In deciding how much of the available margin should be rebated, a family of curve approximations is drawn below the maximum. When the decision was made regarding what portion of the profit margin to rebate, values along that line were published as the discount schedule.

The most recent approximation of the maximum discount curve is the store discount schedule of August 25, 1954; it is shown in graphical form in Schedule 5.

[fol. 953] The same method of calculation is used to establish the maximum available margin for the chain stores, but the following elements are not included in the regular services and are omitted from the total delivery times (see Schedule 2A).

Customer Service
Collect
Delay to Collect

Due to the omission of these elements, the maximum margin available to chain stores is greater than that available to independents or to any other group of stores requiring the extensive delivery services.

With maximum available margin determined for chain stores or other limited service groups, the lower line which will represent a portion of this margin to be rebated as

discount, should bear a cost relationship to that already established for the independent stores. The line has been established so that Bowman does not make a smaller gross margin (available for administrative expenses, depreciation, taxes, profit, etc.) on sales to a customer receiving a lower net price than the margin enjoyed from a customer receiving a higher net price. In this way, the greater discount reflects only cost savings attributable to high volume purchases and or fewer delivery services.

[fol. 954] To illustrate the point, suppose that the discount line established for customers receiving all services (independent stores) is the 50% line on Schedule 4. Then, data in Schedules 2A and 4 for a daily volume of 200 points is as follows:

Maximum available margin—independent store	19.56%
Less: Rebated discount (50% line)	10.00%
Gross Margin	9.56%
Maximum available margin—chain store	22.49%
Less: Gross margin—independent store	9.56%
Maximum discount	12.93%

As a result of this transaction at a 200 point volume, Bowman's discount to the chain store could be justified by its costs, provided the gross margin after discount exceeded 9.56%. Since the minimum gross margin determines the maximum discount, Bowman could not rebate more than 12.93% to the chain.

This type of calculation at all volume levels, establishes a Minimum Profit Maximum Discount line for the chain stores (see Schedules 2A and 4A). The lower priced customer need not be rebated as high a discount as this line allows, but the average actual discount should not exceed the average allowable discount. In actual practice, the discount to corporate chains has been represented by a horizontal line which is less than the average maximum amount allowed to them.

[fol. 955] Section IV

[fol. 956] IV. Testing the Discount Schedule

Cost differentials of the delivered product occur during delivery and the test concerns only that phase of the operations; but as the mixture of products purchased by a store customer affects the total cost of a day's order delivered to him, this is also taken into consideration in testing the schedule.

It is industry practice to speak of purchase quantities in point values. Some sales control reports use points for measuring sales volume, discount schedules are based on points, and administration of delivery routes makes use of point valuations. Generally speaking, it is a means of relating a mixture of products to a common basis. A quart of milk is one point, while a gallon of milk is four points. We also find that a quart of milk, a quart of buttermilk, and a pint of Half and Half cream are each evaluated at a point, although their wholesale and retail prices differ and their platform costs (cost of a product ready to be delivered) differ. As a result, two customers buying the same point volume, may not receive the same merchandise or dollar volume, may not receive the same number of containers, and may have orders which total to different platform costs.

[fol. 957] To include the variations created by different mixtures of products, the schedule is tested by using prices, platform costs, and delivery costs for the total product volume and mix purchased by each customer.

The test which follows was made on Route #1177, Elston Division. All variations in volume and service during a week's time, were included by using all deliveries during the entire week of November 15-20, 1954 as the basis for test.

A detailed illustration of testing is shown for one of the customers, Mr. S. Livas, a relatively large-volume independent. During the week, Mr. Livas had six deliveries and purchased the following quantities: (4)

Product & Container (G) Glass (F) Fiber		No. of Units	No. of Cases
½ gallon—Milk	(F)	104	8 67
Quart—Milk	(F)	264	11 00
Quart—Sta-Slim	(F)	22	0 92
Pint—Half & Half Cream	(F)	105	3 00
½ pint—Cream	(F)	3	0 05
½ pint—Whipping Cream	(F)	9	0 15
Quart—Buttermilk	(F)	13	0 54
Pint—Sour Cream	(F)	1	0 03
½ pint—Sour Cream	(F)	1	0 02
Whip Dispenser	(F)	7	0 11
Cheese Containers	(F)	13	1 19
Quart—Dari-Rich	(G)	7	0 58
Quart—Egg-Nog	(G)	5	0 42
½ pint—Yogurt	(G)	12	0 50
Gallon—Milk	(G)	60	15 00
½ gallon—Milk	(G)	25	4 17
Pound—Butter		69	2 88
Dozen—Eggs		10	0 42
Totals		760	49 65

[fol. 958] Mr. Livas receives both the necessary and optional groups of services, and in addition pays his bill daily by cash. The standard time allowances for this week's deliveries are shown in the following table:

Delivery Time for Mr. Livas' Deliveries
(November 15-20, 1954)

Work Element	Calculation	Standard Time
Get order	6×1 37	8 22
Delay to get order	6×0 11	0 66
Select merchandise	(6×1 13)+(43 65× 48)	27 73
Unload order	49 65×0 092	4 57
Deliver	(6× 795)+(43 65× 295)	17 65
Make out delivery slip	6×2 14	12 84
Have delivery slip checked	6×0 19	1 14
Route bookkeeping	6×0 63	3 78
Sort glass bottles	109×0 025	2 73
Pick up empties	(6×0 43)+(43 65× 23)	12 62
Load empties on truck	49 65×0 109	5 41
Arrange load	49 65×0 377	18 72
*Drive on route	6×3 92	23 52
Load cases on truck at plant	49 65×0 143	7 10
Unload cases from truck at plant	49 65×0 20	9 93
Customer services	760×0 033	25 08
Collect	6×1 19	7 14
Delay to collect	6×0 13	0 78
Total Standard Time (minutes)		189 62

* 10 stops ÷ 8 0 miles on route = 1.25 stops per mile
4.9 minutes per mile (see graph, Appendix A) × 8 0 miles = 39.2 minutes
39.2 minutes ÷ 10 customers = 3.92 minutes per customer.

[fol. 959] During the same week, an A & P chain store outlet on Route #1177, had six deliveries and had purchase orders which totaled 4539 units and 289.13 cases. (5)

This outlet required only the necessary delivery services. By applying the time standards in the same manner as for the deliveries to Mr. Livas, excluding time required for customer services, collect, and delay to collect, the total time for volume delivered and services rendered was 609.30 minutes.

Delivery Time for A & P Deliveries
(November 15-20, 1954)

Work Element	Calculation	Standard Time
Get order	6×1 37	8 22
Delay to get order	6×0 11	0 66
Select merchandise	(6×1 13)+(275 63× 48)	139 08
Unload order	281 63×0 092	25 91
Deliver	(6× 795)+(275 63× 295)	86 08
Make out delivery slip	6×2 14	12 84
Have delivery slip checked	6×0 19	1 14
Route bookkeeping	6×0 63	3 78
Sort glass bottles	345×0 025	8 63
Pick up empties	(6×0 43)+(275 63× 23)	65 97
Load empties on truck	281 63×0 109	30 70
Arrange load	281 63×0 377	106 17
*Drive on route	6×3 92	23 52
Load cases on truck at plant	281 63×0 143	40 27
Unload cases from truck at plant	281 63×0 20	56 33
Total Standard Time (minutes)		609 30

* 10 stops ÷ 8.0 miles on route = 1.25 stops per mile
4.9 minutes per mile (see graph, Appendix A) × 8.0 miles = 39.2 min.
39.2 minutes ÷ 10 customers = 3.92 minutes per customer.

[fol. 960] Following the same calculations for every stop on the route results in the following:

Route #1177 Customer	Total Units	Total Cases	Total Delivery Time
S. Livas	760	49 65	189 62
J. Mandela	430	24 13	127 79
A. Raimer	107	4 83	80 19
J. Lohan	728	47 08	182 75
H. Heuer	408	23 22	125 62
A & P	4,539	289 13	609 30
M. Musso	179	12 26	96 23
G. Kruse	371	21 92	121 37
T. Frigo	610	45 47	177 33
D. George	148	13 66	98 45
Total Delivery Time (minutes)			1,808 65

During November, 1954, it cost $56.18 per route per day to provide service at Elston (see Schedule 6). For Route #1177, the cost per customer service minute was $0.1864 ($56.18 x 6 1808.65).

Before determining total delivery cost, recognition is given to the fact that butter, eggs, and bulk products are excluded from a customer's point volume in selecting the discount rate, and from the dollar volume in applying the discount rate. The variable portion of delivery time is [fol. 961] revised to exclude the effect of those three items and then extended by $0.1864 per minute to determine total delivery cost. The sum of delivery cost, discount paid, and platform cost of all items (excluding butter, eggs, and bulk), subtracted from the corresponding total list price, leaves the gross margin. This is expressed as a percent of net price and is compared to that figure for other customers. For Mr. Livas and the A & P outlet, the results are as follows:

	Mr. Livas	A & P
Total delivery time	189.62 min.	609.30 min.
Less: delivery time for butter, eggs, and bulk products	8.95	
Revised total delivery time	180.67 min.	609.30 min.
*Total delivery cost	$ 33.79	$ 113.69
Total platform cost (6)	$131.69	$ 867.13
Total list price (7)	$212.64	$1,383.67
Total discount (8)	$ 15.08 (7.09%)	$ 152.20 (11.00%)
Gross margin	$ 32.08	$ 250.65
Net Price (list price – discount)	$197.56	$1,231.47
% Gross Margin to Net Price	16.24%	20.35%

* Includes payment of store licence fee $6.00 per year or $0.115 per week.

[fol. 962] In this case, the A & P outlet received a larger discount rate, and Bowman Dairy enjoyed a greater gross margin from this store than from Mr. Livas. The summary table for all customers on Route #1177, which follows, shows the same type of result between A & P and any other store. This indicates then, that the lower net price, in each comparison, does not exceed the effect of cost differences due to higher volume purchases and fewer delivery services.

This kind of test can be applied to any route, comparing the differences in gross margins and the differences in discount rates. It will either support or disqualify the discount granted to chain outlets in relation to the independent

stores on their respective routes. To cost-justify the chain discount in general, which is 11.00% at present, requires another type of calculation which was mentioned previously.

At various volume levels, calculate the maximum available margin for an independent store (or any other group receiving equally extensive delivery services) and a chain store (or any other group receiving equally limited delivery services). By subtracting the current published discount rate to independent stores from their maximum available margin, the gross margin on independent store [fol. 963] transactions is determined. This same gross margin when deducted from the maximum margin available to chain stores, determines the Minimum Profit-Maximum Discount line for their transactions.

For each chain outlet, read from this line the discount rate which could be rebated, at the specific daily average volume purchased by it. Extend each store's sales by its allowable rate. Summarize this extension for all outlets served by Bowman in that chain. If this total discount exceeds that actually paid by Bowman, the actual rebate is cost-justified.

[fol. 964]

Summary Table
Route 1177
Week of November 15–20, 1954

Excluding Butter, Eggs and Bulk

Customer	Total Delivery Time, All Products (Minutes)	Revised Delivery Time	Revised Delivery Cost, Incl. Store License (11½¢)	Total Platform Cost	Total List Price	Discount On List Price	Gross Margin	Net Price	Gross Margin As A Percent of Net Price
S. Livas	189.62	180.67	$ 33.79	$131.69	$212.64	$ 15.08 (7.09%)	$ 32.08	$ 197.56	16.24%
J. Mandala	127.79	126.43	23.68	72.21	113.12	6.36 (5.62%)	10.87	106.76	10.18%
J. Raimer	80.19	78.98	14.84	14.64	23.31	0.86 (3.68%)	*7.03*	22.45	—
J. Lohan	182.75	179.58	33.59	131.44	208.16	14.82 (7.12%)	28.31	193.34	14.64%
H. Heuer	125.62	123.92	23.21	67.28	106.60	6.03 (5.66%)	10.08	100.57	10.02%
A & P	609.30	609.30	113.69	867.13	1,383.67	152.20 (11.00%)	250.65	1,231.47	20.35%
M. Musso	96.23	93.63	17.57	31.29	49.64	2.26 (3.56%)	*1.48*	47.38	—
G. Kruse	121.37	118.77	22.25	65.70	105.02	5.71 (5.44%)	11.36	99.31	11.44
T. Frigo	177.33	173.25	32.41	120.18	191.05	13.14 (6.88%)	25.32	177.91	14.23
D. George	98.45	98.45	18.47	32.97	52.48	2.35 (4.48%)	*1.31*	50.13	—
	1,808.65								

$$\text{Cost rate} = \frac{\$56.18 \times 6}{1808.65} = \$.1864 \text{ per route minute}$$

[fol. 965] Appendix A

Standard Time Allowances Developed from 1949 Time Studies

Work Element	No. of Customers	No. of Units	No. of Cases	Total Minutes	Standard Minutes
Get order	1,265			1734 96	1 37 (avg.) per cust.
Delay to get order	1,265			137 45	11 (avg.) per cust.
Select merchandise	1 13 for 1st case and .48 for each additional				
Unload order			3428 24	317 91	092 (avg.) per case
Deliver order	795 for 1st case and .295 for each additional				
Make out delivery slip	1,089			2335 77	2 14 (avg.) per cust.
Have slip checked	1,089			211 38	19 (avg.) per cust.
Route bookkeeping	739			462 88	63 (avg.) per cust.
Sort glass bottles		12,115		309 15	025 per glass bottle
Pick up empties	43 for 1st case and .23 for each additional				
Load empties on truck			2530 00	276 48	109 (avg.) per case
Arrange load			3428 24	1292 38	377 (avg.) per case
Drive on route	(See separate table and graph)				
Load cases at plant			3281 90	284 41	143 (avg.) per case
Unload cases at plant			1321 00	268 90	20 (avg.) per case
Customer services		66,574		2232 75	033 (avg.) per unit except A&P and Kroger
Collect	943			1128 58	1 19 (avg.) per cash customer
Delay to collect	943			124 64	13 (avg.) per cash customer

[fol. 966] Analysis of 22 Time Studies for Unloading Cases at Plant

	No. of Occurrences	No. of Cases	Total Minutes	Average Minutes per Case
Unload 1 case glass	442	442	30 49	
Unload 2 cases glass	8	16	2 96	
Unload 1 case paper	48	48	4 04	
Unload 2 cases paper	12	24	1 51	
Unload 3 cases paper	4	12	63	
Unload 4 cases paper	10	40	1 13	
Unload 5 cases paper	140	700	9 64	
Drag 1 case to truck door	—	—	—	
Drag 2 cases to truck door	6	—	1 78	
Drag 3 cases to truck door	4	—	45	
Drag 4 cases to truck door	17	—	3 20	
Drag 5 cases to truck door	139	—	14 45	
Arrange cases to unload	5		2 61	
Drive to next van	70	—	154 54	
Drive to unload returns	22		26 12	
Unload returns	22	35	13 91	
Carry 1 case to other van	2	2	82	
Carry 2 cases to other van	1	2	62	
Total		1,321	268 90	20 Standard

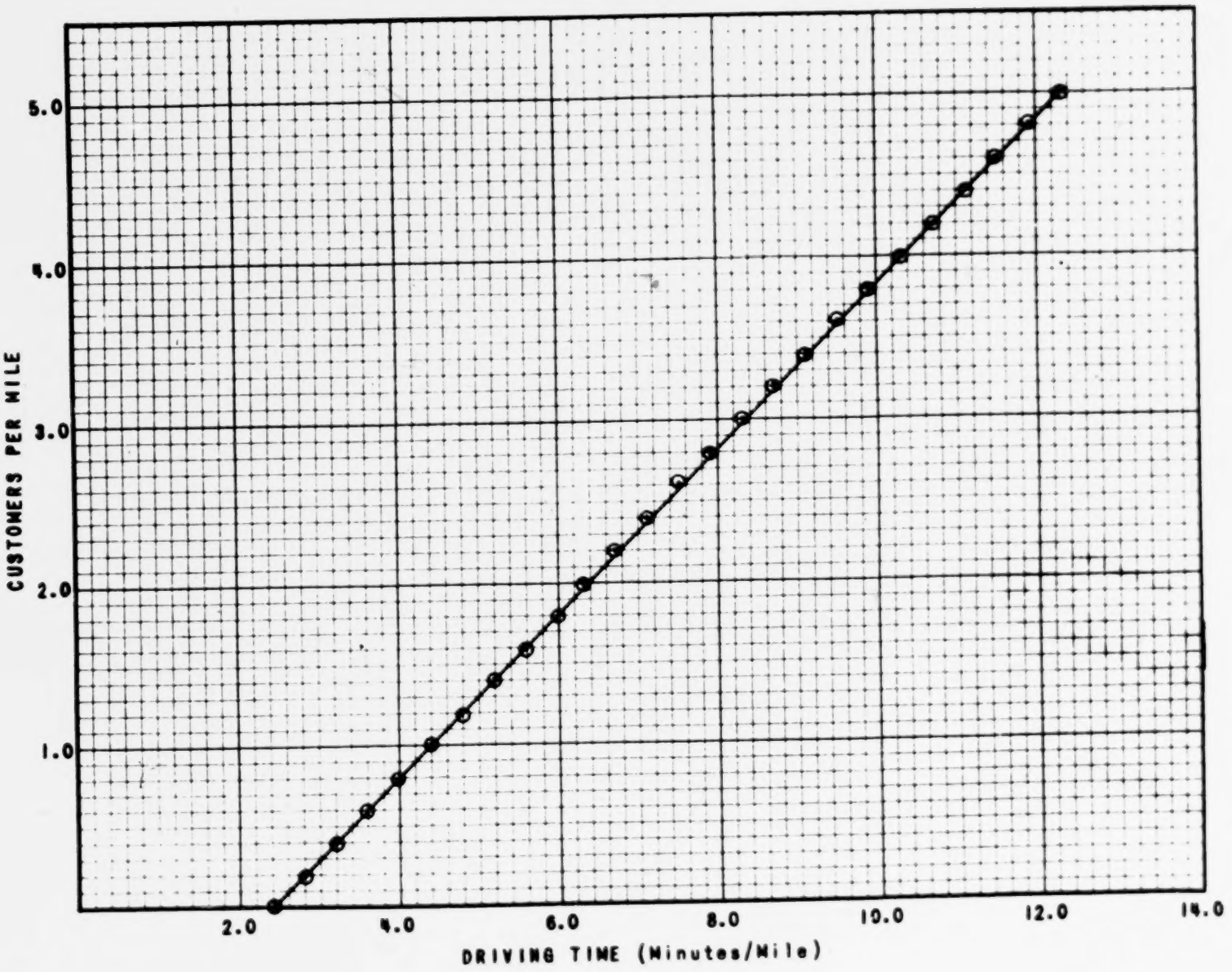
Driving Time—State Route
Minutes per Mile (Gas Trucks)

Minutes per Mile	
0	0
0	2
0	4
0	6
0	8
1	0
1	2
1	4
1	6
1	8
2	0
2	2
2	4
2	6
2	8
3	0
3	2
3	4
3	6
3	8
4	0
4	2
4	4
4	6
4	8
5	0

Minutes per Mile	
5	4
5	8
6	2
6	6
7	0
7	4
7	8
8	2
8	6
9	0
9	3
9	7
10	1
10	5
10	9
11	3
11	7
12	1
12	5
12	9
13	3

DRIVING TIME - GAS TRUCK

STORE ROUTE



[fol. 969] Appendix B

Development of Delivery Time Standards

Time studies were taken in four store divisions, but principally in the Elston Division.

Several route foremen familiar with normal delivery operations, were trained to make time studies. Time data from their studies were the basis for subsequent delivery standards.

Time studies were taken from continuous running stop watches and recorded on time study sheets for the following operational elements:

1. *Check In*

Punch clock, go to locker room and change clothes. Any stop for conversation or other reason was recorded as Miscellaneous or Personal Time.

2. *Pick Up Loading or Order Sheet*

Go to office, supervisor or other place and get loading sheet, order sheet, changes in customers' orders or other instructions.

3. *Get Vehicle*

Go to garage or parking lot and get vehicle. This time ends when he starts from garage or parking lot to go direct to the route or when he arrives at a loading point to pick up extra products which have not been loaded by the loading crew.

[fol. 970] 4. *Service Vehicle*

Service vehicle with gas, water and oil or wait for mechanic to perform these operations. Wash vehicle and ice load.

5. *Wait to Service Vehicle*

Wait to get vehicle into position to be serviced.

6. *Load Truck At Plant*

Load additional orders received after truck was loaded by loading crew or some miscellaneous by products (List number of cases loaded).

7. *Wait to Load Truck*

8. *Check Load*

9. *Drive to First Delivery Stop*
Record time and mileage from plant to first stop on route.

10. *Drive On Route*
This is the time for driving from one customer to the next.

11. *Sell Or Get Order*
Dismount from truck, travel to customer, investigate ice box, or obtain written or verbal order and return to truck. On travel from point of delivery, obtain order and return to truck. If empties are picked up after receiving the order, the time ends when the order is received and travel time to empty storage is included in Pick Up Empties. Actual selling is done by solicitors and not by drivers.

12. *Delay In Selling Or Getting Order*
Any time waiting for store to open or waiting for customer to perform other operations before placing the order.

[fol. 971] 13. *Select Merchandise*
Leave seat, open truck door if necessary, enter truck, place cases to be delivered to a customer near the truck door, stack extra containers on top of cases and dismount from truck.

14. *Unload Order*
Remove selected cases from floor of truck and place on ground, hand truck or dolly.

15. *Deliver*
Pick up case and carry to customer's delivery point; or engage bottom case of stack with hook and drag cases to delivery point; or push hand truck or dolly loaded with cases to delivery point.

16. *Customer Service*
Any specific service rendered individual customers beyond regular delivery of products such as:

a. Move cases to another part of the store other than the place where original delivery ended.

b. Place containers in ice box.
c. Arrange containers in ice box.
d. Provide customer with ice.

17. *Deliver and Return to Truck For Another Delivery*

18. *Go To Empty Bottle Storage*
Go from delivery or collection point to empty bottle storage.

19. *Sort Bottles*
Separate bottles belonging to other dairies from those belonging to driver's company.

20. *Pick Up Empties*
Pick up or load empty bottles and cases on hand truck or dolly and return to truck.

[fol. 972] 21. *Load Empties On Truck*
Pick up empty bottles and cases and place in truck. Record number of cases.

22. *Prepare Bill Or Delivery Slip*
Includes counting, recording and pricing of quantities delivered and entering deposits and refunded deposits on bottles and or cases.

23. *Have Slip And Delivery Checked By Customer*
Travel to customer and present slip for verification and or signature.

24. *Delay In Having Slip And Delivery Checked*

25. *Collect*
Present delivery slip or bill to customer, make change and receipt slip.

26. *Delay In Collecting*

27. *Return To Truck After Collection*

28. *Arrange Load*
All movement of cases and containers within the truck to obtain access to required products or relieve congestion near truck doors.

29. *Route Bookkeeping*
Enter deliveries, total sales, deposits and deposit refunds for each customer in route book.

30. *Drive From Last Stop To Plant*

31. *Delay To Unload Empties Or Returned Goods At Plant*
Wait to move truck into position to unload; wait for van man, talk to van man or any other person.

32. *Unload Empties At Plant*
Record number of cases.

[fol. 973] 33. *Unload Returned Goods*
Record number of cases and containers.

34. *Garage Vehicle*
Time required to drive to garage or parking lot from point where returned goods are unloaded or truck is serviced and park vehicle.

35. *Office Bookkeeping*
Prepare necessary records for cashier. Balance original load against cash receipts, signed bills, returned merchandise, bottle and case deposits and credits.

36. *Turn In Cash To Cashier*

37. *Prepare Order Or Loading Sheet For Next Day*

38. *Miscellaneous Time*
Any time which cannot be charged directly to a delivery or preparation for delivery such as:

a. Lunch
b. Stop for coffee
c. Telephone
d. Personal time

Operations were broken down into the operational elements previously described to provide a sequence of normal activities of drivers for time studies to be made, and also to determine whether there was sufficient deviation from these activities or methods of procedure to necessitate additional time studies to be taken to determine proper standard time allowances.

[fol. 974] The analysis of the time studies showed there was sufficient consistency by drivers to set standard time

allowances on all except Unloading Empties and Returned Goods at the plant.

Additional time studies were later taken on the following operational elements for Unloading Empties and Returned Goods At Plant to obtain a more accurate standard time allowance:

31. *Delay To Unload*
Wait to move truck into position to unload, wait for van man, talk to van man or any other person.

32-A *Unload One Case of Glass*
Time for picking up case from floor of truck and either hand to van man or place on van floor.

32-B *Unload Two Cases of Glass*
Time for picking up cases from floor of truck and either hand to van man or place on van floor.

32-C *Unload One Case Of Paper*
Time for picking up case from floor of truck and either hand to van man or place on van floor.

32-D *Unload Two Cases Of Paper*
Time for picking up cases from floor of truck and either hand to van man or place on van floor.

32-E *Unload Three Cases Or More Of Paper*
(Record number)
Time for picking up cases from floor of truck and either hand to van man or place on van floor.

[fol. 975] 32-F *Drag A Stack Of Cases To Truck Door For Unloading*
Record number in stack.

32-G *Arrange Cases To Unload*

32-H *Drive To Next Van*

32-I *Drive To Unload Returned Goods*

4 *Service Truck*

33 *Unload Returned Goods*
Record cases of glass, cases of paper, cases of butter, eggs and cheese.

The time from the time studies for delivery elements previously described were combined to form complete operations, which were then divided into two divisions as follows:

A. *Make Ready And Personal Time*

a. Check In
Element 1 Check In

b. Get And Garage Vehicle
Element 3 Get Vehicle
Element 34 Garage Vehicle

c. Prepare For Delivery
Element 2 Pick Up Loading Or Order Sheet
Element 4 Service Vehicle
Element 5 Wait To Service Vehicle
Element 8 Check Load

[fol. 976] d. Office Bookkeeping
Element 35 Office Bookkeeping
Element 36 Turn In Cash To Cashier
Element 37 Prepare Order Or Loading Sheet For Next Day

e. Miscellaneous Time
Element 38 Miscellaneous Time

f. Drive To And From Route
Element 9 Drive To First Delivery Stop
Element 30 Drive From Last Stop To Plant

g. Delay To Load and Unload At Plant
Element 7 Wait To Load Truck
Element 31 Delay To Unload Empties Or Returned Goods At Plant

B. *Route Time*

a. Sell Or Get Order
Element 11 Sell Or Get Order

b. Delay To Sell Or Get Order
Element 12 Delay In Selling Or Getting Order

c. Customer Service
Element 16 Customer Service

d. Make Out Order Slip
Element 22 Prepare Bill or Delivery Slip

e. Have Slip And Delivery Checked
Element 23 Have Slip And Delivery Checked By Customer

Element 24 Delay In Having Slip And Delivery Checked

[fol. 977] f. Collect

Element 25 Collect

Element 27 Return To Truck After Collection

g. Delay To Collect

Element 26 Delay In Collecting

h. Route Bookkeeping

Element 29 Route Bookkeeping

i. Drive

Element 10 Drive On Route

j. Load Cases At Plant

Element 6 Load Truck At Plant

k. Select Merchandise

Element 13 Select Merchandise

l. Unload Order

Element 14 Unload Order

m. Deliver

Element 15 Deliver

Element 17 Deliver And Return To Truck For Another Delivery

n. Sort Bottles

Element 18 Go To Empty Bottle Storage

Element 19 Sort Bottles

o. Pick Up Empties

Element 20 Pick Up Empties

p. Load Empties On Truck

Element 21 Load Empties On Truck

[fol. 978] q. Arrange Load

Element 28 Arrange Load

r. Unload Cases At Plant

Element 32-A Unload One Case Of Glass

Element 32-B Unload Two Cases Of Glass

Element 32-C Unload One Case Of Paper

Element 32-D Unload Two Cases Of Paper

Element 32-E Unload Three Or More Cases Of Paper

Element 32-F Drag A Stack Of Cases To Truck

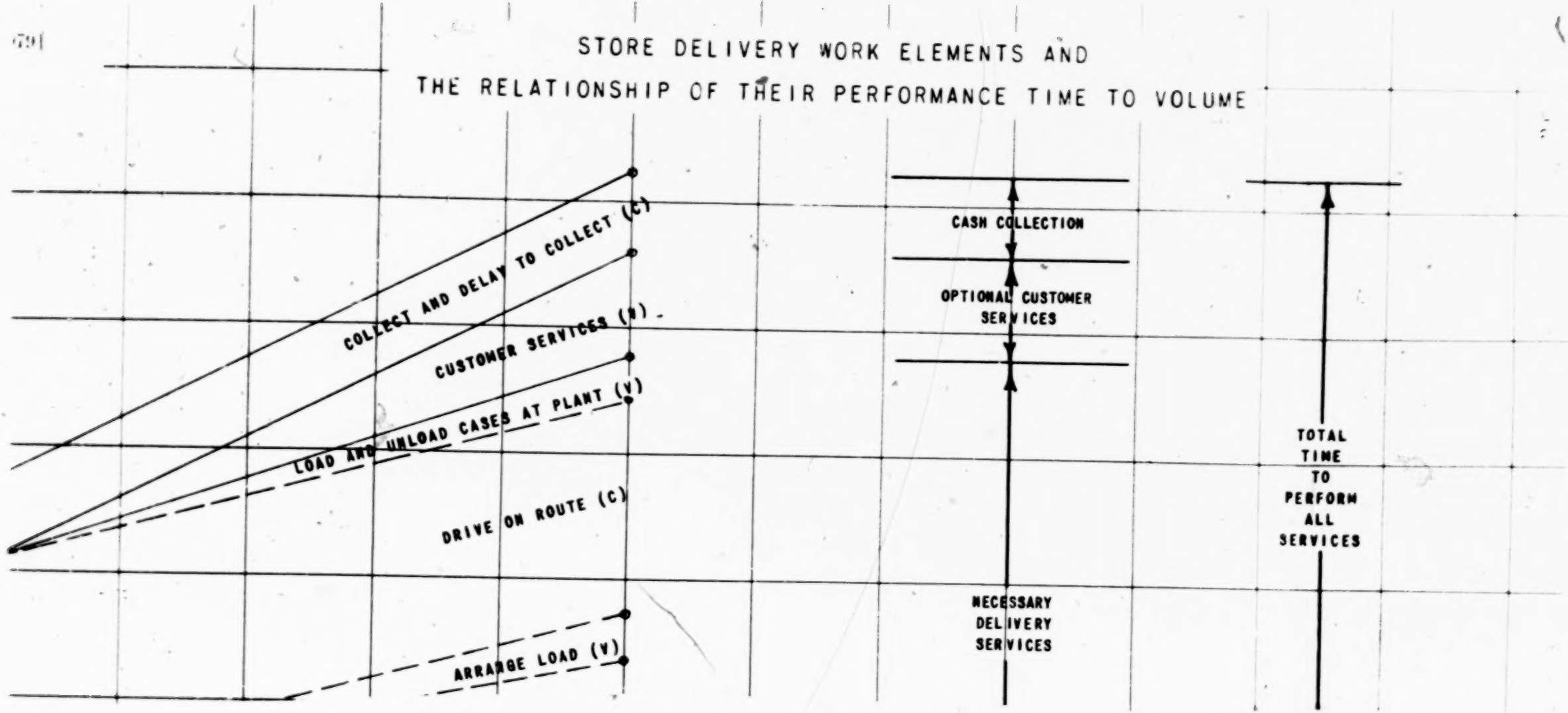
Element 32-G Arrange Cases To Unload

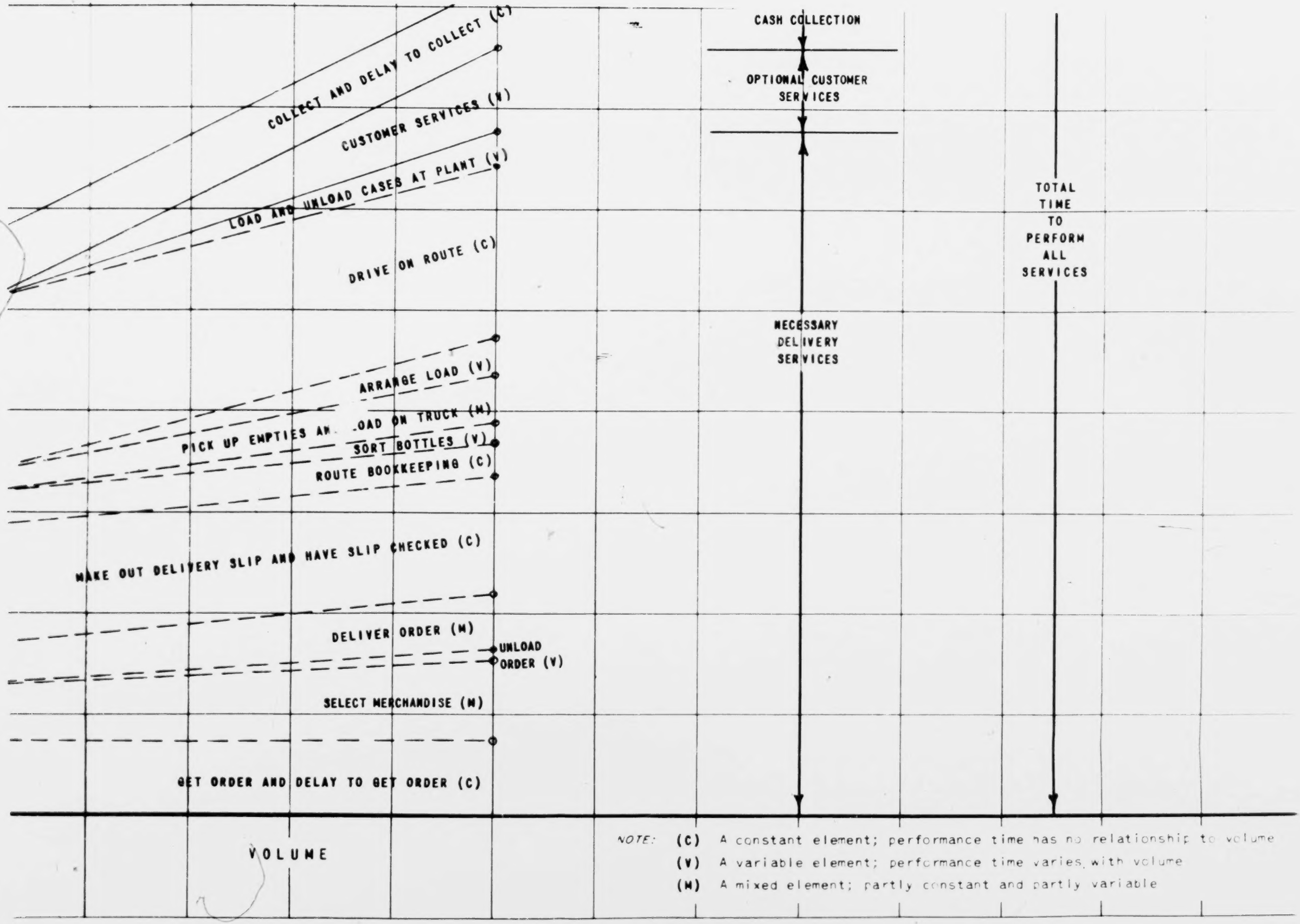
Element 32-H Drive To Next Van

Element 32-I	Drive To Unload Returned Goods
Element 33	Unload Returned Goods

Standard time allowances for the preceding operations were developed from the time studies as shown in Appendix A.

STORE DELIVERY WORK ELEMENTS AND THE RELATIONSHIP OF THEIR PERFORMANCE TIME TO VOLUME




COLLECT AND DELAY TO COLLECT (C)
CUSTOMER SERVICES (M)
LOAD AND UNLOAD CASES AT PLANT (V)
DRIVE ON ROUTE (C)
ARRANGE LOAD (V)
PICK UP EMPTIES AND LOAD ON TRUCK (M)
SORT BOTTLES (V)
ROUTE BOOKKEEPING (C)
MAKE OUT DELIVERY SLIP AND HAVE SLIP CHECKED (C)
DELIVER ORDER (M)
UNLOAD ORDER (V)
SELECT MERCHANDISE (M)
GET ORDER AND DELAY TO GET ORDER (C)
VOLUME
CASH COLLECTION
OPTIONAL CUSTOMER SERVICES
NECESSARY DELIVERY SERVICES
TOTAL TIME TO PERFORM ALL SERVICES
NOTE: (C) A constant element; performance time has no relationship to volume
(V) A variable element; performance time varies with volume
(M) A mixed element; partly constant and partly variable

(Jul 981)

Schedule 2

Determination of a Store Discount Schedule
(Refer to Time Standards in Appendix)

Deliver	Sort Bottles (2)	Pick Up Empties	Load Empties on Truck	Average Load	Unload Cases at Plant	Total Delivery Time	Total Delivery Cost (15c Min.)	Delivery Cost per Quart	Delivery and Platform Cost per Quart (3)	Margin Between List Price (20¢ a quart) and Delivered Cost	Margin Imposed (25¢ a quart) Less Delivered Cost
795		43	016	158	084	12 232	183 480c	18 35c	32 35c		
795		43	990	313	166	42 939	194 085	9 70	23 70		
869		188	136	471	250	13 908	208 620	6 95	20 95		
993		581	182	630	334	15 046	225 690	5 64	19 64	0 36c	1 20
1 114		678	227	784	416	16 167	242 505	4 85	18 85	1 15	8 05
1 238		775	273	943	500	17 307	259 605	4 33	18 33	1 67	10 59
1 361		872	318	1 101	584	18 443	276 645	3 95	17 95	2 05	12 44
1 482		966	363	1 255	666	19 564	293 460	3 69	17 69	2 31	13 71
1 606		1 063	409	1 414	750	20 703	310 545	3 45	17 45	2 55	14 88
1 730		1 159	455	1 572	834	21 840	327 600	3 28	17 28	2 72	15 71
1 975		1 350	545	1 885	1 000	24 100	361 500	3 01	17 01	2 99	17 02
2 220		1 541	635	2 198	1 166	26 360	395 400	2 82	16 82	3 18	17 95
2 468		1 734	727	2 515	1 334	28 636	429 540	2 68	16 68	3 32	18 63
2 713		1 925	818	2 828	1 500	30 897	463 455	2 57	16 57	3 43	19 17
2 957		2 116	908	3 140	1 666	33 154	497 310	2 49	16 49	4 01	19 56
3 267		2 357	1 022	3 536	1 876	35 997	539 955	2 40	16 40	4 10	20 00

[fol. 982]

Schedule 2A

Determination of a Chain Store Discount Schedule
(Refer to Schedule #2)

Volume (Fibre Quarts of Milk per Day)	Total* Delivery Time (Minutes)	Total Delivery Cost (15¢ Min.)	Delivery Cost per Quart	Delivery & Platform Cost per Quart	Margin Between List Price (20½¢) and Total Cost	Margin Expressed as a % of List Price
10	10 582	158 730¢	15 87¢	29 87¢		
20	10 959	164 385	8 22	22 22		
30	11 598	173 970	5 80	19 80	0 70¢	3 41
40	12 406	186 090	4 65	18 65	1 85	9 02
50	13 197	197 955	3 96	17 96	2 54	12 39
60	14 007	210 105	3 50	17 50	3 00	14 63
70	14 813	222 195	3 17	17 17	3 33	16 24
80	15 604	234 060	2 93	16 93	3 57	17 41
90	16 413	246 195	2 73	16 73	3 77	18 39
100	17 220	258 300	2 58	16 58	3 92	19 12
120	18 820	282 300	2 35	16 35	4 15	20 24
140	20 420	306 300	2 19	16 19	4 31	21 02
160	22 036	330 540	2 07	16 07	4 43	21 61
180	23 637	354 555	1 97	15 97	4 53	22 10
200	25 234	378 510	1 89	15 89	4 61	22 49
225	27 252	408 780	1 82	15 82	4 68	22 83
300	33 267	499 005	1 66	15 66	4 84	23 61
400	40 166	602 490	1 51	15 51	3 99	24 34
500	49 310	739 650	1 48	15 48	5 02	24 49
600	58 660	879 900	1 47	15 47	5 03	24 54

* Total delivery time (chain stores) Equals Total delivery time (independent stores) less Customer Service, Collect, and Delay to Collect.

[fol. 983]

Determination of a Chain Store Discount Schedule;
The Minimum Profit—Maximum Discount Line
(Based on 50% Approximation, Schedule 4)

	Independent Store			Chain Store	
Volume (Fibre Quarts of Milk per Day)	1 Maximum Available Margin	2 Rebated Discount (50% Approx.)	3 Gross Margin	4 Maximum Available Margin	5 4 3 Maximum Discount
10					
20					
30		0 7 %		3 41%	3 41%
40	4 20%	2 0	2 20%	9 02	6 82
50	8 05	3 25	4 80	12 39	7 59
60	10 59	4 50	6 09	14 63	8 54
70	12 44	5 80	6 64	16 24	9 60
80	13 71	7 10	6 61	17 41	10 80
90	14 88	7 35	7 53	18 39	10 86
100	15 71	7 60	8 11	19 12	11 01
120	17 02	8 13	8 89	20 24	11 35
140	17 95	8 70	9 25	21 02	11 77
160	18 63	9 20	9 43	21 61	12 18
180	19 17	10 73	9 44	22 10	12 66
200	19 56	10 00	9 56	22 49	12 93
225	20 00	10 00	10 00	22 83	12 83
300	20 88	10 00	10 88	23 61	12 73
400	21 71	10 00	11 71	24 34	12 63
500	21 90	10 00	11 90	24 49	12 59
600	22 15	10 00	12 15	24 54	12 39

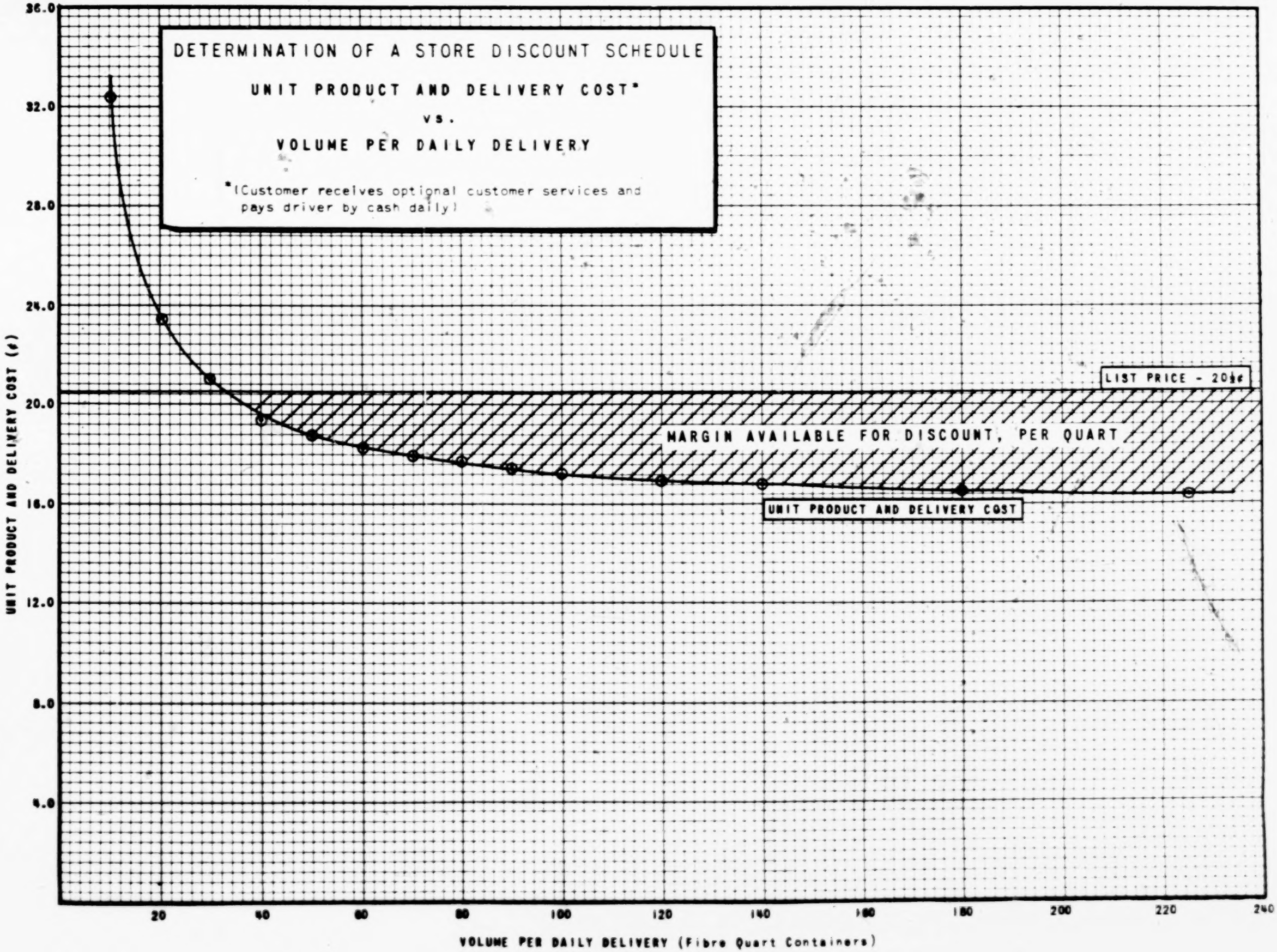
DETERMINATION OF A STORE DISCOUNT SCHEDULE

UNIT PRODUCT AND DELIVERY COST*

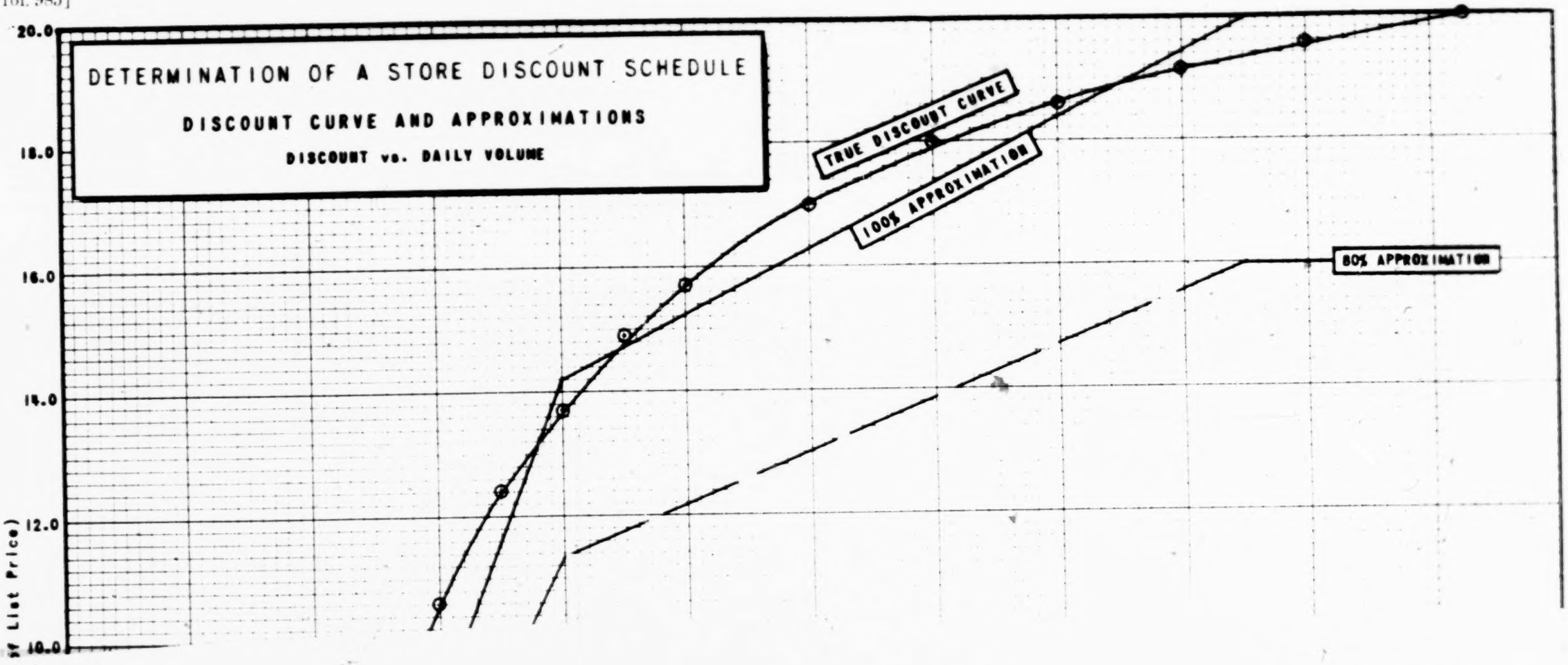
vs.

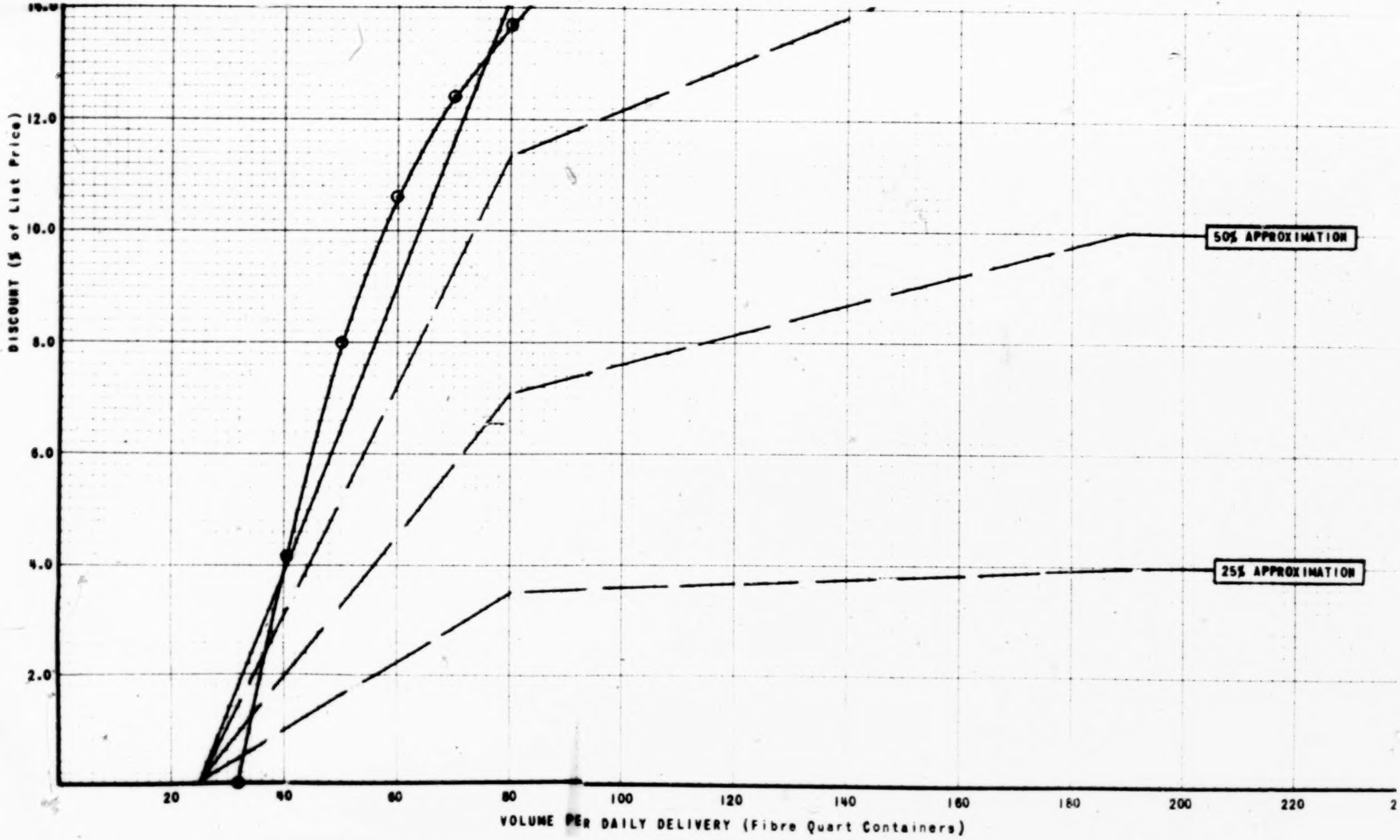
VOLUME PER DAILY DELIVERY

*(Customer receives optional customer services and pays driver by cash daily)



Schedule 4


DETERMINATION OF A STORE DISCOUNT SCHEDULE
DISCOUNT CURVE AND APPROXIMATIONS
DISCOUNT vs. DAILY VOLUME
TRUE DISCOUNT CURVE
100% APPROXIMATION
80% APPROXIMATION
20.0
18.0
16.0
14.0
12.0
10.0
% List Price)


DISCOUNT (% of List Price)
12.0
10.0
8.0
6.0
4.0
2.0
50% APPROXIMATION
25% APPROXIMATION
20
40
60
80
100
120
140
160
180
200
220
VOLUME PER DAILY DELIVERY (Fibre Quart Containers)

(ed. 980)

Schedule 2

Determination of a Store Discount Schedule
(Refer to Time Standards in Appendix)

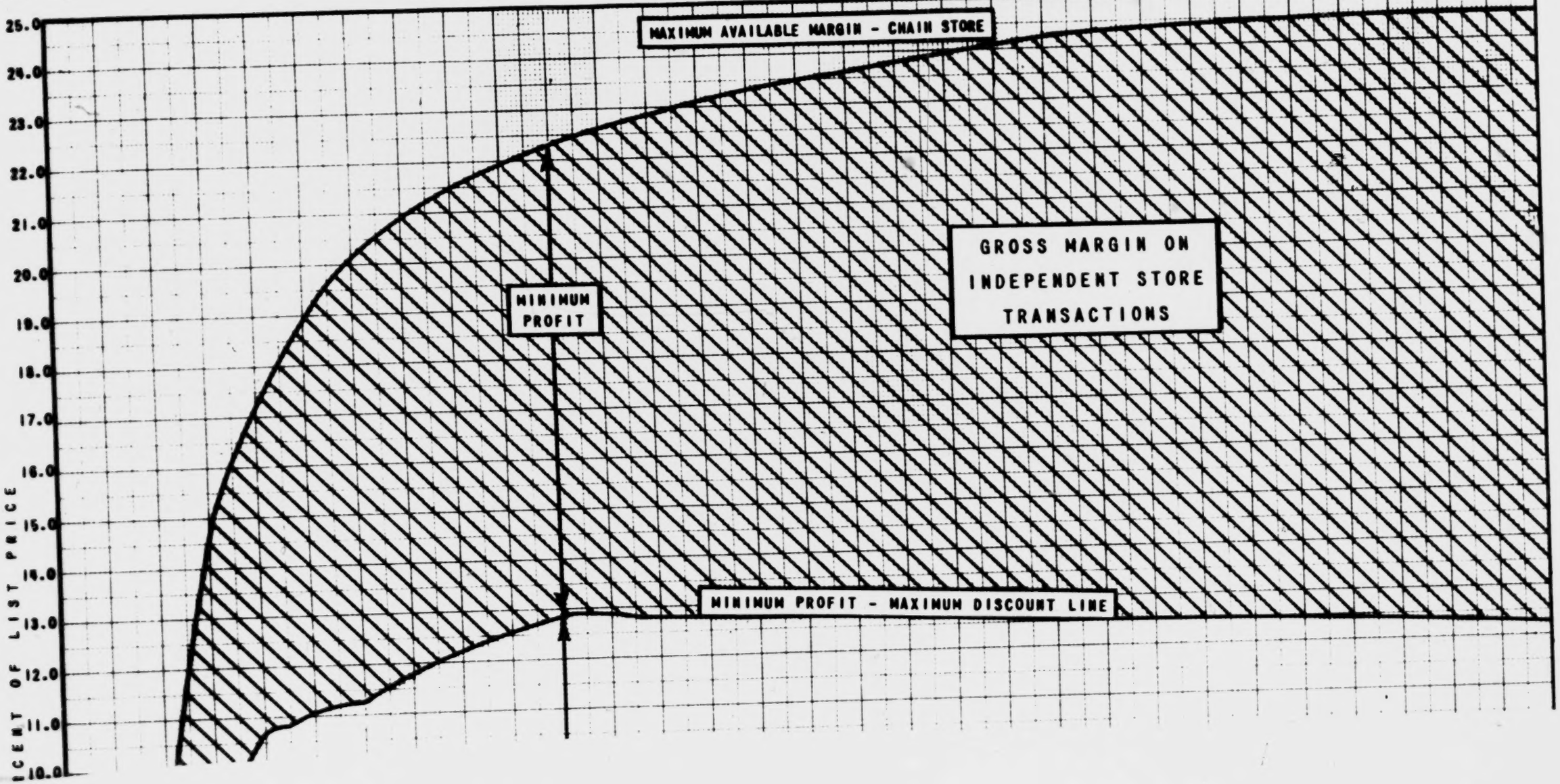
Volume (Fibre Quarts of Milk per Day)	Case Equivalents (24 Quarts per Case)	Get Order	Delay to Get Order	Customer Service	Make Out Order Slip	Have Slip Checked	Route Bookkeeping	Collect	Delay to Collect	Drive on Route (1)	Haul Cases to Plant	Select Merchandise	Unload Order
10	42	1 37	0 11	55	2 14	0 19	0 63	1 19	0 13	3 40	660	1 15	0 59
20	83	1 37	0 11	66	2 14	0 19	0 63	1 19	0 13	3 40	419	1 15	0.6
30	1 25	1 37	0 11	99	2 14	0 19	0 63	1 19	0 13	3 40	329	1 25	145
40	1 67	1 37	0 11	1 32	2 14	0 19	0 63	1 19	0 13	3 40	230	1 45	154
50	2 08	1 37	0 11	1 65	2 14	0 19	0 63	1 19	0 13	3 40	207	1 65	191
60	2 50	1 37	0 11	1 98	2 14	0 19	0 63	1 19	0 13	3 40	358	1 85	230
70	2 92	1 37	0 11	2 31	2 14	0 19	0 63	1 19	0 13	3 40	418	2 05	269
80	3 33	1 37	0 11	2 64	2 14	0 19	0 63	1 19	0 13	3 40	476	2 25	306
90	3 75	1 37	0 11	2 97	2 14	0 19	0 63	1 19	0 13	3 40	536	2 45	345
100	4 17	1 37	0 11	3 30	2 14	0 19	0 63	1 19	0 13	3 40	596	2 65	384
120	5 00	1 37	0 11	3 96	2 14	0 19	0 63	1 19	0 13	3 40	715	3 05	460
140	5 83	1 37	0 11	1 62	2 14	0 19	0 63	1 19	0 13	3 40	834	3 45	536
160	6 67	1 37	0 11	5 28	2 14	0 19	0 63	1 19	0 13	3 40	954	3 85	614
180	7 50	1 37	0 11	5 94	2 14	0 19	0 63	1 19	0 13	3 40	1 073	4 25	690
200	8 33	1 37	0 11	6 60	2 14	0 19	0 63	1 19	0 13	3 40	1 191	4 65	766
225	9 38	1 37	0 11	7 425	2 14	0 19	0 63	1 19	0 13	3 40	1 341	5 15	863

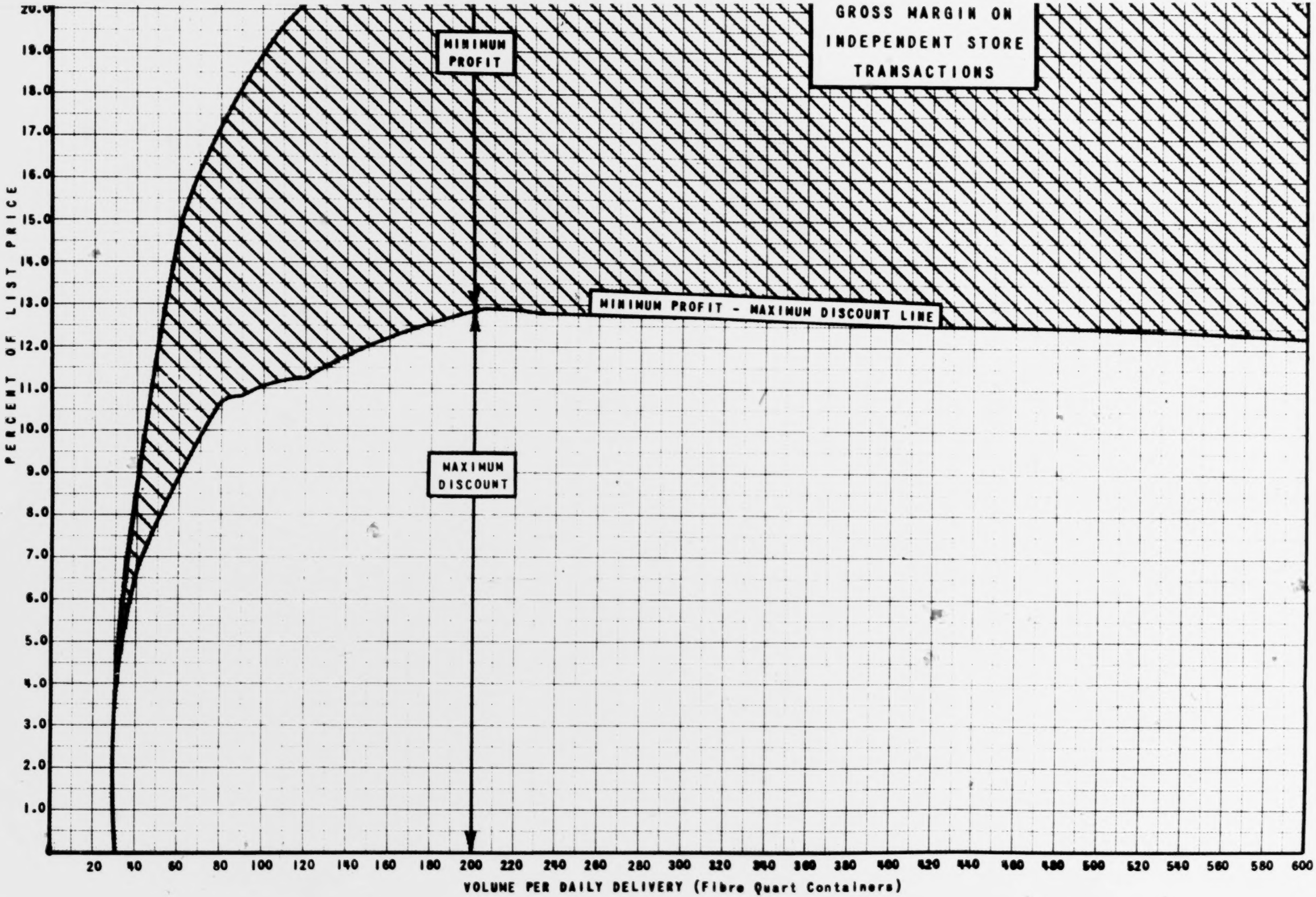
(1) Varies by route; 3.40 minutes per customer is a reasonable time.
(2) To avoid complexities of product mix in this example, assume that all milk was purchased in fibre containers.
(3) Use 14¢ per quart for platform cost.

[Fol. 986]

Schedule 4A

DETERMINATION OF A CHAIN STORE DISCOUNT SCHEDULE



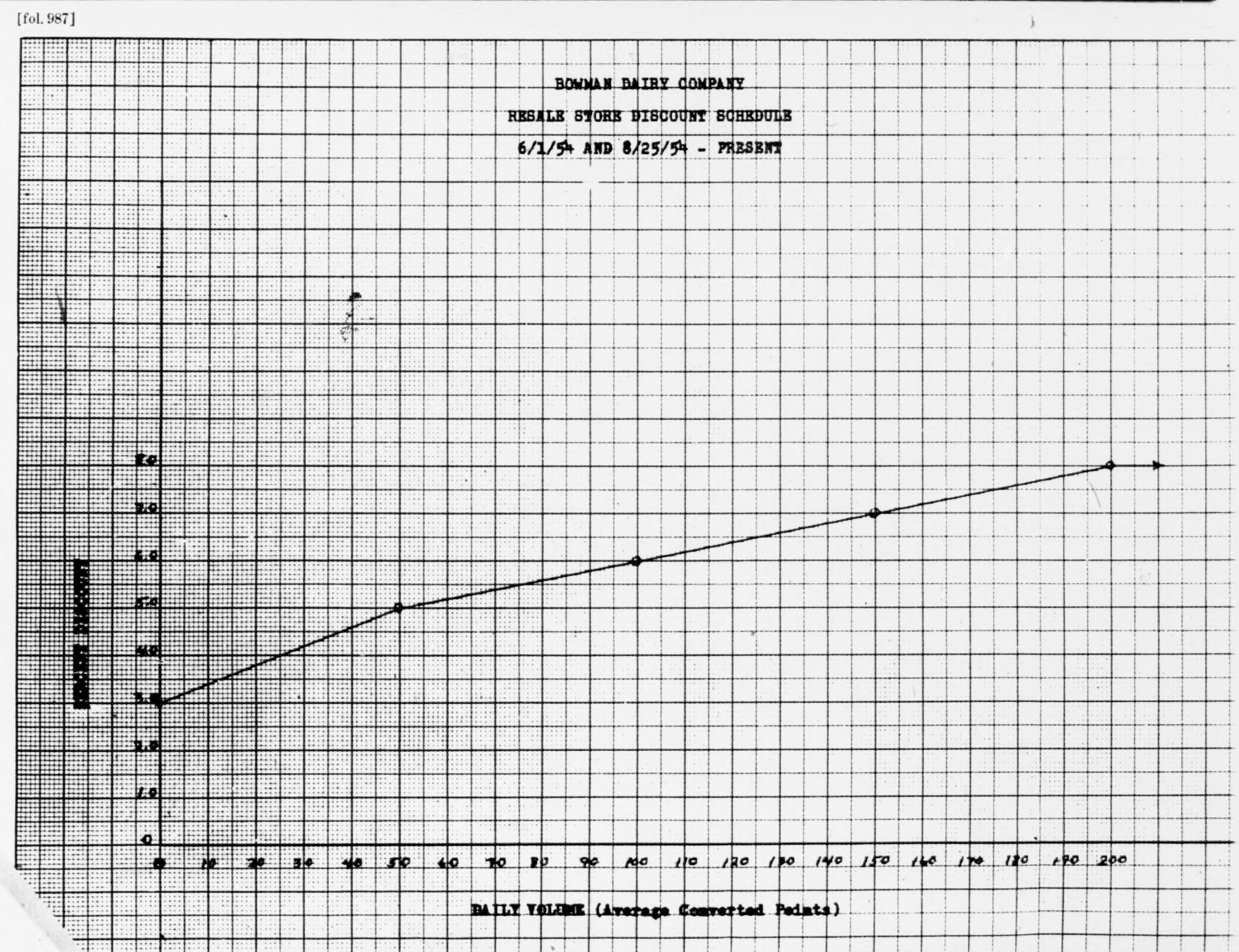

GROSS MARGIN ON INDEPENDENT STORE TRANSACTIONS
MINIMUM PROFIT
MINIMUM PROFIT - MAXIMUM DISCOUNT LINE
MAXIMUM DISCOUNT
PERCENT OF LIST PRICE
20.0
19.0
18.0
17.0
16.0
15.0
14.0
13.0
12.0
11.0
10.0
9.0
8.0
7.0
6.0
5.0
4.0
3.0
2.0
1.0
20 40 60 80 100 120 140 160 180 200 220 240 260 280 300 320 340 360 380 400 420 440 460 480 500 520 540 560 580 600
VOLUME PER DAILY DELIVERY (Fibre Quart Containers)

[fol. 987]

BOWMAN DAIRY COMPANY

RESALE STORE DISCOUNT SCHEDULE

6/1/54 AND 8/25/54 - PRESENT



fol. 988

Schedule 6

Elston Division Expenses

November, 1954

Auto Expense:		
Depreciation	$ 1 706 19	
Gas and oil	477 65	
Insurance	770 24	
License	894 58	
Repairs and supplies	4 665 99	
Repair and upkeep wages	1 379 70	
Rental proration		$ 9 894 35
Salaries and Wages:		
Delivery wages	$31 608 28	
Milkroom wages	7 407 79	
Solicitors' wages	3 520 00	
Office salaries and wages	4 883 16	
Truck drivers' wages	1 919 51	
Vacation wages	2 129 44	51 468 18
Personnel benefits		12 216 15
Total Commissions		
Bottle Expenses:		
Bottle deposit	$ 114 83	
Bottle loss	709 80	
Foreign bottles	277 90	
Bottle expense	3 502 50	4 465 87
Bottle allowance		
Other Expenses:		
Sales contest expense	$ 800 00	
Advertising	1 903 95	
Bad debts		
Bad debt collections	48 30	
Building repairs	368 44	
Depreciation		
Donations	382 00	
Equipment repairs		
Expense transfers	122 04	
Ice and refrigeration		
Illinois occupation tax	5 71	
Insurance	7 60	
Laundry	268 58	
License		
Membership and dues	849 20	
Miscellaneous expenses	22 93	
Office supplies and expense	56 17	
Operating supplies and expense		
Painting	10 00	
Rentals	423 30	
Taxes	266 53	
Telephone	160 00	
Trade expense	669 17	
Utilities	42 00	
Vending machine expense	6 00	6 613 00
Store license		
Total Expense		$84 657 55
Number of Route Days		1 507
Cost per Route Day		$56 18

Schedule 6—Continued

[fol. 980]	References
1. Source:	Summary of Sales, Delivery, and Collection Expenses (Form ♦50), November 1954.
2. Reference:	Mr. J. Curtin—Elston Division Mr. A. Block—Forest Division Mr. W. Paeth—South Division.
3. Reference:	Mr. R. Buthman—Sales Department
4. Source:	Route book, Route ♦1177 Elston Division, November 1954.
5. Source:	Route book, Route ♦1177 Elston Division, November 1954.
6. Source:	Product Cost to Divisions, November 1954. (Forms ♦10, 11, 11A, 11B, 11C, 11D, 11E, 11F, 13, 14, 15B, 16B, 17A, 18).
7. Source:	(a) Wholesale List Prices (Form ♦M 95-2), Revision ♦190, November 5, 1954. (b) Chain Store Price List (Form ♦M 54), Revision ♦212, November 16, 1954.
8. Source of discount rate:	Resale Store Discounts (Form ♦217-5M), November 1954.

[fol. 990] IN UNITED STATES DISTRICT COURT

DISCOUNT SCHEDULE 1

BOWMAN EXHIBIT 5

Bowman Dairy Company

Resale Store Discount Schedule

Effective Monday, January 19, 1953

Basic discount 3% on all purchases of fresh milk products listed within

Graduated Resale Store Discount Schedule

A graduated discount on all purchases of fresh milk products as hereinafter listed, over and above an average of 30 converted quarts per day, will be paid as follows:

Average Converted Quarts per Day	Percent of Discount	Average Converted Quarts per Day	Percent of Discount
30 to 40	3 0% to 3 5%	220 to 230	6 2% to 6 3%
40 to 50	3 5% to 4 0	230 to 240	6 3 to 6 4
50 to 60	4 0 to 4 2	240 to 250	6 4 to 6 5
60 to 70	4 2 to 4 4	250 to 260	6 5 to 6 6
70 to 80	4 4 to 4 6	260 to 270	6 6 to 6 7
80 to 90	4 6 to 4 8	270 to 280	6 7 to 6 8
90 to 100	4 8 to 5 0	280 to 290	6 8 to 6 9
100 to 110	5 0 to 5 1	290 to 300	6 9 to 7 0
110 to 120	5 1 to 5 2	300 to 310	7 0 to 7 1
120 to 130	5 2 to 5 3	310 to 320	7 1 to 7 2
130 to 140	5 3 to 5 4	320 to 330	7 2 to 7 3
140 to 150	5 4 to 5 5	330 to 340	7 3 to 7 4
150 to 160	5 5 to 5 6	340 to 350	7 4 to 7 5
160 to 170	5 6 to 5 7	350 to 360	7 5 to 7 6
170 to 180	5 7 to 5 8	360 to 370	7 6 to 7 7
180 to 190	5 8 to 5 9	370 to 380	7 7 to 7 8
190 to 200	5 9 to 6 0	380 to 390	7 8 to 7 9
200 to 210	6 0 to 6 1	390 to 400	7 9 to 8 0
210 to 220	6 1 to 6 2	400 and over	8 0

These discounts in excess of but including the basic discount will be paid upon the following conditions:

1. Purchase of an average of 30 or more converted quarts of Bowman Milk and Sta-Slim per normal delivery day.
2. No refrigerator arrangement by the Bowman driver-salesman.
3. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your monthly purchases of Bowman Milk and Sta-Slim will be converted to quarts. This total will be divided by the number of days during the month upon which Bowman Dairy Company makes store deliveries. The result becomes your average converted quarts per day.
2. From your average converted quarts per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to your total purchases of Bowman Dairy Company's fresh milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons.
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream.
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

[fol. 991] In United States District Court

Discount Schedule 2

Bowman Exhibit 6

Bowman Dairy Company

Resale Store Discount Schedule

Effective Friday, July 10, 1953

Basic discount 5.5% on all purchases of fresh milk products listed within

Graduated Resale-Store Discount Schedule

A graduated discount on all purchases of fresh milk products as hereinafter listed, over and above an average of 50 converted quarts per day, will be paid as follows:

Average Converted Quarts per Day	Percent of Discount	Average Converted Quarts per Day	Percent of Discount
50 to 60	5.5% to 5.7%	200 to 210	8.0% to 8.1%
60 to 70	5.7 to 5.9	210 to 220	8.1 to 8.2
70 to 80	5.9 to 6.1	220 to 230	8.2 to 8.3
80 to 90	6.1 to 6.3	230 to 240	8.3 to 8.4
90 to 100	6.3 to 6.5	240 to 250	8.4 to 8.5
100 to 110	6.5 to 6.7	250 to 260	8.5 to 8.6
110 to 120	6.7 to 6.9	260 to 270	8.6 to 8.7
120 to 130	6.9 to 7.1	270 to 280	8.7 to 8.8
130 to 140	7.1 to 7.3	280 to 290	8.8 to 8.9
140 to 150	7.3 to 7.5	290 to 300	8.9 to 9.0
150 to 160	7.5 to 7.6	300 to 310	9.0 to 9.1
160 to 170	7.6 to 7.7	310 to 320	9.1 to 9.2
170 to 180	7.7 to 7.8	320 to 330	9.2 to 9.3
180 to 190	7.8 to 7.9	330 to 340	9.3 to 9.4
190 to 200	7.9 to 8.0	340 to 350	9.4 to 9.5

These discounts in excess of but including the basic discount will be paid upon the following conditions:

1. Purchase of an average of 50 or more converted quarts of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your monthly purchases of Bowman milk products will be converted to quarts. This total will be divided by

the number of days during the month upon which Bowman Dairy Company makes store deliveries. The result becomes your average converted quarts per day.

2. From your average converted quarts per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons.
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream.
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

[fol. 992] In United States District Court

Discount Schedule 3

Bowman Exhibit 7

Resale Store Discount Schedule

Effective Sunday, Nov. 1, 1953

Basic discount 3% on all purchases of fresh milk products listed within

Graduated Resale Store Discount Schedule

A graduated discount on all purchases of fresh milk products as hereinafter listed, over and above an average of 50 converted quarts per day, will be paid as follows:

Average Converted Quarts per Day	Percent of Discount	Average Converted Quarts per Day	Percent of Discount
1 to 49	3%		
50 to 60	5 5% to 5 7%	200 to 210	8 0% to 8 1%
60 to 70	5 7 to 5 9	210 to 220	8 1 to 8 2
70 to 80	5 9 to 6 1	220 to 230	8 2 to 8 3
80 to 90	6 1 to 6 3	230 to 240	8 3 to 8 4
90 to 100	6 3 to 6 5	240 to 250	8 4 to 8 5
100 to 110	6 5 to 6 7	250 to 260	8 5 to 8 6
110 to 120	6 7 to 6 9	260 to 270	8 6 to 8 7
120 to 130	6 9 to 7 1	270 to 280	8 7 to 8 8
130 to 140	7 1 to 7 3	280 to 290	8 8 to 8 9
140 to 150	7 3 to 7 5	290 to 300	8 9 to 9 0
150 to 160	7 5 to 7 6	300 to 310	9 0 to 9 1
160 to 170	7 6 to 7 7	310 to 320	9 1 to 9 2
170 to 180	7 7 to 7 8	320 to 330	9 2 to 9 3
180 to 190	7 8 to 7 9	330 to 340	9 3 to 9 4
190 to 200	7 9 to 8 0	340 to 350	9 4 to 9 5

These discounts in excess of but including the basic discount will be paid upon the following conditions:

1. Purchase of an average of 50 or more converted quarts of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your monthly purchases of Bowman milk products will be converted to quarts. This total will be divided by the number of days during the month upon which Bow-

man Dairy Company makes store deliveries. The result becomes your average converted quarts per day.

2. From your average converted quarts per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons.
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream.
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

[fol. 993] In United States District Court

Discount Schedule 4

Bowman Exhibit 8

Resale Store Discount Schedule

Effective Monday, November 16, 1953

Graduated Resale Store Discount Schedule

A discount on all purchases of fresh milk products as hereinatter listed, will be paid as follows:

Average Converted Quarts per Day	Percent of Discount
0 to 24	0%
25 to 49	3%
50 to 65	4%
65 to 150	4% to 5%
150 to 299	5% to 6½%
300 and over	7%

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of 25 or more converted quarts of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your monthly purchases of Bowman milk products will be converted to quarts. This total will be divided by the number of days during the month upon which Bowman Dairy Company makes store deliveries. The result becomes your average converted quarts per day.
2. From your average converted quarts per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman

Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons.
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream.
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

[fol. 994] In United States District Court

Discount Schedule 5

Bowman Exhibit 9

Resale Store Discount Schedule

Effective Wednesday, December 9, 1953

Graduated Resale Store Discount Schedule

A discount on all purchases of fresh milk products as hereinafter listed, will be paid as follows:

Average Converted Milk Quarts per Day	Percent of Discount
0 to 24	0%
25 to 150	2% to 3%
150 to 235	3% to 4%
235 to 300	4% to 5%
Over 300	5%

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of 25 or more converted quarts of Bowman milk per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your total monthly purchases of Bowman milk in gallons, ½ gallons and quarts will be converted to quarts. This total will be divided by the number of days during the month in which Bowman Dairy Company makes store deliveries. The result becomes your average converted quarts per day.
2. From your average converted quarts per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman

Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons.
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream.
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

[fol. 995] In United States District Court

Discount Schedule 6

Bowman Exhibit 10

Bowman Dairy Company

Resale Store Discount Schedule

Effective Monday, February 8, 1954

Graduated Resale Store Discount Schedule

Average Converted Points per Day	Percent of Discount	Average Converted Points per Day	Percent of Discount
0 to 10	2 0% to 2 1%	150 to 160	3 5% to 3 6%
10 to 20	2 1 to 2 2	160 to 170	3 6 to 3 7
20 to 30	2 2 to 2 3	170 to 180	3 7 to 3 8
30 to 40	2 3 to 2 4	180 to 190	3 8 to 3 9
40 to 50	2 4 to 2 5	190 to 200	3 9 to 4 0
50 to 60	2 5 to 2 6	200 to 210	4 0% to 4 1
60 to 70	2 6 to 2 7	210 to 220	4 1 to 4 2
70 to 80	2 7 to 2 8	220 to 230	4 2 to 4 3
80 to 90	2 8 to 2 9	230 to 240	4 3 to 4 4
90 to 100	2 9 to 3 0	240 to 250	4 4 to 4 5
100 to 110	3 0 to 3 1	250 to 260	4 5 to 4 6
110 to 120	3 1 to 3 2	260 to 270	4 6 to 4 7
120 to 130	3 2 to 3 3	270 to 280	4 7 to 4 8
130 to 140	3 3 to 3 4	280 to 290	4 8 to 4 9
140 to 150	3 4 to 3 5	290 to 300	4 9 to 5 0

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of one or more converted points of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your total monthly purchases of Bowman milk products will be converted to points. This total will be divided by the number of days during the month in which Bowman Dairy Company makes store deliveries. The result becomes your average points per day.

2. From your average points per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

[fol. 996] In United States District Court

Discount Schedule 7

Bowman Exhibit 11

Bowman Dairy Company

Resale Store Discount Schedule

Graduated Resale Store Discount Schedule

Average Converted Points per Day	Percent of Discount	Average Converted Point per Day	Percent of Discount
0 to 10	2.0% to 2.4%	80 to 90	5.2% to 5.6%
10 to 20	2.4% to 2.8%	90 to 100	5.6% to 6.0%
20 to 30	2.8% to 3.2%	100 to 110	6.0% to 6.4%
30 to 40	3.2% to 3.6%	110 to 120	6.4% to 6.8%
40 to 50	3.6% to 4.0%	120 to 130	6.8% to 7.2%
50 to 60	4.0% to 4.4%	130 to 140	7.2% to 7.6%
60 to 70	4.4% to 4.8%	140 to 150	7.6% to 8.0%
70 to 80	4.8% to 5.2%		

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of one or more converted points of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your total monthly purchases of Bowman milk products will be converted to points. This total will be divided by the number of days during the month upon which Bowman Dairy Company make store deliveries. The result becomes your average points per day.
2. From your average points per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons
Golden Guernsey

Cream, including Half & Half, Rich Cream and Whipping Cream
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

7

[fol. 997] In United States District Court

Discount Schedule 8

Bowman Exhibit 12

Bowman Dairy Company

Resale Store Discount Schedule

Graduated Resale Store Discount Schedule

Average Converted Points Sold per Day	Percent of Discount	Average Converted Points Sold per Day	Percent of Discount
0 to 10	3 0%, to 3 4%	80 to 90	5 6%, to 5 8%
10 to 20	3 4%, to 3 8%	90 to 100	5 8%, to 6 0%
20 to 30	3 8%, to 4 2%	100 to 110	6 0%, to 6 2%
30 to 40	4 2%, to 4 6%	110 to 120	6 2%, to 6 4%
40 to 50	4 6%, to 5 0%	120 to 130	6 4%, to 6 6%
50 to 60	5 0%, to 5 2%	130 to 140	6 6%, to 6 8%
60 to 70	5 2%, to 5 4%	140 to 150	6 8%, to 7 0%
70 to 80	5 4%, to 5 6%		

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of one or more converted points of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your total monthly purchases of Bowman milk products will be converted to points. This total will be divided by the number of days during the month upon which Bowman Dairy Company make store deliveries. The result becomes your average points per day.
2. From your average points per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

   Milk, including quarts, half-gallons and gallons
   Golden Guernsey

Cream, including Half & Half, Rich Cream and Whipping Cream
Quick Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

No. 8. Revised Discount Schedule Effective June 1, 1954 in conjunction with price decrease effective same date.

[fol. 998] In United States District Court

Discount Schedule 9

Bowman Exhibit 13

Resale Store Discount Schedule

Effective Monday, January 2, 1956

Graduated Resale Store Discount Schedule

A discount on all purchases of fresh milk products as hereinafter listed, will be paid as follows:

Average Converted Points per Day	Percent of Discount
0 to 24	0%
25 to 99	2% to 3%
99 to 199	3% to 4%
199 to 299	4% to 5%
299 to 355	5% to 5½%
355 and over	5½%

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of 25 or more converted points of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your monthly purchases of Bowman milk products will be converted to points. This total will be divided by the number of days during the month upon which Bowman Dairy Company makes store deliveries. The result becomes your average converted points per day.
2. From your average converted points per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream
Quick-Whip
Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

Bowman Dairy Company.

No. 9

[fol. 999] IN UNITED STATES DISTRICT COURT

BOWMAN EXHIBIT NO. 14

Discounts Schedule Tests

(March, 1955)

1. Route 1471.
2. Route 129.
3. Kroger Chain Store Discount.
4. A & P Chain Store Discount.

[fol. 999a] [File endorsement omitted.]

[fol. 1000] Stevenson, Jordan & Harrison, Inc.
Management Engineers and Consultants
19 West 44th Street, New York 36, N. Y.
205 W. Wacker Drive, Chicago 6, Ill.
779 Washington Street, Buffalo 3, N. Y.
Hanna Building, Cleveland 15, O.

New York 36, N. Y.,
October 24, 1955.

Mr. Francis Kullman, Jr.,
Bowman Dairy Company,
140 West Ontario Street,
Chicago 10, Illinois.

DEAR MR. KULLMAN:

Enclosed is a report concerning four tests of discount schedules which you asked us to make. They are:

1. Route 1471 (South Division)—March 1955.
2. Route 129 (South Division)—March 1955.
3. Kroger chain store discount—March 1955.
4. A & P chain store discount—March 1955.

The procedure for testing these two routes and two chain store discounts was that outlined in the *Manual For Establishing And Testing A Store Discount Schedule.*

You will notice that in establishing the schedule, volume was expressed on a point basis. That is an industry-wide

practice of relating many dairy items to a common basis. [fol. 1001] It is convenient for a dairy to use in administering its distribution system, and easy for the customer to understand. Since we cannot predict and plan for all of the possible combinations of purchased items and quantities available to customers, the point method is a necessary basis for prior measurement. However, there are some inconsistencies in point values, e.g., a quart of milk is one point while a quart of cream is four points, although their delivery costs are equal. This basis is inadequate for an accurate and comprehensive test of an actual previous transaction. Therefore, the actual total product volume and mix was the basis for computing delivery costs for regular delivery practices, platform costs, discounts, and percent of margin returned on each customer's transaction.

The cost calculations show that the lower net prices (higher discounts) to the chain store outlets on Routes 129 and 1471, when compared individually to the other stores on those routes, do not exceed the effect of cost differences resulting from greater volume and fewer delivery services. [fol. 1002] Cost calculations also substantiate the general discount of 11.00% rebated to the A & P and Kroger chains.

Details are shown in the body of the report.

Respectfully submitted, Stevenson, Jordan & Harrison, Inc., A. J. Bergfeld.

AJB:ak.

[fol. 1003] CHAPTER I

[fol. 1004] I. Test of Routes =129 and =1471 (South Division)

These routes were tested in the same manner as described previously in the *Manual For Establishing And Testing A Store Discount Schedule*.

For each store on these routes, all deliveries during the week of March 14-19, 1955 were included in the study. This accounted for variations in order size throughout a weekly period.

Each customer's actual volume and products mix were used as the basis for computing delivery cost, platform costs, and list prices.

Delivery costs were based on the regular services available and generally provided to the type of store. Since the driver and his equipment must be prepared to perform any or all of the group of services set up for independent stores, the cost of that group is calculated as part of the delivery cost, and is incorporated into the discount schedule. This includes daily cash payment and the optional customer services beyond a sidewalk or floor delivery. Conversely, only the essential delivery services are provided to chain store outlets. It is understood that additional time is considered unavailable to them and furthermore, [fol. 1005] that the store manager will expedite delivery by not causing the route driver serious delays. (1)

This difference in delivery time has been built into the discount schedule and is the basis for calculating delivery costs for customers on routes #129 and #1471.

An example is shown for Mr. S. Grzywna, route #1471. During this week he had six deliveries and purchased the following quantities: (2)

Product & Container (G) Glass (F) Fiber		No. of Units	No. of Cases
½ gallon—Milk	(F)	46	3 83
Quart—Milk	(F)	179	7 45
Quart—Sta-Slim	(F)	8	0 33
Pint—Half & Half Cream	(F)	31	0 89
Quart—Buttermilk	(F)	9	0 38
Quart—Dari-Rich	(F)	2	0 08
½ pint—Dari-Rich	(F)	24	0 40
½ pint—Sour Cream	(F)	12	0 20
Whip Dispenser	(F)	4	0 07
Cheese Containers	(F)	3	0 08
Quart—Milk	(G)	30	2 50
Gallon—Milk	(G)	30	7 50
½ gallon—Milk	(G)	16	2 67
Pound—Butter		15	0 63
Dozen—Eggs		15	0 63
Totals		424	27 64

[fol. 1006] Mr. Grzywna received necessary and optional services and paid his bill daily by cash. Applying the time standards (see Appendix A) for this type of service and for the volume delivered resulted in a total delivery time for the week of 136.87 minutes. (See following table)

In this same period, the A & P chain store outlet on the same route also had six deliveries and its purchase orders totaled 1,241 units and 92.77 cases. (3)

This store received only the necessary delivery services. When standard time data was applied for this service and volume delivered, delivery time totaled 242.42 minutes. (See following table)

Delivery Time to Mr. Grzywna and to A & P
Route #1471 (March 15-20, 1955)

Work Element	Calculated Standard Time	
	Mr. Grzywna	A & P
Get order	8 22	8 22
Delay to get order	0 66	0 66
Select merchandise	17 17	48 43
Unload order	2 54	8 53
Deliver	11 16	30 37
Make out delivery slip	12 84	12 84
Have delivery slip checked	1 14	1 14
Route bookkeeping	3 78	3 78
Sort glass bottles	1 90	3 93
Pick up empties	7 56	22 54
[fol. 1007]		
Load empties on truck	3 01	10 11
Arrange load	10 42	34 97
*Drive on route	25 08	25 08
Load cases on truck at plant	3 95	13 27
Unload cases from truck at plant	5 53	18 55
Customer services	13 99	—
Collect	7 14	—
Delay to collect	0 78	—
Total Standard Time (minutes)	136 87	242 42

* 18 stops ÷ 16.0 miles on route = 1.13 stops per mile.
4.7 minutes per mile (see graph, appendix A) x 16.0 miles = 75.2 minutes.
75.2 minutes ÷ 18 customers = 4.18 minutes per customer per day

Delivery time is calculated similarly for all stops; total time for each is:

Route #1471 Customer	Total Units	Total Cases	Total Delivery Time
S. Grzywna	424	27 64	136 87
St. Michael School	1,602	26 75	145 11
St. Michael Convent	3	0 75	33 03
S. Mroz	207	8 19	90 62
Brija	231	11 40	97 75
Roubik	90	7 08	85 05
E. Nykrin	343	16 91	112 60
R. Hoffman	84	3 04	79 34
U.A.R. Co.	551	15 46	107 78

[fol. 1008]

Route #1471 Customer	Total Units	Total Cases	Total Delivery Time
A. Ahlberg	57	2 63	78 07
S. Tomaskovic	519	35 57	154 93
A & P	1 241	92 77	242 42
Goldblatt Bros.	995	51 66	192 54
G. Psomakos	1 208	80 13	265 91
G. Forecki	68	3 59	79 70
J. Smulski	232	9 56	94 26
J. Drabek	237	16 69	108 75
J. Fojtik	40	1 67	64 34
J. Schuch	17	0 63	50 32
Total Delivery Time (minutes)			2 219 19

In March, the cost per route day at the South Division was $65.65. (see schedule 1). (4) For Route #471, the cost per customer service minute was $0.1775. ($65.65 x 6/2219.19).

Since butter, eggs, and bulk items are not included in determining the discount rate or calculating the dollar discount, the variable delivery time for those products was deducted from the previous totals. The last few steps in the calculations are as follows:

1. Deduct appropriate delivery time for butter, eggs, and bulk products from the total standard time for all products.
2. Multiply the revised delivery time by the route cost rate and add $0.115 per week for store license.
3. Determine total platform cost for all products, excluding butter, eggs and bulk.

[fol. 1009] 4. Determine total list price for all products, excluding butter, eggs and bulk.

5. Using actual discount rate earned by each customer in March, calculate discount on this week's sales, excluding butter, eggs and bulk.
6. Subtract the sum of delivery cost, platform cost, and discount from the total list price: This is the gross margin.
7. Express the gross margin as a percentage of net price (list price less discount). Compare these percentages for different customers.

For Mr. Grzywna and the A & P outlet, these calculations are:

	Grzywna	A & P
Total delivery time	136 87	242 42
Less: delivery time for butter, eggs and bulk products	3 50	
Revised total delivery time	133 37	242 42
Total delivery cost, including license	$ 23 79	$ 43 14
Total platform cost (5)	$ 65 62	$243 28
Total list price (6)	$112 65	$426 30
Total discount (7)	$ 46 56 (5 82%)	$ 46 89 (11 00%)
Gross margin	$ 18 68	$ 92 99
Net price (list price - discount)	$106 09	$379 41
% gross margin to net price	17 6%	24 5%

These calculations for every stop on the route are shown in Schedule 2.

[fol. 1010] The calculations show that in every case except one (Goldblatt Brothers), the lower net price to the A & P outlet is substantiated by its higher gross margin. In the Goldblatt - A & P comparison, the gross margin on the A & P transaction is only 0.1% lower than expected, based on the discounts rebated to each.

The same calculations have also been done for route #129. The results of this test are shown in Schedule 3. In this case, when the A & P outlet and Kroger outlet are each compared individually with other stores on the route, their lower net prices are substantiated by cost differences; i. e., the store with the lower net price returned the higher gross margin percentage.

[fol. 1011] CHAPTER II

[fol. 1012] II. Test of Kroger and A & P Chain Store Discounts

The test of the chain store discounts was based on the Minimum Profit-Maximum Discount Line. At any volume point along that line, the gross margin on the chain store transaction (or transaction with any other group of stores receiving similar limited service) is the same as the gross margin on an independent store transaction. This line of equal gross margins determines the maximum discount that can be rebated. As long as the store receiving the lower

net price returns an equal or greater gross margin than the store receiving the higher net price, the cost savings passed on to the former have not exceeded those accruing from greater volume and or fewer regular delivery services to the chains.

The calculations necessary to establish the Minimum Profit-Maximum Discount Line followed those outlined in detail previously in the *Manual For Establishing And Testing A Store Discount Schedule*.

The cost calculations were kept current and realistic. Standard time data (see Appendix A) was applied to the services rendered at various volume levels to determine total delivery time. A representative portion of volume delivered was considered to be in glass bottles in order to [fol. 1013] include the driver's time for handling bottles on the route. A representative time for driving between customers was included in delivery cost (8). Route costs (9) and platform costs (10), (cost of merchandise available for delivery), for March 1955 were also used in arriving at the total cost per unit at various volume levels. The margin remaining after subtracting the total unit cost from list price was expressed as a percentage of price. Schedules four and five show this margin for independent and chain stores at various order sizes.

The following example for a volume of 100 average daily points illustrates the final steps in establishing the Minimum Profit-Maximum Discount line for chain stores:

Maximum available margin—independent store	17.66%
Less: Rebated discount—March discount schedule	6.00%
Gross Margin remaining	11.66%
Maximum available margin—chain store	21.76%
Less: Gross Margin—Independent store	*11.66%
Maximum discount	10.10%

* This is the minimum margin for chain store transactions.

At this particular daily volume, a chain store outlet does not earn more than a 10.10% discount of list price. See Schedule six for maximum discount at all volume levels.

[fol. 1014] This illustration demonstrates that some chain outlets do not earn a full 11.06% discount. Those which purchase less than approximately 170 points per day are in this category. On the other hand, those exceeding 170 points per day and receiving the regular chain store services are entitled to more than 11.06%.

To test the discount to Kroger and A & P outlets, we have made a store-by-store analysis. For the week of March 14-19, 1955, purchase orders (11) were converted to points for each outlet served by Bowman in both chains. From the daily average points for each store and the calculated Minimum Profit-Maximum Discount Line, the allowable discount rate was determined. This rate, multiplied by the actual dollar volume during that week, was the earned discount for that store during March 14-19. This procedure repeated for every outlet in both chains determined the total discount that could have been rebated as a result of delivery cost savings.

For the Kroger chain, the results are as follows:

1. The 49 stores in Chicago, Evanston, Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park actually received a discount of $2,866.99; they earned and could have received $2,916.86.

2. The 38 stores in outlying areas actually received a discount of $1,589.98; they earned and could have received $1,620.25.

[fol. 1015] 3. Of the 49 stores, only 2 would have received less than an 11% discount, if billed individually.

4. Of the 38 stores in outlying areas, only 6 would have received less than 11% discount, if billed individually.

For the A & P chain, the results are as follows:

1. The 43 stores in Chicago, Evanston, Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park actually received a discount of $3,065.27; they earned and could have received $3,103.83.
2. The 33 stores in outlying areas actually received a discount of $1,774.41; they earned and could have received $1,800.26.
3. Of the 43 stores, only 1 would have received less than 11% discount, if billed individually.
4. Of the 33 stores in outlying areas, only 5 would have received less than 11% discount, if billed individually.

[fol. 1016]

Appendix A

Standard Time Allowances Developed From 1949 Time Studies

Work Element	No. of Customers	No. of Units	No. of Cases	Total Minutes	Standard Minutes
Get order	1 265			1 734 96	1 37 (avg.) per cust.
Delay to get order	1 265			137 45	11 (avg.) per cust.
Select merchandise	1 13 for 1st case and .18 for each additional				
Unload order			3428 24	317 91	.092 (avg.) per case
Deliver order	795 for 1st case and .295 for each additional				
Make out delivery slip	1 089			2345 77	2 14 (avg.) per cust.
Have slip checked	1 089			211 38	.19 (avg.) per cust.
Route bookkeeping	739			462 88	.63 (avg.) per cust.
Sort glass bottles		12 115		309 15	.025 per glass bott.
Pick up empties	43 for 1st case and .23 for each additional				
Load empties on truck			2540 00	276 48	.109 (avg.) per case
Arrange load			3428 24	1202 38	.35 (avg.) per case
Drive on route	(See separate table and graph)				
Load cases at plant			3281 90	284 11	.113 (avg.) per case
Unload cases at plant			1321 00	268 90	.20 (avg.) per case
Customer services		66 574		2252 75	.034 (avg.) per unit except A&P and Kroger
Collect	943			1128 58	1 19 (avg.) per cash customer
Delay to collect	943			124 64	13 (avg.) per cash customer

[fol. 1017] Analysis of 22 Time Studies For Unloading Cases at Plant

	No. of Occurrences	No. of Cases	Total Minutes	Average Minutes Per Case
Unload 1 case glass	112	112	30 49	
Unload 2 cases glass	8	16	2 96	
Unload 1 case paper	48	48	4 01	
Unload 2 cases paper	12	24	1 51	
Unload 3 cases paper	1	12	.63	
Unload 4 cases paper	10	40	1 13	
Unload 5 cases paper	140	700	9 64	
Drag 1 case to truck door				
Drag 2 cases to truck door	6		1 78	
Drag 3 cases to truck door	4		.95	
Drag 4 cases to truck door	17		3 20	
Drag 5 cases to truck door	139		14 45	
Arrange cases to unload	5		.2 61	
Drive to next van	78		154 54	
Drive to unload returns	22		26 12	
Unload returns	22	35	13 91	
Carry 1 case to other van	2	2	.82	
Carry 2 cases to other van	1	2	.62	
Total		1 321	268 90	.20 Standard

[fol. 1018] Bowman Dairy

Driving Time—Store Route
Minutes Per Mile (Gas Truck)

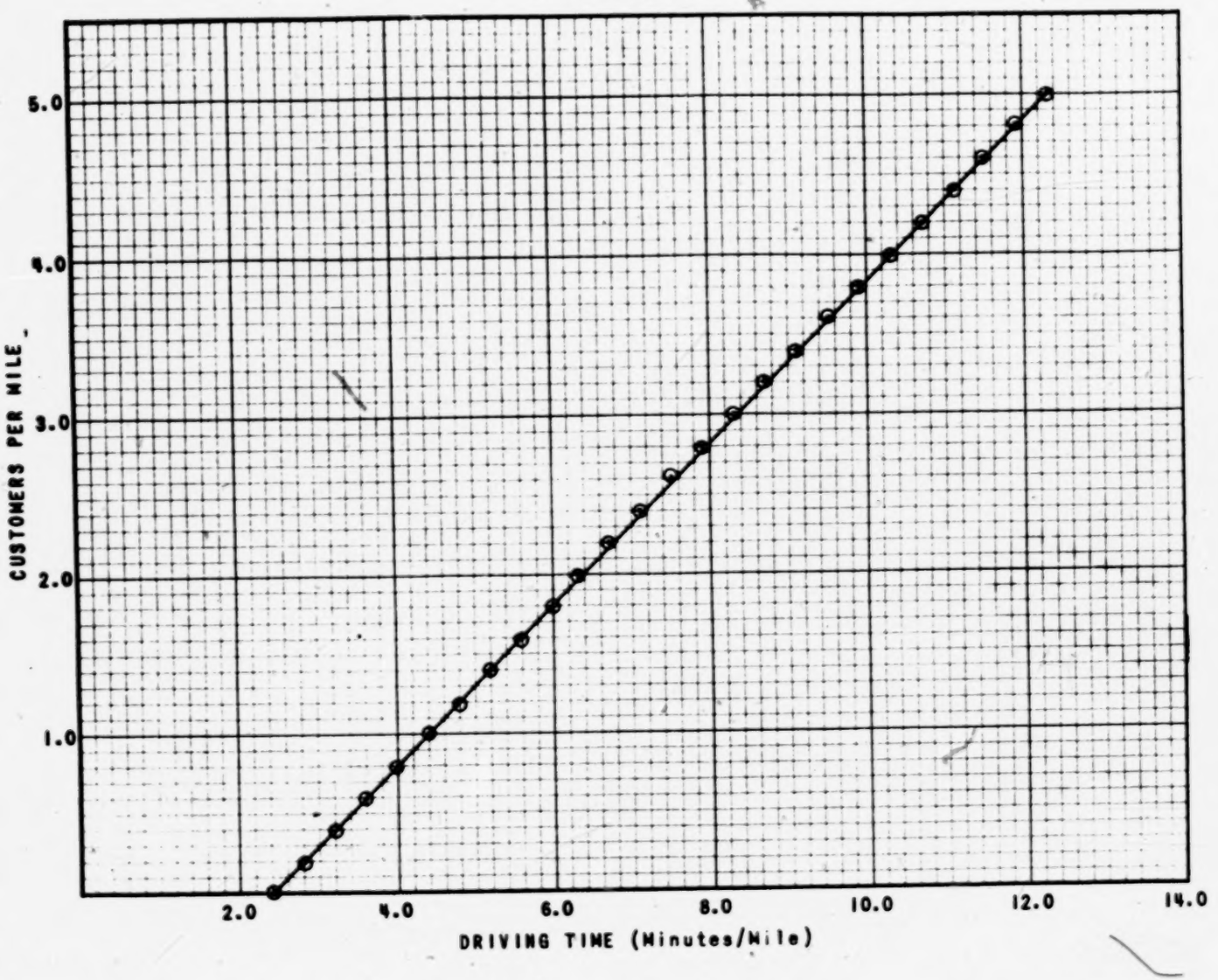
Customers Per Mile	Minutes Per Mile
0	2 4
0 2	2 8
0 4	3 2
0 6	3 6
0 8	4 0
1 0	4 4
1 2	4 8
1 4	5 2
1 6	5 6
1 8	6 0
2 0	6 3
2 2	6 7
2 4	7 1
2 6	7 5
2 8	7 9
3 0	8 3
3 2	8 7
3 4	9 1
3 6	9 5
3 8	9 9
4 0	10 3
4 2	10 7
4 4	11 1
4 6	11 5
4 8	11 9
5 0	12 3

[Fol. 1019]

BOWMAN DAIRY

DRIVING TIME - GAS TRUCK

STORE ROUTE



[fol. 1020] Schedule 1

South Division Expenses
March, 1955

Auto Expense:		
Auto Depreciation	$ 2 414 64	
Auto Gas and Oil	2 494 64	
Auto Insurance	899 98	
Auto License	1 010 30	
Auto Repairs and Supplies	1 529 22	
Auto Repair and Upkeep Wages	3 555 45	
Auto Rental Proration		
		$ 11 904 23
Salaries and Wages:		
Delivery wages	$36 497 05	
Milkroom wages	13 368 41	
Solicitors' wages	4 126 94	
Office salaries and wages	7 165 28	
Truck drivers' wages	527 45	
Vacation wages	3 382 50	
Personnel benefits	5 309 33	
		70 377 06
Total Commissions		17 298 81
Bottle Expenses:		
Bottle deposit	$ 38 90	
Bottle loss	1 399 36	
Foreign bottles		
Bottle expense	367 14	
Bottle allowance	4 849 44	
		6 654 84
Other Expenses:		
Advertising	$ 2 892 83	
Bad debts	285 00	
Bad debt collections		
Building repairs	74 54	
Depreciation	1 084 84	
Donations	100 00	
Equipment	174 92	
Expense transfers	*215 40*	
Ice and refrigeration	52 50	
Illinois occupation tax		
Insurance	17 91	
Laundry	24 50	
License	372 67	
Membership and dues	105 52	
Miscellaneous expenses	1 824 94	
Office supplies and expense	282 61	
Operating supplies and expense	84 52	
Painting	55 77	
Rentals	3 00	
Store license	222 00	
Store merchandising	1 357 50	
Taxes	609 09	
Telephone	324 65	
Trade expense		
Utilities	1 033 85	
Vending machine expense		
		10 767 76
Total Expense		$117 098 70
Number of Route Days		1 782
Cost Per Route Day		$ 65 65

[fol. 1021]

SCHEDULE 2

Summary Table
Route 129
Week of March 14-19, 1955

Excluding Butter, Eggs and Bulk

Customer	Total Delivery Time, All Products (Minutes)	Revised Delivery Time	Revised Delivery Cost, Incl. Store License (11 1/2¢)	Total Platform Cost	Total List Price	Discount On List Price	Gross Margin	Net Price	Gross Margin as a Percent of Net Price
Grzywna	136 87	133 37	$23 79	$63 62	$112 65	$ 6 56 (5 82%)	$18 68	$106 09	17 6%
St. Michael School (bulk stop)	145 11								
St. Michael Convent (bulk stop)	33 03								
Mroz	90 62	90 62	16 20	23 19	39 65	1 63 (4 12%)	1 87	38 02	—
Brija	97 75	96 84	17 30	29 43	50 78	2 30 (4 52%)	1 75	48 48	3 6
Roubik	85 05	85 05	15 21	14 08	24 78	0 93 (3 76%)	5 44	23 85	—
Nykrin	112 60	111 47	19 90	46 07	81 35	4 18 (5 14%)	11 20	77 17	14 5
Hoffman	79 34	78 84	14 11	10 19	17 95	0 65 (3 60%)	7 00	17 30	—
U. A. R. Co. (bulk stop)	107 78								
Ahlberg	78 07	78 03	13 97	7 68	12 65	0 43 (3 40%)	9 47	12 22	—
Tomaskovic	154 93	154 93	27 62	88 99	153 81	9 78 (6 36%)	27 42	144 03	19 0
Goldblatt Bros.	192 34	192 34	34 26	158 00	278 65	23 69 (8 50%)	62 70	254 96	24 6
A & P	242 42	242 42	43 14	243 28	426 30	46 79 (11 00%)	92 99	379 41	24 5
Psomakos	265 91	264 10	46 99	210 26	367 28	28 90 (7 86%)	81 13	338 38	24 0
Forecki	79 70	79 20	14 17	7 87	13 81	0 46 (3 36%)	8 09	33 35	—
Smulski	94 26	89 73	16 04	25 10	44 90	1 92 (4 28%)	1 84	42 98	4 3
Drabek	108 75	107 96	19 28	41 33	72 03	3 64 (5 06%)	7 78	68 39	11 4
Fojtik	64 34	64 34	11 54	4 85	8 20	0 27 (3 28%)	8 46	7 93	—
Schuch	50 32	50 32	9 05	1 99	3 70	0 11 (3 08%)	7 45	3 59	—
	2219 19								

$$\text{Cost rate} = \frac{\$65.65 \times 6}{2219.19} = \$.1775 \text{ per route minute}$$

[fol. 1022]

SCHEDULE 3

Summary Table
Route 129
Week of March 14–19, 1955

Excluding Butter, Eggs and Bulk

Customer	Total Delivery Time, All Products (Minutes)	Revised Delivery Time	Revised Delivery Cost, Incl. Store License (11-1/2¢)	Total Platform Cost	Total List Price	Discount On List Price	Gross Margin	Net Price	Gross Margin as a Percent of Net Price
Oswald	76.81	76.81	$19.49	$ 16.11	$ 28.19	$ 1.12 (3.96%)	$ 8.53	$ 27.07	
Square Deal (Theodore)	105.32	105.32	26.68	52.75	92.83	5.11 (5.50%)	8.29	87.72	9.5%
Reuther	129.15	128.67	32.57	72.19	125.32	7.72 (6.16%)	12.84	117.60	10.9%
Union Food (Chismar)	131.98	131.98	33.40	82.28	143.01	8.90 (6.22%)	18.43	134.11	13.7%
Jo - Jo Grill (bulk stop)	59.81								
A & P	241.15	241.15	60.93	254.72	447.35	49.21 (11.00%)	82.49	82.49	20.7%
Nichols	89.25	89.25	22.62	30.68	53.43	2.16 (4.60%)	2.33	50.97	
Charlie's (Goldenstern)	197.31	197.31	49.88	144.83	255.05	18.75 (7.35%)	11.59	236.30	17.6%
Kroger	154.48	154.48	39.07	151.45	269.73	29.67 (11.00%)	49.54	240.06	20.6%
Steve's (Martinet)	100.27	100.27	25.40	46.77	82.71	4.28 (5.18%)	6.26	78.43	8.0%
Mac's (McDougall)	106.14	105.26	26.66	46.21	81.20	4.37 (5.38%)	3.96	76.83	5.2%
Daggy	91.37	91.05	23.08	31.01	54.26	2.50 (4.60%)	2.33	51.76	
Wilson	78.85	78.85	20.00	19.16	33.65	1.36 (4.04%)	6.87	32.29	
	1561.89								

Cost rate = $65.65 x 6 = $.2522 per route minute
1561.89

[f.o.l. 1023]

SCHEDULE 4

Determining a Discount Schedule for Independent Stores
March, 1955*

Volume (Quarts)	Total Delivery Cost	Delivery Cost Per Quart	Delivery & Platform Cost Per Quart	Maximum Margin Available (List Price Less Cost)	Maximum Margin As A % of List Price
10	230.357¢	23.01¢	35.17¢		
20	253.343	12.62	24.75		
30	277.750	9.26	21.39		
40	308.144	7.70	19.83	0.67¢	3.27%
50	333.533	6.67	18.80	1.70	8.29
60	363.927	6.07	18.20	2.43	11.85
70	389.334	5.56	17.69	2.81	13.71
80	419.364	5.24	17.37	3.13	15.27
90	445.117	4.95	17.08	3.42	16.68
100	475.166	4.75	16.88	3.62	17.66
120	530.949	4.42	16.55	3.95	19.27
140	586.750	4.19	16.32	4.18	20.39
160	642.533	4.02	16.15	4.35	21.22
180	698.316	3.88	16.01	4.49	21.90
200	753.771	3.77	15.90	4.60	22.44
225	824.933	3.67	15.80	4.70	22.93
250	890.744	3.56	15.69	4.81	23.46
300	1032.741	3.44	15.57	4.93	24.05
350	1169.350	3.34	15.47	5.03	24.54
400	1311.346	3.28	15.41	5.09	24.83
500	1589.934	3.18	15.31	5.19	25.32
600	1863.553	3.11	15.24	5.26	25.66
700	2142.504	3.06	15.19	5.31	25.90
800	2421.091	3.03	15.16	5.34	26.05
900	2699.697	3.00	15.13	5.37	26.20
1000	2978.303	2.98	15.11	5.39	26.29
1100	3256.927	2.96	15.09	5.41	26.39
1200	3541.483	2.95	15.08	5.42	26.44

*Cost per route minute = $.182
Platform cost (fiber quart—homogenized)—$.1213
List price (fiber quart—homogenized)—$.205

[fol. 1024]

SCHEDULE 5

Determining a Discount Schedule for Chain Stores
March, 1955*

Volume (Quarts)	Total Delivery Cost	Delivery Cost Per Quart	Delivery & Platform Cost Per Quart	Maximum Available Margin (List Price Less Cost)	Maximum Margin As A % of List Price
10	200.327¢	20.03¢	32.16¢	—	—
20	216.307	10.82	22.95	—	—
30	235.708	7.86	19.99	0.51¢	2.49%
40	260.096	6.50	18.63	1.87	9.12
50	279.479	5.59	17.72	2.78	13.56
60	303.867	5.06	17.19	3.31	16.15
70	323.268	4.62	16.75	3.75	18.29
80	347.292	4.34	16.47	4.03	19.66
90	367.039	4.08	16.21	4.29	20.93
100	390.718	3.91	16.04	4.46	21.76
120	434.853	3.62	15.75	4.75	23.17
140	478.642	3.42	15.55	4.95	24.15
160	522.413	3.27	15.40	5.10	21.88
180	566.184	3.15	15.28	5.22	25.46
200	609.627	3.05	15.18	5.32	25.95
225	665.774	2.96	15.09	5.41	26.39
250	716.570	2.87	15.00	5.50	26.83
300	828.537	2.76	14.89	5.61	27.37
350	935.116	2.67	14.80	5.70	27.80
400	1047.082	2.62	14.75	5.75	28.04
500	1265.610	2.53	14.66	5.84	28.48
600	1479.169	2.47	14.60	5.90	28.78
700	1698.060	2.43	14.56	5.94	28.98
800	1916.587	2.40	14.53	5.97	29.12
900	2135.133	2.37	14.50	6.00	29.27
1000	2353.679	2.35	14.48	6.02	29.37
1100	2572.242	2.34	14.47	6.03	29.41
1200	2796.739	2.33	14.46	6.04	29.46

*Cost per route minute = $.182
Platform cost (fiber quart—homogenized)—$.1213
List price (fiber quart—homogenized)—$.205

[fol. 1025]

SCHEDULE 6

Establishing the Minimum Profit-Maximum Discount Line for Chain Stores, March, 1955
(Refer Also To Schedules 4 and 5)

	Independent Store			Chain Store	
Volume (Quarts)	Maximum Available Margin	Rebated Discount, March, 1955	Gross Margin (Col. 1-Col. 2)	Maximum Available Margin	Maximum Discount (Col. 4-Col. 3)
10	—	3.40%	—	—	—
20	—	3.80	—	—	—
30	—	4.20	—	2.49%	2.49%
40	3.27%	4.60	—	9.12	9.12
50	8.29	5.00	3.29%	13.56	10.27
60	11.85	5.20	6.65	16.15	9.50
70	13.71	5.40	8.31	18.29	9.98
80	15.27	5.60	9.67	19.66	9.99
90	16.68	5.80	10.88	20.93	10.05
100	17.66	6.00	11.66	21.76	10.10
120	19.27	6.40	12.87	23.17	10.30
140	20.39	6.80	13.59	24.15	10.56
160	21.22	7.20	14.02	24.88	10.86
180	21.90	7.60	14.30	25.46	11.16
200	22.44	8.00	14.44	25.95	11.51
225	22.93	8.00	14.93	26.39	11.46
250	23.46	8.00	15.46	26.83	11.37
300	24.05	8.00	16.05	27.37	11.32
350	24.54	8.00	16.54	27.80	11.26
400	24.83	8.00	16.83	28.04	11.21
500	25.32	8.00	17.32	28.48	11.16
600	25.66	8.00	17.66	28.78	11.12
700	25.90	8.00	17.90	28.98	11.08
800	26.05	8.00	18.05	29.12	11.07
900	26.20	8.00	18.20	29.27	11.07
1000	26.29	8.00	18.29	29.37	11.08
1100	26.39	8.00	18.39	29.41	11.02
1200	26.44	8.00	18.44	29.46	11.02

[REFERENCES ON PAGE 348]

[fol. 1026] **References**

1. Reference: Mr. R. Buthman—Sales Department
2. Source: Carbon copies of verified and signed delivery tickets (Form #128) for Route #1471, March 14–19, 1955
3. Source: Carbon copies of verified and signed delivery tickets (Form #128) for Route #1471, March 14–19, 1955
4. Source: Summary of Sales, Delivery, and Collection Expenses (Form #50), March 1955
5. Source: Product Cost To Divisions, March 1955 (Forms #10, 11, 11A, 11B, 11C, 11D, 11E, 11F, 13, 14, 15B, 16B, 17A, 18)
6. Source: (a) Wholesale List Prices (Form #M-95-2), Revision #192, December 12, 1954
   (b) Chain Store Price List (Form #M 54), Revision #222, March 16, 1955
7. Source discount rate: Resale Store Discount (Form #217-5M), March 1955
8. Source: Average route driving time for 28 routes in Elston Division
9. Source: (a) Summary of Sales, Delivery, and Collection Expenses (Form #50), March 1955
   (b) Delivery cost calculations for Elston Division routes
10. Source: Product Cost To Divisions, March 1955*
11. Source: Summary bills to A & P and Kroger chains, week ending March 19, 1955

[fol. 1027] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

BOWMAN EXHIBIT No. 15

Test of Bracket Discount Plan
Effective September 26, 1955
Bowman Dairy Company
Chicago, Illinois
November 1955

[fol. 1028] Stevenson, Jordan & Harrison, Inc.
Management Engineers and Consultants

19 West 44th Street
New York 36, N.Y.

779 Washington Street
Buffalo 3, N.Y.

205 W. Wacker Drive
Chicago 6, Ill.

Hanna Building
Cleveland 15, O.

New York 36, N.Y.
November 20, 1955.

Mr. Francis Kullman, Jr.,
Bowman Dairy Company,
140 West Ontario Street,
Chicago, Illinois.

DEAR MR. KULLMAN:

We have tested the bracket discount plan effective on September 26, 1955 to determine if cost differences justify the differences in discounts between chain stores and the several independent store volume groups.

We tested the groups of customers established by the plan by basing the cost and price calculations on sample size purchase orders within each bracket. A recent analysis of the three store divisions enabled us to select a good sample. For the relatively short period that you expect to use the bracket system, we believe that there will be no significant change in this distribution of purchase order size.

[fol. 1029] The basis for test was the marginal return

principle described in the *Manual For Establishing And Testing A Store Discount Schedule*. Using September costs and the delivery time standards in Appendix A of the manual, we calculated and compared for each store volume group, the gross margin available to Bowman Dairy after product cost, delivery cost, and rebated discount. The discount earned by the chain store group was 9.8 per cent, and for the independents was 0, 2.0, 3.0, 4.0, and 5.0 per cent, depending upon purchase volume. The calculations show that in a comparison between any two groups, the gross margin from the lower-priced customer (higher volume, higher discount) is greater than the corresponding margin from the higher-priced customer (lower volume, lower discount). Therefore, the advantage in discount does not exceed the accompanying cost saving.

The data and calculations for these conclusions are summarized in attached Schedules:

Schedule 1—Bracket system discount plan effective September 26, 1955, and size of representative purchase within each group.

Schedule 2—Illustration of the complete calculation for determining marginal return.

Schedule 3—Results of the marginal return calculations for all volume categories.

[fol. 1030] It is our understanding that, despite the favorable results shown by this sampling test of a bracket system, that you will return to the more equitable sliding-scale type of rebated discount plan as soon as market conditions permit.

Respectfully submitted, Stevenson, Jordan & Harrison, Inc., A. J. Bergfeld.

AJB:dg

[fol. 1031]

Schedule 1A

Discounts Effective September 26, 1955 and Size of Representative Purchase Within Each Group

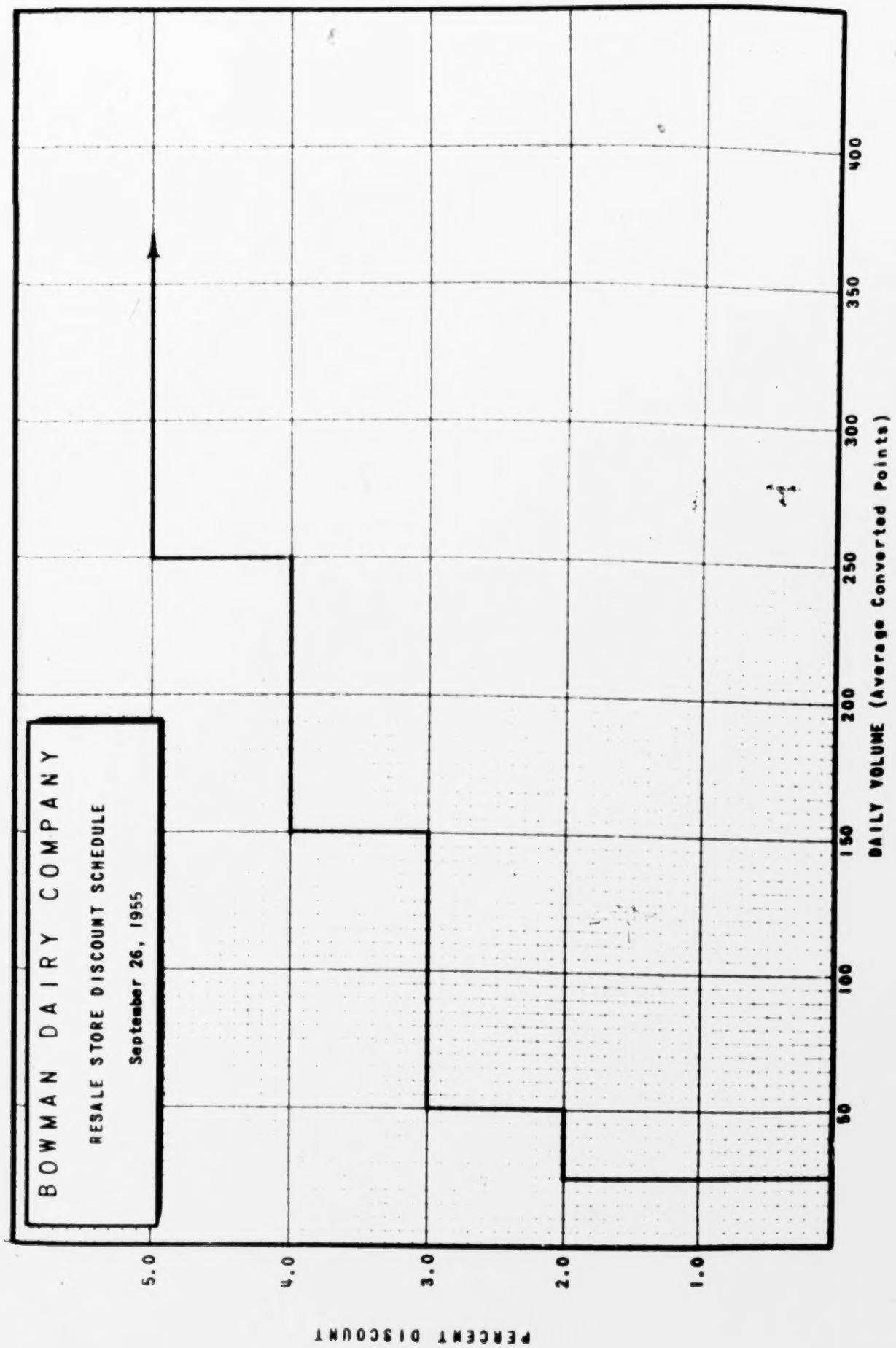
Bracket		Size of Representative Purchase (1)
Independent Stores:		
0— 24 Points	0%	14 Points
25— 49 Points	2 0%	36 Points
50—149 Points	3 0%	82 Points
150—249 Points	4 0%	186 Points
250—Points or more	5 0%	521 Points
Chaine Stores	9 8%	461 Points

1. This is based upon an analysis made by Mr. D. Parmalee (Accounting Department) of independent stores served by the three store divisions in June, 1955. The representative for each group is the average size purchase.

The average was felt to be a better representative than the modal point of a frequency distribution for each bracket in this situation. Except for the 0—24 point group, a frequency distribution did not show strong central tendency and was skewed to the high volume side of the range, i.e., the customers were concentrated at the low volume end of the range. Consequently, the average was considered a better representative and a conservative one. The 461 point chain store outlet represents average sales to all outlets for a ten week period ending 9/3/55.

[fol. 1032]

Schedule 1B



[fol. 1033] SCHEDULE 2

Calculation of the Marginal Return From a Customer Transaction Earning a 4% Discount (1)

186 points, including 27 glass containers, equal 11.13 cases.

1. Elements which are constant per delivery			
Get order		1.37	
Delay to get order		.11	
Make out delivery slip		2.14	
Have slip checked		.19	
Route bookkeeping		.63	
Drive on route (representative)		3.69	
Collect		1.19	
Delay to collect		.13	9.450 min.
2. Elements which vary with volume			
Unload order	.092 per case		
Load empties on truck	.109 per case		
Arrange load	.377 per case		
Load cases at plant	.143 per case		
Unload cases at plant	.200 per case		
Customer service	.033 per unit		
Sort bottles	.025 per bottle	1.7.064	
3. Elements which have both characteristics			
Select merchandise			
1.13 for 1st case + .18/add'tl. case.			
Deliver order			
.795 for 1st case + .295/add'tl. case.			
Pick up empties			
.43 for 1st case + .23/add'tl. case			12.536

[fol. 1034]

4. Total delivery time	39.050 min.
5. Total delivery cost @ $ 182	$ 7.11
6. Total delivery and platform cost ($ 1349)	$32.20
7. Total list price @ $ 185	$34.41
8. Available margin	$ 2.21
9. Discount (4%)	$ 1.38
10. Gross margin after discount	$ 0.83
11. Net price (line 7—line 9)	$33.03
12. Gross margin after discount as a percentage of net price (line 10 + line 11)	2.5%

(1) Representative order size for this group—186 points
List price (fiber quart of milk)—18½¢
Platform cost (Sept. 1955)—13.49¢
Cost per route minute (Sept. 1955)—18.2¢

[fol. 1036] IN UNITED STATES DISTRICT COURT

BOWMAN EXHIBIT NO. 16

Test of Store Discount Plan
Effective January 2, 1956
Bowman Dairy Company
Chicago, Illinois
April 1956

[fol. 1037] Stevenson, Jordan & Harrison, Inc.
Management Engineers and Consultants

19 West 44th Street
New York 36, N.Y.

779 Washington Street
Buffalo 3, N.Y.

205 W. Wacker Drive
Chicago 6, Ill.

Hanna Building
Cleveland 15, O.

New York 36, N.Y.
April 16, 1956.

Mr. Francis Kullman, Jr., President,
Bowman Dairy Company,
140 West Ontario Street,
Chicago, Illinois.

DEAR MR. KULLMAN:

In response to your request, we have made a study to ascertain whether the difference between a discount of 10% to A & P and Kroger Stores in the Chicago area and the discounts allowed to independents as established by the Schedule effective January 2, 1956, is justified by cost differences. We have based our test on actual sales data for the week ending January 14, 1956.

In making this study we have followed the procedure described in the *Manual For Establishing And Testing A Store Discount Schedule*, which we will refer to as "Basic Manual", and in the discount schedule tests (March 1955), which we will refer to as "March Tests." The sample's results indicate that the A & P Stores and the Kroger Stores in the Chicago area could each have been granted an overall discount of 10.01%.

[fol. 1038] The data on which this conclusion is based is summarized in a series of Schedules, which are listed below with a reference to the portions of the Basic Manual and March Tests which explain each Schedule:

Schedule 1—Published schedule and graphic presentation of Bowman store discount schedule for independent stores, effective January 2, 1956. See Basic Manual on pp. 11-12 and Schedule 5.

Schedule 2—A calculation of maximum discount or minimum profit that could be justified for an individual chain store purchasing a 400 point volume. See Basic Manual pp. 13-14; see also March Tests, p. 9.

Schedule 3—Table reflecting results of similar calculations throughout the volume range. See Basic Manual, p. 14, and p. 2 of Schedule 2A; see also schedule 6 of March Tests.

Schedule 4—Graphic presentation of "minimum profit —maximum discount". See Basic Manual, Schedule 4A.

Schedule 5—Example of calculation of allowable discount for a particular chain outlet.

Schedule 6—Summary of allowable discounts for all A & P Stores in the Chicago area and for all Kroger Stores in the Chicago area. See March Tests, pp. 10-11.

Respectfully submitted, Stevenson, Jordan & Harrison, Inc., A. J. Bergfeld.

AJB:ak

[fol. 1039] Schedule 1A

Resale Store Discount Schedule

Effective Monday, January 2, 1956

Graduated Resale Store Discount Schedule

A discount on all purchases of fresh milk products as hereinafter listed, will be paid as follows:

Average Converted Points per Day	Percent of Discount
0 to 24	0%
25 to 90	2% to 3%
90 to 190	3% to 4%
190 to 300	4% to 5%
300 to 355	5% to 5½%
355 and over	5½%

Discounts may be changed from time to time by notice as market conditions vary.

These discounts will be paid upon the following conditions:

1. Purchase of an average of 25 or more converted points of Bowman milk products per normal delivery day.
2. The store customer must expedite the driver-salesman in obtaining the order and collecting for it.

Discounts will be computed as follows:

1. Your monthly purchases of Bowman milk products will be converted to points. This total will be divided by the number of days during the month upon which Bowman Dairy Company makes store deliveries. The result becomes your average converted points per day.
2. From your average converted points per day your discount is determined from the discount schedule above.
3. Your discount rate for the month will then be applied to the dollar value of your total purchases of Bowman Dairy Company's milk products, which shall include the following:

Milk, including quarts, half-gallons and gallons
Golden Guernsey
Cream, including Half & Half, Rich Cream and Whipping Cream
Quick-Whip

Sour Cream
Buttermilk
Dari-Rich
Energee
Sta-Slim
Yogurt
Egg Nog
Strawberry Drink
Certified Products
Cottage Cheese

Discount checks will be mailed to you during the month following the month upon which your discount rate is computed.

No. 9

Bowman Dairy Company.

[fol. 1035]

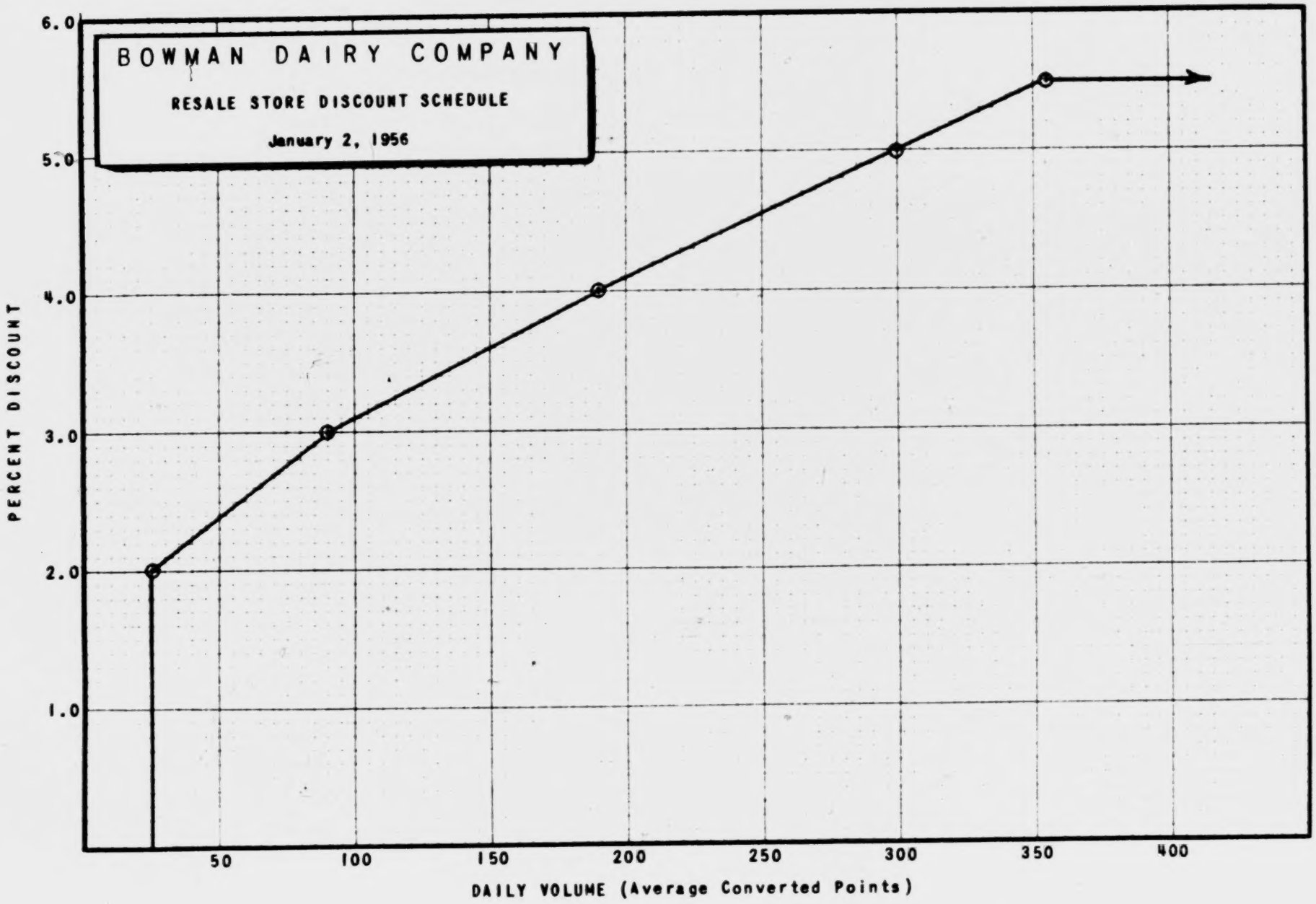
Schedule 3

Marginal Returns for all Volume Categories

	Chain	Independent Stores				
	9 8%	0%	2%	3%	4%	5%
	461 Points	14 Points	36 Points	83 Points	186 Points	321 Points
1. Total delivery and platform cost	$72 63	$ 4 27	$ 7 81	$15 46	$32 20	$54 11
2. Total list price	85 29	2 59	6 66	15 36	34 41	59 39
3. Available margin (line 2 − line 1)	12 66	(1 68)	(1 15)	(0 10)	2 21	5 28
4. Discount	8 36	—	0 13	0 46	1 38	2 97
5. Margin, after discount (line 3 − line 4)	4 30	(1 68)	(1 28)	(0 56)	0 83	2 31
6. Net price (line 2 − line 4)	76 93	2 59	6 53	14 90	33 03	56 42
7. Margin after discount as a % of net price (line 5 + line 6)	5 6%	(64 9)%	(19 6)%	(3 8)%	2 5%	4 1%

( ) Denotes Loss.

[fol. 1040]



Schedule 1B

1040

[fol. 1041] Schedule 2

Allowable Discount to a Chain Store Outlet Purchasing 400 Point per Day

	Independent Store	Chain Store
1. List price	20.00¢	20.00¢ (1)
2. Unit platform and delivery cost at a 400 point volume (2)	17.05¢	16.12¢
3. Margin between price and cost	2.95¢	3.88¢
4. Margin, as a % of price	14.75%	19.40%
5. Rebated discount to independent store (see Schedule 1)	5.50%	
6. Gross margin remaining	9.25% (3)	
7. Minimum gross margin allowable on chain store transaction		9.25%
8. Maximum allowable discount to a chain store at a 400 point volume (4)		10.15%

(1) During this period the list price of a fiber quart of milk to chain stores was 20.0¢, and the net price was 18¢.

(2) Detailed calculations shown in Schedule 3.

(3) Calculation of allowable discount is based on equal remaining gross margins from both types of transactions.

(4) The minimum margin determines the maximum discount.

[fol. 1042] Schedule 3A

Determining a Discount Schedule for Independent Stores, January, 1956*

Daily Volume (Quarts)	Total Delivery Cost	Unit Delivery Cost	Margin Available (List Price Less Delivery and Platform Cost)	Maximum Margin as a % of List Price
25	271 784¢	10 87¢	—	—
30	282 680	9 42	—	—
40	313 224	7 83	—	—
50	339 031	6 78	—	—
60	369 926	6 17	0 08¢	0 40%
70	395 752	5 65	0 60	3 00
80	421 560	5 27	0 98	4 90
90	452 455	5 03	1 22	6 10
100	478 262	4 78	1 47	7 35
120	534 632	4 46	1 79	8 95
140	591 334	4 22	2 03	10 15
160	648 037	4 05	2 20	11 00
180	704 758	3 92	2 33	11 65
190	730 547	3 84	2 41	12 05
200	761 460	3 81	2 44	12 20
225	828 708	3 68	2 57	12 85
250	900 691	3 60	2 65	13 25
300	1039 922	3 46	2 79	13 95
315	1081 011	3 43	2 82	14 10
330	1122 081	3 40	2 85	14 25
340	1152 976	3 39	2 86	14 30
350	1178 783	3 37	2 88	14 40
355	1194 434	3 36	2 89	14 45
375	1251 137	3 34	2 91	14 55
400	1318 033	3 30	2 95	14 75
450	1463 313	3 25	3 00	15 00
500	1601 212	3 20	3 05	15 25
550	1740 462	3 16	3 09	15 45
600	1879 693	3 13	3 12	15 60
700	2158 155	3 08	3 17	15 85
800	2436 247	3 05	3 20	16 00
900	2719 796	3 02	3 23	16 15
1000	2997 907	3 00	3 25	16 25
1100	3276 369	2 98	3 27	16 35
1200	3559 585	2 97	3 28	16 40

* Cost per route minute—$.185.
Platform cost (fiber quart-homogenized)—$.1375.
List Price (fiber quart-homogenized)—$.20.

[fol. 1043]

Schedule 3B

Determining a Discount Schedule for Chain Stores, January, 1956*

Daily Volume (Quarts)	Total Delivery Cost	Unit Delivery Cost	Margin Available (List Price Less Delivery and Platform Cost)	Maximum Margin as a % of List Price
25	222 259¢	8 89¢	—	—
30	234 839	7 83	—	—
40	254 560	6 63	—	—
50	269 157	5 38	0 87¢	4 35%
60	288 878	4 81	1 44	7 20
70	308 913	4 41	1 84	9 20
80	328 616	4 11	2 14	10 70
90	348 337	3 87	2 38	11 90
100	368 021	3 68	2 57	12 85
120	407 796	3 40	2 85	14 25
140	442 113	3 16	3 09	15 45
160	481 870	3 01	3 24	16 20
180	521 293	2 90	3 35	16 75
190	540 977	2 85	3 40	17 00
200	560 680	2 80	3 45	17 25
225	607 929	2 70	3 55	17 75
250	654 826	2 62	3 63	18 15
300	753 690	2 51	3 74	18 70
315	780 867	2 48	3 77	18 85
330	808 062	2 45	3 80	19 00
340	827 764	2 43	3 82	19 10
350	847 467	2 42	3 83	19 15
355	859 695	2 42	3 83	19 15
375	894 364	2 38	3 87	19 35
400	946 349	2 37	3 88	19 40
450	1039 774	2 31	3 94	19 70
500	1138 990	2 28	3 97	19 85
550	1232 766	2 24	4 01	20 05
600	1326 709	2 21	4 04	20 20
700	1519 553	2 17	4 08	20 40
800	1712 194	2 14	4 11	20 55
900	1904 871	2 12	4 13	20 65
1000	2097 512	2 10	4 15	20 75
1100	2290 152	2 08	4 17	20 85
1200	2483 163	2 07	4 18	20 90

* Cost per route minute—$.185.
Platform cost (fiber quart-homogenized)—$.1375
List Price (fiber quart-homogenized)—$.20.

[fol. 1044] **Schedule 3C**

Establishing the Minimum Profit-Maximum Discount Line for Chain Stores, January, 1956

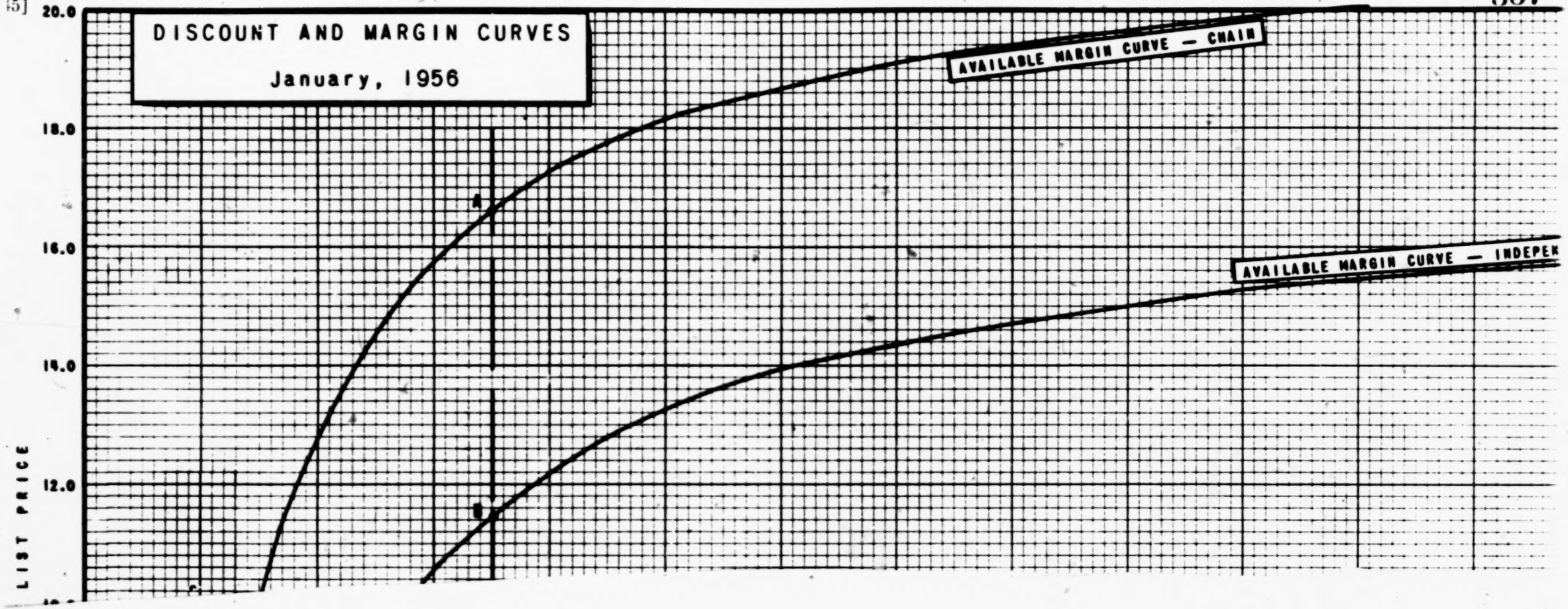
(Refer Also to Schedules 1 and 2)

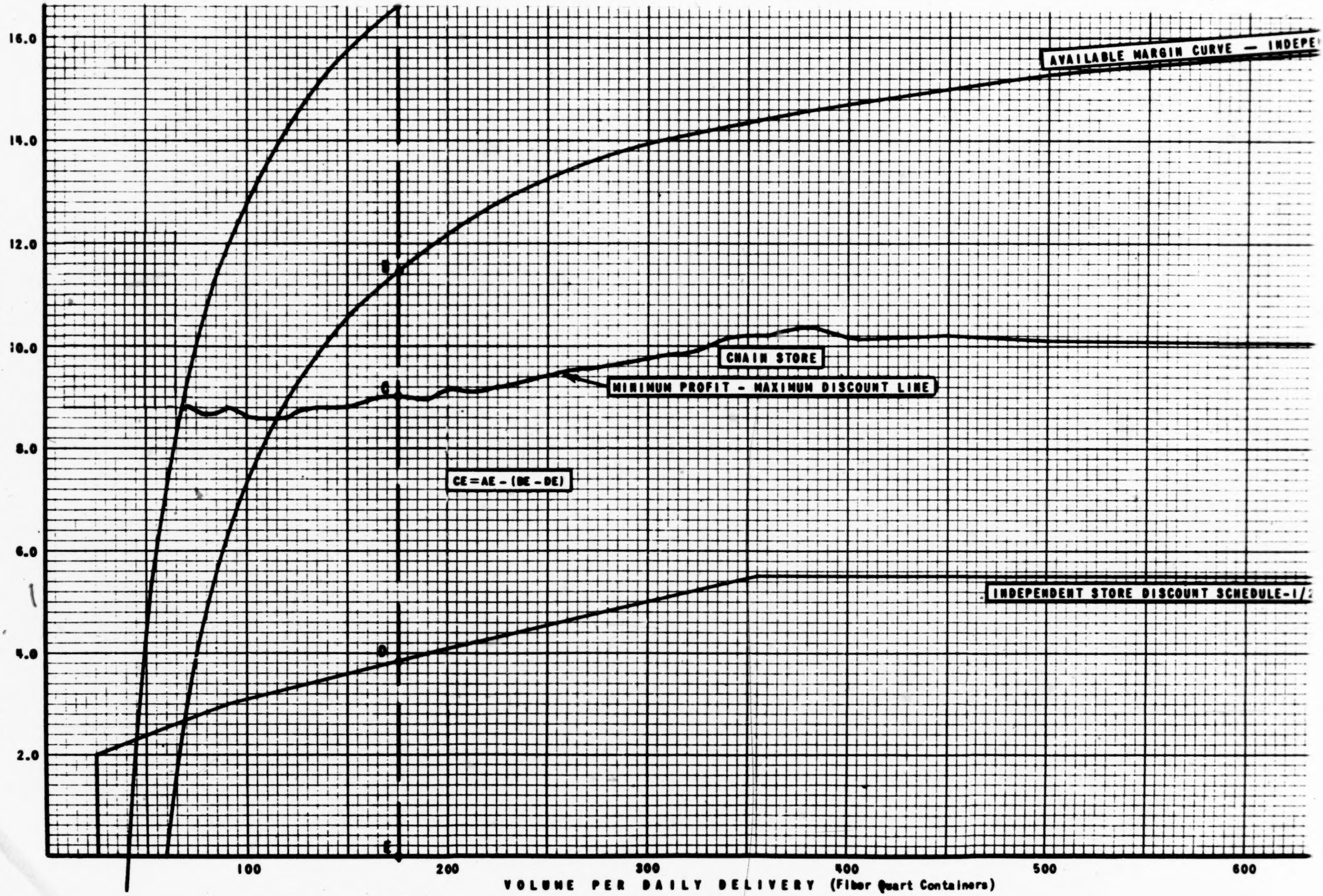
	Independent Store			Chain Store	
Daily Volume (Quarts)	Maximum Available Margin	Rebated Discount	Gross Margin	Maximum Available Margin	Maximum Discount
	1	2	3-1-2	4	5-4-3
25	—	2.00%	—	—	—
30	—	2.08	—	—	—
40	—	2.23	—	—	—
50	—	2.38	—	4.35%	4.35%
60	0.40	2.54	—	7.20	7.20%
70	3.00	2.69	0.31%	9.20	8.89%
80	4.90	2.85	2.05	10.70	8.65
90	6.10	3.00	3.10	11.90	8.80
100	7.35	3.10	4.25	12.85	8.60
120	8.95	3.30	5.65	14.25	8.60
140	10.15	3.50	6.65	15.45	8.80
160	11.00	3.70	7.30	16.20	8.90
180	11.65	3.90	7.75	16.75	9.00
190	12.05	4.00	8.05	17.00	8.95
200	12.20	4.09	8.11	17.25	9.14
225	12.85	4.32	8.53	17.75	9.22
250	13.25	4.55	8.70	18.15	9.45
300	13.95	5.00	8.95	18.70	9.75
315	14.10	5.14	8.96	18.85	9.89
330	14.25	5.27	8.98	19.00	10.02
340	14.30	5.36	8.94	19.10	10.16
350	14.40	5.45	8.95	19.15	10.20
355	14.45	5.50	8.95	19.15	10.20
375	14.55	5.50	9.05	19.35	10.30
400	14.75	5.50	9.25	19.40	10.15
450	15.00	5.50	9.50	19.70	10.20
500	15.25	5.50	9.75	19.85	10.10
550	15.45	5.50	9.95	20.05	10.10
600	15.60	5.50	10.10	20.20	10.10
700	15.85	5.50	10.35	20.40	10.05
800	16.00	5.50	10.50	20.55	10.05
900	16.15	5.50	10.65	20.65	10.00
1000	16.25	5.50	10.75	20.75	10.00
1100	16.35	5.50	10.85	20.85	10.00
1200	16.40	5.50	10.90	20.90	10.00

5]

DISCOUNT AND MARGIN CURVES

January, 1956




16.0
14.0
12.0
10.0
8.0
6.0
4.0
2.0
PER CENT OF LIST PRICE
AVAILABLE MARGIN CURVE — INDEPE
CHAIN STORE
MINIMUM PROFIT - MAXIMUM DISCOUNT LINE
CE = AE - (DE - DE)
INDEPENDENT STORE DISCOUNT SCHEDULE-1/
100
200
300
400
500
600
VOLUME PER DAILY DELIVERY (Fiber Quart Containers)

[fol. 1046] Schedule 5

Calculation of Allowable Discount to A & P Store #915,
Week Ending January 14, 1956

Note: Point volume and list price excludes butter, eggs, Gayemont cheese and bottle deposits and credits, which are not considered in discount calculations

1. Points purchased during the week	3007
2. Average daily points (3007 ÷ 6)	501
3. Allowed discount rate (Reference: Schedules 3 and 4)	10 10%
4. Total list price (See page 2 of 2)	$612 795
5. Calculated allowable discount (line 3 × line 4)	$ 61 89

[fol. 1047] Schedule 5

Sales to A & P Store #915, Week Ending January 14, 1956

(g) Glass Item (f) Fiber	Quantity(1)	Unit (2) List Price	Unit Point Value
½ gallon Energee (g)	12	$ 35	2
Gallon milk (g)	117	74	4
Quart eggnog (g)	20	45	4
Special container sour cream (g)	6	33	1
Whip dispenser (f)	10	44	1
½ pint sour cream (f)	18	27	1
Quart Dari-Rich (f)	11	25	1
Quart buttermilk (f)	73	20	1
½ pint whipping cream (f)	20	31	1
½ pint cream (f)	7	285	1
Pint half and half (f)	274	30	1
Quart sta-slim (f)	80	19	1
Quart milk (f)	820	20	1
½ gallon milk (f)	558	385	2
No butter, eggs, or Gayemont cheese were sold to this store.			
Totals		$612 795	3007

(1) Source: Summary bills to A & P, week ending January 14, 1956.
(2) Chain store price list (Form #M 54), Revision #252, January 9, 1956.

[fol. 1048] Schedule 6

Summary of Allowable Discounts to A & P and Kroger Stores
in the Chicago Area (1)

	A & P	Kroger
1. Total list price	$29.967 59	$28.740 78
2. Calculated allowed discount ($)	3.001 13	2.875 65
(%)	10 01%	10 01%

(1) A & P—41 Stores
Kroger—47 Stores

[fol. 1049] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

[Title omitted]

MOTION OF DEFENDANT THE BORDEN COMPANY TO STRIKE CERTAIN TESTIMONY—Filed May 9, 1958

Now comes defendant The Borden Company by its attorneys, Stuart S. Ball and H. Blair White, and move the Court to strike the proposed testimony of the expert witnesses Herbert F. Taggart, Albert E. Sawyer and Otto F. Taylor, or, in the alternative, to order the plaintiff to produce the following documents for the use of this defendant in further cross-examination by deposition of said witnesses:

(a) Government memoranda identified on Exhibit 1 attached hereto as "Analysis of cost and price differences based on Bowman data (January 18, 1957)."

(b) Government memoranda identified on Exhibit 1 as "Cost defense analysis September 25, 1956."

[fol. 1050] (c) All correspondence and documents plaintiff received from each of said witnesses which relate to their proposed testimony in this cause.

(d) Copies of all correspondence and documents plaintiff forwarded to each of said witnesses which relate to their proposed testimony in this cause.

In support of this motion, this defendant states:

1. On November 8, 1955 this Court entered the Supplemental Pre-Trial Order which presented plaintiff's case in chief support of the alleged violations of the Robinson-Patman Act.

2. On September 19, 1957 this Court entered the Additional Pre-Trial Order which contained Borden's defense to plaintiff's allegations. The Order set forth Borden's Store Customer Cost Survey.

3. In January 1958 plaintiff submitted to Borden a proposed Rebuttal Pre-Trial Order which contains the testimony of plaintiff's expert witnesses, Messrs. Taggart, Sawyer and Taylor. Paragraphs 10, 12 and 14 state that these expert witnesses reviewed "plaintiff's pre-trial order, the preliminary drafts of Borden's pre-trial order, the deposition of Mr. Joseph F. Malone, and the defendant's counsel's abstract of this deposition." The remainder of these paragraphs presents the purported expert opinions of these witnesses with respect to "the principle underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of the Robinson-Patman Act."

[fol. 1051] 4. At the pre-trial conference on March 14, 1958 it was agreed that the proposed Rebuttal Pre-Trial Order would be offered by plaintiff as the direct testimony of Messrs. Taggart, Sawyer and Taylor and that these expert witnesses were to be cross-examined by deposition. The cross-examination by deposition was to be condensed and placed in the final draft of the Rebuttal Pre-Trial Order as further testimony of said witnesses.

5. The depositions of the witnesses Taggart, Sawyer and Taylor were commenced, respectively, on April 14, 16 and 28.

6. On deposition each of these expert witnesses stated that he had no knowledge of the facts of this case or of distribution costs in the dairy industry other than those furnished to him by counsel for the plaintiff or by Elliott B. Woolley, another expert witness for plaintiff.

7. On deposition each of the witnesses testified that plaintiff submitted the documents listed on Exhibit 1 for his expert examination and opinion; that the memoranda listed above in paragraphs (a) and (b) were prepared by Mr. Woolley and contained statements of fact; that the witness returned all the documents to plaintiff; that his opinion was based in part upon all of the documents examined; and that he exchanged certain correspondence and memoranda with plaintiff's witness Woolley prior to the final draft of his testimony.

8. Exhibit 1 shows that each of the witnesses examined

documents in addition to the documents listed in paragraphs 10, 12 and 14 of the proposed Rebuttal Pre-Trial Order.

[fol. 1052] 9. Each of the witnesses stated that he could not remember the content of the various documents submitted to him by the plaintiff.

10. During each deposition counsel for Borden requested plaintiff to produce the documents listed above in paragraphs a through d for use in examining the expert witness as to the facts on which he based his opinions. Plaintiff's counsel refused to produce the documents on the grounds either that they were privileged "work product" or that it was "against the policy of the Department of Justice" to produce such material.

11. Plaintiff's refusal to produce the documents denied Borden an opportunity to cross-examine the expert witnesses concerning all of the facts on which they based their opinions. Plaintiff's refusal also results in the omission from the record of the complete facts on which the opinions expressed were based, and thus renders the opinions incompetent as evidence.

The foregoing motion goes to the foundation of the proposed testimony of the expert witnesses Taggart, Sawyer and Taylor and is submitted at this time to enable plaintiff to cure the defect by producing the documents for use in further cross-examination. Due to the past directions of this Court, this motion does not raise all objections pertaining to the competency, relevancy and materiality of the proposed testimony. Accordingly, Borden's other [fol. 1053] grounds for objecting to said testimony have been reserved for presentation in its brief to be submitted at the close of all of the evidence.

In its brief, for example, Borden will contend that the evidence is incompetent because based in part upon undisclosed oral statements of purported facts made to the witnesses Taggart, Sawyer and Taylor by plaintiff's other witness Woolley. Borden will also contend that the evidence is incompetent because based upon or compounded with opinions as to the law and other matters outside the scope of opinion evidence and because based on an incom-

plete disclosure of material facts; but these are matters as to which no immediate corrective action can be taken by either party.

Respectfully submitted, /s/ Stuart S. Ball. /s/ H. Blair White, Attorneys for defendant The Borden Company.

Of Counsel: Sidley, Austin, Burgess & Smith, 11 South LaSalle Street, Chicago 3, Illinois STate 2-5400.

[fol. 1053a] [File endorsement omitted.]

[fol. 1054] In United States District Court Nothern District of Illinois Eastern Division

No. 51 C 947

[Title omitted]

Transcript of Proceedings of May 16, 1958

Transcript of proceedings had at the pre-trial conference in the above-entitled cause before Hon. William J. Campbell, one of the Judges of said Court, in his jury room, United States Courthouse, Chicago, Illinois, on Friday, May 16, 1958, at 2:00 o'clock, p.m.

Present:

Mr. Earl Jinkinson, Mr. Bertram Long, and Mr. Elliott B. Woolley, On behalf of the Government.

Mr. Stuart S. Ball, and Mr. Joseph Greaves, On behalf of defendants The Borden Company and Belmont Dairy Company.

Mr. John P. Stevens, On behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

[fol. 1055] The Court: Shall we dispose of your motion first? Or have you done so?

Mr. Ball: The motion has served one purpose. It has gotten us a long brief which the Government has served us with today. It is very educational, even though hardly relevant.

Mr. Jinkinson: It is ten pages. I don't think you can characterize any brief of the Anti-Trust Department of ten pages as being long.

The Court: I should say this sets an all time low for the Anti-Trust Division. Whether or not it is relevant is something else.

Mr. Ball: Perhaps if I take a minute to explain to the Court what our problem is?

The Court: Yes.

Mr. Ball: The procedure we are following I think presents us all with a rather unusual question.

The Court: Yes.

Mr. Ball: If we were to deal with the problem of the expert witness being called at the trial, you would assume that perhaps the matter would be set forth to him in the form of a hypothetical question in which you could then [fol. 1056] measure the elements of the hypothetical question against the record and you could question whether or not this fact or that fact would change the situation or in some other way a basic way of testing the validity of an opinion and find out exactly what factual information on which it is based.

Now, we had the situation that may have been inevitable on the Government's part, but Mr. Woolley was in communication with the three witnesses that were called as experts. Each one of the three made a statement that they received certain documentary information which contained certain factual information. That, without whether they remembered what the facts were, we can assume were the facts upon which they based their opinion.

However, both or all three of the witnesses said that they also wanted some documentary and the information they received was a memorandum from Mr. Woolley.

They also said in this memorandum—there were two memorandums, one with respect to the Borden and one with respect to the Bowman situation.

They also said that in these memoranda there were certain statements of fact. All of them said they could not [fol. 1057] remember exactly what it was that was said to them in these documents.

They also had some correspondence back and forth with Mr. Woolley which I think in one case at least, and probably two, they said there was some factual information that was mentioned or discussed in the letters.

Now, we are in this position. We could sit back and assay relief for briefs and argument and say that those opinions are totally no good because they are based in part upon facts that we had no opportunity to file to be able to ask the proper questions and appraise what effect the facts not known to us had upon the opinions.

It has seemed to us instead of letting this issue, however, go to the filing of briefs when if the Court would say yes that conceding the facts destroys the validity of those opinions, it was more consonant with the spirit of

our proceeding that we suddenly brought it to the attention of the Court and threshed the problem out in this way and that is the purport of the motion.

What we are saying is that we feel that no opinion [fol. 1058] evidence can really be accepted when it is based upon facts, the exact nature of which cannot be ascertained or not known to the person who cross examined the expert about the facts upon which he bases his opinion.

The Court: But the uncertain nature of the facts, if it be uncertain——

Mr. Ball: Yes.

The Court: —is apparent.

Mr. Ball: Yes, it is.

The Court: And all opinion testimony is in effect invading the province of the trier of facts, anyway.

Mr. Ball: Yes.

The Court: Doesn't it resolve itself pretty largely to a matter of argument? I mean, this is one of the elements that I should expect you to argue.

Mr. Ball: It is.

The Court: In arguing the value to be given the opinion of this particular expert.

I will tell you why I say this. I would like very much to conclude this case on the basis that we have been going along thus far.

Mr. Ball: Yes.

The Court: I have never had thus far to say in an Anti-Trust case what I have said in many criminal cases [fol. 1059] and in many patent cases. That is, since I as the trier of the facts in a patent case, and the jury as the trier of the facts in the criminal cases, I am not going to be too much impressed with the expert testimony, since it is my conclusion in effect ultimately that you have to get along with, as bad as it may be and that I will limit you to one expert per side in a patent case, and one alienist per side in a criminal case, and then instruct the jury that they do not have to believe either alienist. That is what I usually do in a criminal case.

I do not like to do that here but I cite this merely to tell you that I regard this type of testimony, Mr. Ball, whether it be on your side or on the Government's side, in the same general category as opinion evidence.

Now, when one argues the value of the opinion one must, of course, be impressed with the ability of the man forming the opinion on the subject on which he is opinionated and the facts on which he bases his opinion.

Now, the facts or absence thereof are known to you sufficiently, I think, to argue the weight of his opinion and I [fol. 1060] would rather not open this up. There is only one other answer to this and that is for me to put their expert on the stand and let you cross examination him. And once we start that and now we have gotten this far without that, but once we start that we are liable to drag this thing out further than it has been dragged already. I don't like that.

Mr. Ball: I am not at all in disagreement with the Court's approach. I think perhaps I have not made the one point clear. If we had the witness on the stand and we would bring out from the witness that his opinion was certainly based on certain facts or information received in a piece of paper, that he can't remember exactly what those facts were but he does know that those facts entered into it.

The Court: Entered into his conclusion.

Mr. Ball: Yes. Then I would object at that time to the competency of the opinion. The Court then would have the chance to give the ruling on the weight of that and the Government would have the opportunity at that time, if the Court decided the witness did not carry weight, of correctiag that by saying, "Oh, here, we furnished the information so that you can complete your cross examination."

[fol. 1061] Now, the purpose of our motion really was to bring this to your attention in one form or another so that it cannot be said we were taking unfair advantage by not making our point at such time that the Government corrects the objection that we are going to make on this argument. Now, that is really the purpose of the procedure.

The Court: I think rather than an objection on the argument, what you should say is that the Government could correct or remove, rather, the basis of one argument that you are going to make.

Mr. Ball: That is right; that is right.

The Court: Now, the Government apparently would rather not do so. I would not in this stage of the proceedings put the expert on the stand, and I have gone through this explanation more or less to tell you that I think you have made your point and largely on procedural grounds I am going to deny your motion.

Mr. Ball: That is quite acceptable to us and the matter of fact is I think it should be known that we debated whether we shouldn't just wait and make the point on the briefs, and we are perfectly content to do that, but we have now given notice to the Government——

The Court: Precisely, and that is an argument that you [fol. 1062] are going to make to the weight of this testimony.

Mr. Ball: That is right.

The Court: All right. They are so notified and with that in mind I am going to deny your motion.

* * * * * * *

[fol. 1063] Mr. Ball: May we have this record show that since our motion is in the alternative, one to produce and the other to strike the testimony——

The Court: Yes.

Mr. Ball: —that the motion to strike the testimony——

The Court: Is denied without prejudice to your asserting your objection to its admissibility in your final brief.

Mr. Ball: Yes.

The Court: If that is not clear in the record, let it now be made clear.

* * * * * * *

[fol. 1064] In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 51 C 947

[Title omitted]

Plaintiff's Rebuttal Pre-Trial Order as to the Borden Company—December 16, 1958

The Court, pursuant to Rule 16 of the Federal Rules of Civil Procedure, having held pre-trial conferences from time to time, and the plaintiff and the defendant The Borden Company (hereinafter called "Borden") having come to certain agreements in the course of said conferences.

It is Ordered:

1. This order pertains only to the plaintiff and the defendant Borden.

2. The introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff and the defendant Borden that the evidence sought to be introduced is immaterial or irrelevant, and the [fol. 1065] same reservation and objection shall apply to all stipulations, agreements, and admissions of fact contained in this order.

3. This rebuttal pre-trial order and all matters herein referred to and all admissions of fact and agreements with respect to the further trial of this action shall be used for no other purpose than the trial of this action and are made solely for the purposes of this trial.

4. The testimony of Herbert F. Taggart, Otto F. Taylor, Albert E. Sawyer, and Elliott B. Woolley, as set forth in this order, is subject to correction, explanation, or amplification by reference, on behalf of either party, to the depositions of these four individuals, which are filed in this case and constitute a part of this record.

5. Either party in briefs and arguments may refer to and quote material appearing in any article or publication written or edited by Messrs. Taggart, Taylor, and Sawyer, which were referred to in their respective depositions, with-

out the necessity of identifying or introducing said articles into the record in this case.

* * * * * * *

[fol. 1066] B. Borden Cost Defense [2]

10. Professor Herbert F. Taggart if called to the stand as a rebuttal witness for the plaintiff would testify as follows:

I am a professor of accounting and formerly Assistant Dean, School of Business Administration, University of Michigan, Ann Arbor, Michigan, and have held other teaching positions at Kansas University and the University of California. I am a graduate of the University of Michigan with a Ph. D. degree in Economics. I am a certified public accountant, State of Michigan, and since 1929 have engaged in the private consulting practice of accounting, especially in connection with pricing problems.

I have held the following positions: Chief, Cost Accounting Unit, Research and Planning Division, National Recovery Administration, Washington, D. C., 1933-1935; Consultant on Distribution Costs, Department of Commerce, 1938-1939; Director of Accounting and Assistant Administrator, Office of Price Administration, 1940-1943; Chief, Contract Termination Section, Audit Division, Office of the Fiscal Director, Army of the United States, 1943-1946; Consultant on account-[fol. 1067] ing problems to ECA, Air Force, and other government departments; Chairman, Advisory Committee on Cost Justification under the Robinson-Patman Act, Federal Trade Commission, 1953-1956.

I am currently a member of the following professional organizations: American Institute of Certified Public Accountants; Michigan Association of Certified Public Accountants; National Association of Cost Accountants (President, Washington Chapter, 1945; National Director, 1947-1948); American Accounting As-

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[2] Exhibits and tables referred to in this section are in the accompanying Folder B.

sociation (President, 1942); and Controllers Institute of America (associate member).

I have written the following books and articles: *Minimum Prices under the N.R.A.; The Cost Principle in Minimum Price Regulation; Distribution Cost Accounting for Wholesaling;* Sections on distribution costs in the second and third editions of the Accountants' Handbook; and many articles in professional journals, including especially "The Standard Brands Case," in the *N.A.C.A.* Bulletin for October 15, 1939.

11. Professor Taggart would further testify that representatives of plaintiff conferred with him in June and July of 1957 and tendered for his review a copy of the plaintiff's Supplemental Pre-Trial Order—Borden, the preliminary draft of defendant Borden's Additional Pre-Trial Order, the deposition of Mr. Joseph F. Malone, and defendant counsel's abstract of this deposition. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of the Robinson-Patman Act, he would testify substantially as follows that:

(a) The field of distribution involves a multiplicity of functions, each of which is inherently different with respect to purpose and the economic conditions applicable thereto. Each of these functional activities with its attending economic conditions peculiar to it will engender different cost elements.

[fol. 1068] (b) Because of the foregoing inherent characteristics of the distribution function, each cost element (or homogeneous grouping of same) should be identified and analyzed separately to ascertain the various economic conditions and factors which create such cost and then be allocated to its sources (functions, products, and customers) in relation to its respective factor or combination of factors creating it. This general principle is in harmony with the requirements of the Robinson-Patman Act accounting objectives.

(c) Central Office Expenses, omitted by Defendant Borden, consisting of the time of the executives and their office staff spent in obtaining and main-

taining customer accounts, should be determined and allocated to the respective store customers in proportion to the use of this time among them.

(d) The route drivers perform two functions identified as:

(1) The service function in which the driver performs certain services at and in the store of the wholesale customers, other activities relating to determining the store's needs for the day, and to do the necessary route bookkeeping, and loading and unloading at platform; and

(2) The transportation function which is necessarily involved in moving the goods from the platform to the wholesale customers on the route. A portion of driver's time is necessarily involved in this function.

(e) In view of the nature of his service function as thus defined in (d), the driver's salaries and wages (including personnel benefits and vacation costs) should be prorated to the driver's service function and his transportation function on the basis of an appropriate time study, which includes the time from the platform to, at, and in each store and return to the platform, the time spent on route bookkeeping, the time spent determining the day's requirements, and the time spent on daily reports.

(f) The driver service costs then should be allocated among the store customers on the basis of the time study of his activities performed only at and in the stores of the customers on the routes, including time spent preparing and checking orders, loading and unloading at platform, and other route bookkeeping tasks.

[fol. 1069] (g) Transportation costs must include not only the cost of operating the vehicle involved, but also the driver's wages apportioned to the transportation function as defined in paragraph (d) above. Such total transportation costs will most logically be allocated to the stores on the basis of their respective volumes delivered. With respect

to transportation costs, customers on delivery routes are responsible for truck operating expense in proportion to their physical volume of purchases.

(h) It is apparent from paragraph 196 MD of Borden's Additional Pre-Trial Order, drivers do exercise some influence on volume delivered, and that such commissions should be allocated to the store customers on the basis of volume of product delivered to each. Under this procedure, commissions would be essentially a direct charge exactly determinable for each customer on every route. To justify allocating commissions on any other basis would require a definite showing that such direct charge produces inequitable or illogical results. If an expense is such that it would be eliminated if the customers were dropped, it is hard to say that it is not a specific cost to that customer.

12. Albert E. Sawyer, of the firm of Sawyer & Marion in New York City, if called to the stand as a rebuttal witness for the plaintiff, would testify that he has the educational and professional background substantially as follows:

He received a Bachelor of Law, June 1929, University of Michigan Law School and engaged in pre-law studies at the College of Literature, Science and the Arts, University of Michigan, completed June 1924.

His professional experience consists of:

Factory accountant for the Dort Motor Car Company, Flint, Michiga. (1918 through 1923);

Employed on a part-time basis as an accountant on the administrative staff of the University of Michigan (September 1923 to November 1927);

[fol. 1070] At the special request of Dr. Clarence C. Little, then president of the University of Michigan, he accepted the assignment on a full time basis to reorganize all *business and accounting procedures* incident to the administration of the University Hospital (November 1927 to October 1928);

He was retained as management consultant by the Women's Hospital, Detroit, Michigan; Toronto General Hospital, Toronto, Canada; and Presbyterian Hos-

pital, New York City, New York (October 1928 through 1930);

Legal Assistant to Henry S. Dennison, president of the Dennison Manufacturing Company, Framingham, Massachusetts. His work with this company constituted a series of special assignments to study and report upon the adaptation of the company's organization and distribution policies to legal and economic changes growing out of the financial and business depression of the early 1930's. Among these assignments were, first, the coordination of the company's participation in some sixteen codes of fair competition under the National Recovery Administration, second, a comprehensive study of the company's distribution practices under the Robinson-Patman Act (March 1931 to August 1938);

He was associated with the law firm of Wise, Corlett and Canfield. From the inception of this work he assumed several substantial assignments in connection with anti-trust matters (August 1938 to November 1939);

Washington associate of the firm of Wise, Corlett and Canfield. He was associated with this firm as a *consultant in accounting, economic and industrial organization problems* and as *practicing attorney* (November 1939 to December 1943);

Formed *law partnership* with Clarence K. Marion under style "Sawyer & Marion" with offices at 1624 Eye Street, N.W., Washington 6, D. C. (December 1948 to date).

His present responsibilities are as he states:

> Since October 1, 1945 I have maintained an office at 56 Beaver Street, New York 4, New York staffed with accountants and statisticians to aid me in my assignments in economic, statistical and accounting research related to litigation in the anti-trust field. [fol. 1071] This phase of my work is carried on since 1951 as a partnership under the style *Albert E. Sawyer Company*, with Clarence K. Marion as partner.
>
> The nature of my law practice has remained the same since my admission to the Bar of the District of

Columbia in 1939. It is a specialized practice which has evolved logically from my experience in cost accounting and business management and industrial organization to which I applied my legal training. My practice concerns itself almost exclusively with laws and regulations affecting manufacturing businesses and these, in turn, with a few exceptions are federal statutes and regulations affecting inter-state commerce. I have been retained in administrative proceedings before the Federal Trade Commission, Fair Labor Standards Administrator, National Labor Relations Board, War Labor Board, U. S. Emergency Court of Appeals, Office of Price Administration, and as counsel to special committees serving the War Production Board, and the Office of Price Administration. I am retained from time to time in criminal and civil suits instituted by the Department of Justice under the Sherman Act and other anti-trust laws. I am retained from time to time in private litigation under such laws. I have represented both plaintiffs and defendants in these matters. My particular forte in connection with this type of practice lies in the combination of legal training and practical business and accounting experience which gives me added facility in the analysis of business problems arising under these laws and regulations, and the development and presentation of accounting and statistical information arising under such laws. In this type of work I am frequently retained by New York and Washington attorneys as special counsel and by government agencies. I am retained by several companies as special counsel, supplementing general counsel in problems arising from the above field of practice.

The various assignments in the anti-trust field have necessitated extensive studies in the following industries; flat glass, specialty glass, rubber, petroleum, rugs and carpets, banking and securities, cordage, automobile parts, pianos, many different branches of the paper industry and industries using paper as their principal raw material, electrical manufacturing, food processing, chemical, rayon, sand & gravel and various miscellaneous manufacturing organizations.

[fol. 1072] My work has involved extensive studies in the field. I have organized and directed a large staff of accountants and statisticians to collect original data in the field which is later analyzed and presented for use in litigation. My field studies have included personal examination of many different types of sales solicitation effort, the methods of planning used in such work, comparative costs, maintenance of jobbers stocks, relative efficiency of different methods of warehousing manufactured goods for the most effective national distribution. Through this work I have become intimately acquainted with the manufacturer's problems of national distribution and the methods of analyzing such work.

My experience has also included a substantial effort in the analysis of manufacturing processes, particularly in studies designed to reveal cost savings due to different methods of manufacturing.

I have been called upon from time to time to study the effectiveness of organizations operated by academic and governmental bodies such as the University of Michigan Hospital; Women's Hospital, Detroit, Michigan; Toronto General Hospital, Toronto, Canada; Columbia University Hospital, New York, N. Y.

Each year for the past twenty-five years I have been called upon for several addresses and lectures before business, accounting and legal groups such as Comptrollers Institute, National Association of Cost Accountants, New York State Bar Association, Trade and Commerce Bar Association, University of Michigan School of Business, Harvard Business School, Harvard Law School, George Washington University Law School, University of Michigan Law School, and the Trade and Industry Law Institute and the Practicing Law Institute of New York.

The more important assignments involving both legal and business analysis are:

F.T.C. vs. Book Paper Association—in charge of development of statistical defense of methods of distribution;

F.T.C. vs. Standard Brands, Inc.—special counsel upon appeal. Developed and presented extensive statistical

and accounting proof of justification of quantity differential rates under Robinson-Patman Act;
[fol. 1073] F.T.C. vs. Tag Manufacturers Institute—in general charge of entire case and counsel for all respondents. Complaint and Order Dismissed upon Appeal;
General counsel for Gummed Industries Association (1939 to date);
General counsel for Waterproof Paper Manufacturers Association (1945 to date);
General counsel for Industrial Bag and Cover Association (1950 to date);
General counsel for Rubber Heel and Sole Institute (1944 to date);
General counsel for the Textile Bag Manufacturers Association (1949 to date);
Public service—member of the Attorney General's National Committee to study the antitrust laws; member of the Federal Trade Commission Advisory Committee on cost justification.

He has authored the following publications:

"The Control of Industrial Costs"
Year Book of National Association of Cost Accountants—1938;
"Cost Accounting Opportunities under the Robinson-Patman Act"
Bulletin: National Association of Cost Accountants Vol. XVIII, No. 12—February 15, 1937;
"Cost Accounting as Evidence in Cases Arising Under the Robinson-Patman Act"
Bulletin: National Association of Cost Accountants Vol. XIX, No. 12—February 15, 1948;
"Accounting and Distribution Techniques as Voluntary Devices to Eliminate Abuses in Marketing"
The Accounting Review—June 1939;
"Round Table Discussion of the Robinson-Patman Act"
Year Book of National Association of Cost Accountants—1938;
[fol. 1074] "The Commission's Administration of

Paragraph 2(a) of the Robinson-Patman Act: An Appraisal."
The George Washington Law Review—January-February 1940
A special symposium commemorating the 25th anniversary of the Federal Trade Commission;
"Robinson-Patman Act Symposium"
Commerce Clearing House, Inc., Publishers of Topical Law Reports—1948;
"Uniform Delivered Price, Under Recent Court Decisions, 1948"
Institute of Trade and Commerce Professions
Current Business Studies No. 1;
"Accounting and Statistical Proof in Price Discrimination Cases"
Iowa Law Review, Vol. 36, No. 2 Winter 1951;
McGraw-Hill Executive Course in Profitable Business Management
J. K. Lasser—Albert E. Sawyer.

He has membership in the following professional societies:

American Bar Association—Member Committee on F.T.C.;
Bar Association of the District of Columbia;
Society of Business Advisory Professions, Inc. (President 1953)—Chairman of the Board 1954—Director 1949—to date;
National Industrial Conference Board;
American Economic Association;
American Marketing Association;
American Statistical Association;
The Business Historical Association, Cambridge, Massachusetts;
National Association of Cost Accountants.

13. Mr. Sawyer would further testify that representatives of plaintiff conferred with him during July-September of 1957 and tendered for his review a copy of the plaintiff's Supplemental Pre-Trial Order-Borden, the preliminary draft of defendant Borden's Pre-Trial Order, the deposition of Mr. Joseph F. Malone, and defendant counsel's abstract

[fol. 1075] of this deposition. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of the Robinson-Patman Act, he would testify substantially as follows that:

(a) The costs that are eligible for consideration under the cost proviso of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act are those which result from certain differences in the procedure of dealing with particular purchasers or classes of purchasers, to wit, those paying the higher of two prices and those paying the lower. The excuse or justification for the two prices rests in a difference either in *quantity* purchased or *method* of sale or delivery. Each of the differing methods or quantities must be assigned a cost—*a partial cost*—of the total operation of producing, selling, and delivering the products in question. The field of inquiry is further narrowed by requiring the differing methods to be related to particular customers or classes of customers receiving the differing treatment on the part of the seller.

(b) So circumscribed and delimited, the application of this proviso deals with a highly synthetic concept which has little or no direct relationship to ordinary every day steps taken in recording the transactions which constitute the selling and delivering of products to customers. "Robinson-Patman Accounting" must, therefore, be distinguished from cost accounting in the ordinary course of business in that it is not a matter of record keeping on a day to day basis and provable as such, but consists essentially of numerous series of estimates, the validity of which rests, in large measure, upon the standard of care and good faith which brings them into being.

(c) Where alternative methods of allocation are available, the considerations which dictated the ultimate choice should be stated as a part of the direct presentation of the justification. If there is reliance upon historical precedence in the particular business or trade, the validity of the continued use

of the precedent should be justified. Experience has dictated that so-called "normal and accepted accounting practices" used for management pur- [fol. 1076] poses, or other general every day purposes, are not necessarily applicable for the purposes dictated by the Robinson-Patman Act.

(d) In segregating distribution costs for cost justification purposes, the functional approach is to be preferred although other approaches may be appropriate under some cost categories, costs are then subdivided into two groups. The first comprises those costs which are readily defined as directly applicable to a given functional segment. This involves no problem of allocation as between two or more segments.

(e) The costs of functions which are not chargeable directly must be assigned by allocation. The process of allocation involves the measurement of the activity or output of the function in terms of appropriate units and then applying to each business segment the amount of the functional cost which is in proportion to its use of or responsibility for the units of functional service. The choice of the appropriate service unit which will adequately measure indirectly related functions to the costing segments is crucial to the validity of the results of a cost justification study. The two main considerations in making this choice is rationality and practicality of the selection.

(f) There is no single set of accounting principles by which to reach a determination of what constitutes "due allowance" for differences in the cost of distribution to one type of buyer as against other types. The care and reasonableness of the methods of allocation are paramount considerations. Where a particular method of allocation tends toward a bias in favor of the discount to be justified there is a special obligation upon the proponent to establish the soundness of the selection of method.

(g) The cost justification of the discounts or price differentials employed by Borden in the sale of fluid milk involve a complex of joint cost relation-

ships which requires an allocation of internal costs among various classes of products and classes of customers. The problems of proof center upon the question whether such presentations as have been developed in justification of these differen- [fol. 1077] tials, resting as they do in large measure upon the subjective qualities and judgments of the individuals who have executed or directed them, constitute acceptable evidence.

(h) Borden's route drivers perform dual functions, one of which is the physical movement of fluid milk products from platform to the customer. In the performance of this function the route man is a truck driver and time devoted to the performance of this function should be allocated as an element of the transportation cost. The second function is the placement of the fluid milk products in the customer's place of business. This includes a variety of activities dependent upon the nature and location of the customer's business. In the performance of these activities the route man provides a service for the customer, more or less, depending upon the customer's requirements. Time devoted to these service activities should be accounted for as an element of customer service costs, and taken into account in the determination of the aforesaid transportation costs.

(i) The allocation of transportation costs to customers provides a choice of methods, the choice being dependent upon whether the tonnage or volume carried directly affects the elements of transportation cost, i.e., the cost of operating the vehicle and the time consumed in driving it on the route. If this is the case then weight or bulk, whichever has the direct effect upon the cost, should become a factor in the allocation. Customers taking heavy weight or large bulk should bear proportionately heavier costs than those who take less.

(j) The allocation of the drivers' costs for customer services performed is a matter of a time study reporting of the route man's time devoted to these activities on a customer basis. In grouping the

results of such studies into customer or discount classes the usual rules relating to proper averaging should be observed, i.e., of homogeneous classes.

(k) Central overhead, or what is sometimes known as General Office Expense, includes broadly, billing, credits, and collection, general accounting and general administrative staff, and executives' time. Where the organization operates through numerous branches each with important central overhead [fol. 1078] functions these should be brought into this category of cost analysis. Many of the costs involved under this heading may readily be classified as of proportionate application to all discount classes, and therefore, outside of the scope of the justification study. Care should be taken to avoid a hasty determination of this condition. It is incumbent upon the proponent of a cost justification to ascertain if there are indirect costs among the general overhead accounts which tend to counteract savings claimed at other levels of distribution. Do the larger customers who benefit from larger discounts impose greater accounting burdens upon the seller by requiring special distribution reports or particularly burdensome billing techniques? *It is particularly incumbent upon the proponent of one of these studies to ascertain in some reasonable fashion the added cost in top administrative personnel required to solicit and maintain the business of the larger customers who enjoy the larger discounts.* This is seldom possible by ordinary appraisal methods. Time is seldom a relevant measure of such costs. *Where the calibre (and the salary) of the executive responsible for the larger units of business is conditioned upon his ability to get and to hold these accounts, the cost in added salary and expense should be allocated to those accounts.* The witness would state upon examination that in his professional capacity as advisor in these matters to many large corporations it is his practice to stress the importance of this aspect of the cost of getting big business and holding it, and to advise that a realistic study be

made and a careful appraisal of the added cost be undertaken. *His experience indicates that this element of cost is not de minimis and that in his judgment a cost justification may well be considered incomplete without a showing that this effort has been seriously made.*

In Borden's cost study, no attempt was made to allocate central office expenses as between chains and independent stores although the defendant conceded that the getting and holding of chain store business was the function of top management. The witness considers the failure to make these allocations and the further failure to explain such omissions other than to cite the fact that such allocations are difficult to make constitutes a significant weakness in Borden's cost study. *His professional experience has indicated such costs are not de minimis, and that a study is incomplete that does not make a reasonable allowance for such* [fol. 1079] *costs known to be applicable to the favored customer classification.*

(l) As to driver's commissions, there would seem to be sufficient indication in Mr. Malone's opinion, as recorded in paragraph 196 MD of Borden's Additional Pre-Trial Order, to warrant the conclusion these costs were directly related to volume purchased by each customer. It then follows that these costs should have been allocated to each customer on a volume basis unless this could be demonstrated to be unfair or inequitable.

14. Otto F. Taylor of the firm of Bacon, Taylor & Beairsto, New York City, New York, if called to the stand as a rebuttal witness for the plaintiff, would testify substantially that his qualifications are as follows:

Birthplace:

Lawrence, Massachusetts

Date of Birth:

February 16, 1889

Home Address:

86 Blackburn Road, Summit, New Jersey

Home Telephone:

Crestview 7-2120

Education:

Academic—Dartmouth College, AB, 1910
Accountancy—Amos Tuck School of Business Administration, MCS, 1911.

Certified Public Accountant Certificates:

New York	1919
Connecticut	1929
New Jersey	1934

[fol. 1080] *Registered Municipal Accountant Certificate:*

New Jersey	1935

Admissions to Practice:

U. S. Treasury Department	1921
U. S. Board of Tax Appeals	1924
Securities & Exchange Commission	1935

Societies:

Phi Beta Kappa	1910
American Institute of Accountants	1920
New York State Society of C.P.A.'s	1919
New Jersey Society of C.P.A.'s	1934
National Association of Cost Accountants	1920
American Management Association	1935

War Service:

First Lieutenant Air Service, 1917 to 1919

Experience:

Niles & Niles, C.P.A.'s—Staff, 1911 to 1917
Haskins & Sells, C.P.A.'s—Staff, 1919
Thomson & Black, Accountants and Engineers—Staff, 1920-1923
Otto F. Taylor, Principal, 1923 to 1927
Webster, Blanchard & Taylor, Partner, June 1, 1927 to May 31, 1957
O. F. Taylor & Co., Partner, June 1, 1937 to date

Other:

President, N. Y. Alumni Amos Tuck School of Business Administration
Director, Summit Trust Co.
Member, Federal Trade Commission Advisory Committee on Cost Justification

15. Mr. Taylor would testify further that in the months of July to September 1957, representatives of the plaintiff conferred with him and tendered for his review a copy of the plaintiff's Supplemental Pre-Trial Order, the preliminary drafts of Borden's Additional Pre-Trial Order, the [fol. 1081] deposition of Mr. Joseph F. Malone, and the defendant counsel's abstract of this deposition. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of Section 2(a) of the Robinson-Patman Act, he would testify substantially as follows that:

(a) Although the general principles of accounting applicable in any instance are the same, the techniques by which they are applied differ according to the purpose to be served. Cost accounting for management purposes, for example, may compare standards of performance with what actually occurs and explain the amount and sources of variation. On the other hand, cost justification under the Robinson-Patman Act is of an entirely different character. Such a study is for the purpose of comparing differences in prices of goods of like grade and quality sold to competing customers with relevant costs which result from differences in the method of sale, differences in the method of delivery and differences in the quantity. Inasmuch as price means, in ordinary terms, the money charged per unit, cost from a Robinson-Patman study must also be in terms of cost per unit or the equivalent.

(b) The basic technique which the accountant will follow is that of long division. First of all he must find the dividends of his problems. These dividends will be the various categories of money

spent by a seller during a period of time, including all of those categories with respect to which variations in cost may occur by reason of the differences in quantity or in method of sale or delivery. All other kinds of expenses may well be excluded because they have no bearing on a cost justification problem. The important thing for the accountant to have in mind in this analysis of money spent is that each of the categories must be homogeneous whether they be products, classes of trade, customers or activities. The reason for this should be obvious when it is considered that cost accounting of necessity deals with averages, otherwise there would be no end of it; and averages to be useful must be averages of like items. The average weight of elephants and mice means nothing; neither does the average cost per minute of transporting goods and selling [fol. 1082] them. This analysis of expenditures is often referred to as "functional analysis" of expenses which means dividing expenses into separate parts, each part representing the cost of a certain homogeneous activity.

The next step in this task of long division is to find the proper divisors to be applied to the dividends. These divisors should be those units which for each individual function most nearly reflect or cause the variations in the amount spent. For example: if the dividend is the money cost of typing invoices, and if the amount of that cost varies according to the number of lines typed, then invoice lines is a proper divisor in that case. If truck transportation costs vary by distance, then mileage is a proper divisor for that cost category.

When the accountant has broken down the expenses of a period by functional groups, and has related to each of those groups the best available unit of measure, he is prepared to complete his long division example and state his quotient or series of quotients consisting of unit costs. The applicable unit costs may then be grouped, the

total of them found, the difference calculated, and compared with the price difference in question.

(c) Calculation of the cost differences which result from different quantities or methods of sale between competing retail stores should include the cost of executive time and expense attributable to securing and maintaining customer accounts and the salaries and expenses of billing, accounting, credit, statistical, and other office operations. If such costs may properly be allocated according to customer classes (for example, chain stores and others), and if one class (say chain stores), required a disproportionate amount of such services, then naturally the costs allocated to that class of customer would reflect that fact.

(d) The route drivers perform two functions identified as: the service function in which the driver performs certain services at and in the store of the customer, and the transportation function which is necessarily involved in moving the goods from the platform to the customers on the route, and in which a portion of the driver's time is necessarily involved.

[fol. 1083] (e) In view of the nature of his service function, as defined above, the driver's salaries and wages (including personnel benefits and vacation costs) should be prorated to driver's service function and his transportation function on the basis of an appropriate time study, which includes the time from the platform to and at each store and return to the platform as well as the time spent on miscellaneous activities such as route bookkeeping, checking orders and daily reports, and loading and unloading at platform.

(f) The driver service costs, as defined above, then should be allocated among the store customers on the basis of the time study of his activities performed at and in the stores of the customers on the routes, including time spent preparing and checking orders, loading and unloading at platform, and other route bookkeeping tasks.

(g) Transportation costs must include not only the

cost of operating the vehicle involved, but also the driver's wages apportioned to the transportation function as defined above. Such total transportation costs will most logically be allocated to the stores on the basis of their respective volumes delivered. With respect to transportation costs, customers on delivery routes are responsible for truck operating expenses in proportion to their physical volume purchased.

A route delivery truck in this business may well be looked upon as a moving warehouse and that the cost of moving it with its load should be allocated very much like the cost of a central warehouse; say, at the pasteurizing plant. Since the total quantity of fluid milk is not allocated to any one store until after the truck reaches that store, all of the cost of getting it there becomes merged and spread over the whole load. Such aggregated transportation cost may, therefore, be divided into parts only on a volume basis. Having reached the store the additional costs incurred at that location including the segregated portion of the driver's pay may properly be assigned to that particular store. It makes no difference whether this store is a chain store unit or an independent store, because it is not owners which compete but particular stores. One owner may have a lot of stores or only one but but in this business finance is irrelevant.

[fol. 1084] (h) The allocation of joint costs involves the selection of units of measurement, or yardsticks as they are sometimes called. Frequently, the problem resolves itself into a choice between available units none of which is perfect. Good accounting practice dictates the selection of that basis which is most closely related to the activity or function the cost of which is being allocated. In the case of commissions paid to milk route drivers based on volume of products delivered, the correct basis of apportioning the cost among customers is obviously the relative volume delivered to individual stores. It could probably

be demonstrated that variations in any unit other than volume, such for example, as minutes at location, are less closely associated with variations in amount of commissions than are variations in volume delivered.

16. Elliott B. Woolley if called to the stand as a rebuttal witness for the plaintiff would testify as follows:

He was graduated from Leland Stanford University, Palo Alto, California in 1937, with an AB degree in economics, statistics, and mathematics. From 1940 to 1942, he engaged in graduate studies in economics, statistics, mathematics, and accounting while a resident in Washington, D. C. at American University and Graduate School of the United States Department of Agriculture. He has written an article for publication in the *Econometrica*, entitled "Method of Minimized Areas for Correlation Analysis." He has since 1937 been employed by the Federal Government in various capacities as statistician and economic analyst until 1948 at which time he was employed by the Antitrust Division of the Department of Justice as an economist and is at the present assigned to the Chicago field office.

17. Mr. Woolley would testify further that he has reviewed all of the material submitted by the defendant Borden pertaining to their offer of defense relating to the existence of competition and cost defense of price differences among their wholesale customers, and the existence of competition and cost defense of price differences among their bulk wholesale customers. He has conducted [fol. 1085] on behalf of the plaintiff a rebuttal mail questionnaire of the wholesale customers of the aforesaid sample stores and has analyzed the results as they relate to the question of competition which are presented in Section I-A of this rebuttal pre-trial order. He also has analyzed the defendant Borden's cost study as presented, the results of which are submitted in answer thereto in the paragraphs to follow. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements

of the Robinson-Patman Act, he would testify as follows: that he agrees in substance with the controlling principles of cost accounting, their application to, and criticism of the Borden cost defenses as stated by the foregoing three expert testimonies.

In addition, he would state that in his opinion total transportation cost is incurred by virtue of the prior existence of the customer demand that the fluid milk product be brought to them, rather than having each customer go to the platform himself. Hence, they are each proportionately responsible for the creation of this cost to Borden; obviously if none demanded such door delivery, this distribution transportation cost would not exist. Each truck has a volume capacity in which all the amounts of fluid milk to be delivered on that day's trip are carried. Each store customer participates in this total volume proportionately to the amount left that day. Since each store's orders occupy a proportionate amount of cubic space in the truck, the total transportation costs thereof should be equally [fol. 1086] applicable to each unit of volume of space so occupied. Hence, the only rational basis of allocation of this cost to the respective customers is in proportion to the volume of fluid milk products delivered to each. Each unit of volume will be charged the same rate of this total transportation cost, and will be most equitably allocated thereby to the store customers.

With regard to the proper allocation of commissions paid to the drivers, he would state that paragraph 181 and Schedule XXIV of Borden's Additional Pre-Trial Order demonstrate that the calculation of drivers' commissions, in conformity with the provisions of the "Milk Driver's Union Contract" (plaintiff's Rebuttal Exhibit N), is based on the total physical volume of fluid milk products delivered to the independent and general store customers on the route; and that each such store contributes its share of volume to that total. Furthermore, that paragraph 196 MD of Borden's Additional Pre-Trial Order demonstrates that in the opinion of Mr. Malone, the defendant Borden's expert,

> . . . it is the practice of the wholesale routemen serving independent store customers to anticipate the total requirements of all his customers in preparing the

route order covering the entire route for the next day. It is also the practice of the wholesale routeman to anticipate the requirements of each individual store customer and, at the time of delivery, to leave quantities which, in the routeman's opinion, are sufficient to supply the daily sales needs of the customer. Mr. Malone states that there may be some minor exceptions to this practice but that this practice prevails in at least 95% of such locations served. There are no pre-orders by store customers.

[fol. 1087] Hence, it appears from these admissions that route drivers have some degree of control or influence over volume, and since the commission is paid on a progressive rate scale, it provides the incentive for the driver to use this control to maximize his volume delivered—limited only to customer demand experience and the opposing health requirement that fluid milk must be returned to the supplier for other non-fluid milk uses if not sold within three days. Since drivers can and do exercise some influence on volume delivered, then commissions paid them for such volume should be allocated to the store customers on the basis of volume of product delivered to each. Commissions are essentially by nature a direct charge exactly determinable for each customers on every route, because the elimination of, or variation in, the volume of any one customer will of necessity affect the amount of commissions paid to the driver.

Borden has computed distribution costs for all units of the chain customers collectively, whereas they have computed such costs for each independent discount class, which is essentially a classification of costs by volume or size of independent customer. Comparison of costs of such chains and independents is not satistically valid since they are not expressed in comparable classifications. It is a fundamental rule of statistical treatment of data that averages to have statistical meaning and validity in comparisons, must be based on comparable treatment and conditions. In the subject case, size of store is the important basis of classification for any valid comparison of costs and prices of both customer classes.

[fol. 1088] 18. In answer to paragraph 153 MD of de-

fendant Borden's Additional Pre-Trial Order, Borden supplied upon plaintiff's request the following additional data on the number of chain store units and the number of non-store customers served in each of the years from 1947 to 1956, inclusive, together with the number of independent stores, and the proportion of chain and independent volume delivered to chain stores, as follows:

[fol. 1088]

Year	Number of Customers Served			% Chain Volume of Total** Delivered
	Independents	Chains*	Non-Store	
1947	2,209	305	1,744	31.3
1948	2,338	298	1,757	33.4
1949	2,267	290	1,696	37.7
1950	2,258	283	1,773	40.7
1951	2,113	281	1,782	41.6
1952	1,925	277	1,667	42.6
1953	1,728	274	1,663	49.5
1954	1,520	256	1,718	55.4
1955	1,357	110	1,814	53.2
1956	1,224	112	1,695	42.1

* Includes A & P and Jewel companies, except Jewel was lost in 1955 and 1956.
** Total of chain and independent volumes in year.

These are stores served by Borden's Chicago Milk Division in its Metropolitan Chicago serving area.

[fol. 1089] 19. In answer to paragraphs 82 MD to 276 of Borden's Additional Pre-Trial Order, plaintiff submits Plaintiff's Rebuttal Exhibit M in the accompanying Folder B, which graphically portrays the nature of the route driver's functions involved in Borden's distribution system, and the various cost centers which should be allocated separately in accordance with the foregoing applicable cost accounting principles consistent with the requirements of Section 2(a) of the Robinson-Patman Act. This exhibit shows for each cost center the economic factor or basis by which it should be allocated to Borden's store customer discount classes in harmony with said cost accounting principles.

20. In answer to paragraphs 82 MD to 276 of Borden's Additional Pre-Trial Order, plaintiff submits the information summarized on *Table 8* in the accompanying Folder B. This information summarizes the distribution of the various economic factors used by Borden to allocate their various delivery cost elements among the relevant classes of whole-

sale customers and additional data not used by them. The data for "Total Driver Time" are derived from Schedules XXVI, XXVII, and XXIX of the Borden's Additional Pre-Trial Order, and represent the distribution of the total number of minutes consumed by all drivers driving to and from routes and the amount of time spent serving the stores on the route during the sample months of July and August 1955. The "Number of Stops" are from paragraph 202 of this same Borden Additional Pre-Trial Order and [fol. 1090] represent the number of stops made at each store on the route by the drivers during the sample months of July and August 1955. The "Number of Locations" are also from paragraph 202 of the Borden's Additional Pre-Trial Order and represent the number of customers served on the routes during the same sample months. These three factors are the sole basis Borden uses to allocate all direct delivery costs among the classes of stores: Drivers' wages and salaries, including personnel benefits and vacation costs, commissions, and cost of transportation. Special delivery costs are distributed on the basis of number of special delivery stops. The indirect labor costs consisting of salaries and wages (including personnel benefits and vacation costs) of office personnel in the Branch, Division, and District offices, were allocated, on the basis of separate time studies of each, to the chains versus independents as a whole; their allocation to the respective independent discount classes was on the basis of "number of customers." The "Number of Points Delivered" and the "Dollar Value of Sales" relate to the sample period of July and August 1955 and were supplied by Borden upon request of plaintiff as identified in Schedule XXXIV of the Borden's Additional Pre-Trial Order.

21. The plaintiff submits *Tables 9 and 10* in the accompanying Folder B, summarizing the results of Borden's allocation of direct and indirect delivery costs among the classes of wholesale customers based on their own system of allocation. *Table 9* summarizes the distribution of the relevant indirect costs of office personnel at the Branch, [fol. 1091] Division, and District offices, which were obtained from Schedule XXXIII and paragraphs 245 to 261 of the Borden's Additional Pre-Trial Order. *Table 10* incorporates the total of *Table 9* and the results of the dis-

tribution of Borden's direct delivery costs as allocated by Borden's system of allocation among the classes of customers. As shown on *Table 10*, the "Number of Points Delivered" are from *Table 8*. The "Direct Labor Costs" are from Schedules XXVI to XXIX of the Borden Pre-Trial Order. The "Special Delivery Costs" are from Schedule XXXI of the same order. The "Transportation Costs" are from Schedule XXXII of the same order. "Office Personnel Costs" are from *Table 9*. The "Loss on Returns" are from paragraphs 264 to 266 and the "Bad Debts" are from paragraphs 262 to 263 of the said order.

22. The Borden driver time study discloses that the principal source of cost difference between the chain and independent customers arises from the differential services rendered the independents but not the chains as shown on Schedules XXVI to XXIX of Borden's Additional Pre-Trial Order. Not all the independents themselves received all of these differential services on the sample day of their time study in 1955. This knowledge, that there results a cost savings to Borden when such differential services are not performed for the independent customer, which would justify greater discount than that which is granted them by the published Borden schedule of discounts in question, was never brought by Borden to the attention of their independent customers according to the record of this case.

[fol. 1092] 23. The plaintiff submits *Tables 11 and 12* in the accompanying Folder B, as further rebuttal evidence. *Table 11* summarizes the effects of segregating the route driver's service and transportation functional costs and the pro rata extractions of drivers' total commissions from the respective results, in accordance with the foregoing applicable principles of cost accounting required for purposes of the Robinson-Patman Act. The total drivers' costs consisting of average weekly drivers' wages and salaries (with personnel benefits and vacation pay) and drivers' commissions ($10,148) are as stated in *Table 10* (column 2), but include the portion of such drivers' costs which are applicable to the transportation function. The drivers' costs applicable to the transportation function (columns 2 to 6, *Table 11*) are those defined in Item Nos. 25, 26, 31, 32, and 36 of paragraph 184 and the cost alloca-

tions for each as stated in Schedules XXVI, XXVIII, and XXIX of the Borden's Additional Pre-Trial Order. The totals of these drivers' costs of transportation time are deleted from the total drivers' costs to produce the required total cost of drivers' service time for each discount class. But these two classes of costs, as thus derived and separated, include their pro rata shares of total drivers' commissions which were proportionately deleted to yield the net drivers' costs, excluding commissions, for the drivers' service time and drivers' transportation time, respectively. *Table 12* shows the effect of reallocation of the drivers' commission expenses ($10,148) and the total transportation costs (consisting of the vehicle costs and the [fol. 1093] drivers' costs of transportation time) on the basis of volume (point values of column 1, *Table 12*), in accordance with the foregoing applicable cost to accounting principles. The allocation of "Special Delivery Costs" and "All Other Costs," consisting of "Office Personnel Loss on Returns" and "Bad Debts," are as defined by the Additional Pre-Trial Order. (See footnotes to Tables 9 and 10.) The total and average unit delivery costs were then computed for each discount class. Rebuttal Exhibit N, in Folder B, is the Milk Wagon Drivers Union Agreement for May 1, 1953 to May 1, 1955.

* * * * * * *

[fol. 1094] Enter:

————, United States District Judge.

Date: December 16, 1958.

[fol. 1095]

TABLE 8

Comparison of Distribution of Various Factors for Allocation of Borden Distribution Cost Elements by Classes of Store Customers

Store Discount Classes	Factor: Units					Percentage Distribution				
	Total Driver Time [3]	No. of Regular Stops [4]	No. of Locations [4]	No. of Points Delivered [5] (1,000)	Dollar Value Sales [5]	Total Driver Time	No. of Regular Stops	No. of Customers	No. of Points Delivered	Dollar Value Sales [6]
Other [2]	17,332	2,002	374	86.3	18,579	8.00	15.6	19.2	5.9	5.9
Independents:										
0%	14,684	2,138	392	30.8	6,555	6.7	16.7	20.1	2.1	2.1
2%	45,591	3,596	573	157.5	33,051	21.0	28.1	29.4	10.7	10.6
3%	37,753	1,951	277	171.3	35,899	17.3	15.2	14.2	11.7	11.5
4%	21,231	710	80	110.9	23,168	9.8	5.6	4.1	7.5	7.4
Total	119,259	8,395	1,322	470.5	98,673	54.8	65.6	67.8	32.0	31.6
Chain Stores [1]	81,004	2,412	254	913.5	195,263	37.2	18.8	13.0	62.1	62.5
Total	217,595	12,890	1,950	1,470.3	312,515	100.0	100.0	100.0	100.0	100.0

[1] A & P and Jewel Stores.
[2] Restaurants, cafeterias, etc.
[3] Schedules XXVI, XXVII, and XXIX of Borden Pre-Trial Order, and are the total minutes in sample (July and August 1955).
[4] Paragraph 202 of Borden Pre-Trial Order.
[5] Paragraph 270 and Schedule XXXIV of Borden Pre-Trial Order.

[fol. 1096]

TABLE 9

Borden Indirect Labor Costs Allocation to Store Office Personnel

Store Discount Classes	Branch Personnel [1]	Division Personnel Departments				District Personnel [5]	Total Indirect Labor Costs
		Billing [2]	Credit [3]	Accounting [4]	Total Division		
Other	499	67	50	—	117	—	616
Independents:							
0%	391	12	3	46	61	13	465
2%	571	18	4	62	84	18	673
3%	276	9	2	31	42	9	327
4%	80	3	1	15	19	5	104
Total	1,318	42	10	154	206	45	1,569
Chains (8.5%)	539	356	1	8	365	12	916
Total	2,356	465	61	162	688	57	3,101

[1] Schedule XXXIII of Borden Pre-Trial Order.

[2] Paragraphs 245–249, incl. of the Borden Pre-Trial Order; Independent total prorated to discount classes on basis of number of store locations.

[3] Paragraphs 251–254, incl. of the Borden Pre-Trial Order: Independent total prorated to discount classes on basis of number of store locations.

[4] Paragraphs 255–258 of Borden Pre-Trial Order: Includes in Independent Stores total, costs of Whitney Statistical Services of $141.00 per week, prorated to independent discount classes on a location basis.

[5] Paragraphs 259–261 of Borden Pre-Trial Order: Includes machine rental costs. Independent store total costs allocated to independent discount classes on a location basis.

He was retained as management consultant by the Women's Hospital, Detroit, Michigan; Toronto General Hospital, Toronto, Canada; and Presbyterian Hospital, New York City, New York (October 1928 through 1930);

Legal Assistant to Henry S. Dennison, president of the Dennison Manufacturing Company, Framingham, Massachusetts. His work with this company constituted a series of special assignments to study and report upon the adaptation of the company's organization and distribution policies to legal and economic changes growing out of the financial and business depression of the early 1930's. Among these assignments were, first, the coordination of the company's participation in some sixteen codes of fair competition under the National Recovery Administration; second, a comprehensive study of the company's distribution practices under the Robinson-Patman Act (March 1931 to August 1938);

He was associated with the law firm of Wise, Corlett and Canfield. From the inception of this work he assumed several substantial assignments in connection with antitrust matters (August 1938 to November 1939);

Washington associate of the firm of Wise, Corlett and Canfield. He was associated with this firm as a *consultant in accounting, economic and industrial organization problems* and as *praticing attorney* (November 1939 to December 1943);

Formed *law partnership* with Clarence K. Marion under style "Sawyer & Marion" with offices at 1624 Eye Street, N.W., Washington 6, D. C. (December 1948 to date).

[fol. 1109] His present responsibilities are as he states:

From October 1, 1945 to September 30, 1957, I maintained an office at 56 Beaver Street, New York 4, New York and since that date have maintained an office at 84 Williams St., New York 38, New York, staffed with accountants and statisticians to aid me in my assignments in economic, statistical and accounting research

related to litigation in the anti-trust field. This phase of my work is carried on since 1951 as a partnership under the style *Albert E. Sawyer Company*, with Clarence K. Marion as partner.

The nature of my law practice has remained the same since my admission to the Bar of the District of Columbia in 1939. It is a specialized practice which has evolved logically from my experience in cost accounting and business management and industrial organization to which I applied my legal training. My practice concerns itself almost exclusively with laws and regulations affecting manufacturing businesses and these, in turn, with a few exceptions are federal statutes and regulations affecting inter-state commerce. I have been retained in administrative proceedings before the Federal Trade Commission, Fair Labor Standards Administrator, National Labor Relations Board, War Labor Board, U. S. Emergency Court of Appeals, Office of Price Administration, and as counsel to special committees serving the War Production Board, and the Office of Price Administration. I am retained from time to time in criminal and civil suits instituted by the Department of Justice under the Sherman Act and other anti-trust laws. I am retained from time to time in private litigation under such laws. I have represented both plaintiffs and defendants in these matters. My particular forte in connection with this type of practice lies in the combination of legal training and practical business and accounting experience which gives me added facility in the analysis of business problems arising under these laws and regulations, and the development and presentation of accounting and statistical information arising under such laws. In this type of work I am frequently retained by New York and Washington attorneys as special counsel and by government agencies. I am retained by several companies as special counsel, supplementing general counsel in problems arising from the above field of practice.

The various assignments in the anti-trust field have necessitated extensive studies in the following industries: flat glass, specialty glass, rubber, petroleum, rugs [fol. 1110] and carpets, banking and securities, cordage,

automobile parts, pianos, many different branches of the paper industry and industries using paper as their principal raw material, electrical manufacturing, food processing, chemical, rayon, sand & gravel and various miscellaneous manufacturing organizations.

My work has involved extensive studies in the field. I have organized and directed a large staff of accountants and statisticians to collect original data in the field which is later analyzed and presented for use in litigation. My field studies have included personal examination of many different types of sales solicitation effort, the methods of planning used in such work, comparative costs, maintenance of jobbers stocks, relative efficiency of different methods of warehousing manufactured goods for the most effective national distribution. Through this work I have become intimately acquainted with the manufacturer's problems of national distribution and the methods of analyzing such work.

My experience has also included a substantial effort in the analysis of manufacturing processes, particularly in studies designed to reveal cost savings due to different methods of manufacturing.

I have been called upon from time to time to study the effectiveness of organizations operated by academic and governmental bodies such as the University of Michigan Hospital, Women's Hospital, Detroit, Michigan; Toronto General Hospital, Toronto, Canada; Columbia University Hospital, New York, N.Y. (Legal Division of N. R. A.), (Research and Planning Division of N. R. A.).

Each year for the past twenty-five years I have been called upon for several addresses and lectures before business, accounting and legal groups such as Comptrollers Institute, National Association of Cost Accountants, New York State Bar Association, Trade and Commerce Bar Association, University of Michigan School of Business, Harvard Business School, Harvard Law School, George Washington University Law School, University of Michigan Law School, and the Trade and Industry Law Institute and the Practicing Law Institute of New York.

The more important assignments involving both legal and business analysis are:

[fol. 1111] F.T.C. vs. Book Paper Association—in charge of development of statistical defense of methods of distribution;
F.T.C. vs. Standard Brands, Inc.—special counsel upon appeal. Developed and presented extensive statistical and accounting proof of justification of quantity differential rates under Robinson-Patman Act;
F.T.C. vs. Tag Manufacturers Institute—in general charge of entire case and counsel for all respondents. Complaint and Order Dismissed upon Appeal;
General counsel for Gummed Industries Association (1939 to date);
General counsel for Waterproof Paper Manufacturers Association (1945 to date);
General counsel for Industrial Bag and Cover Association (1950 to date);
General counsel for Rubber Heel and Sole Institute (1944 to date);
General counsel for the Textile Bag Manufacturers Association (1949 to date);
Public service—member of the Attorney General's National Committee to study the antitrust laws; member of the Federal Trade Commission Advisory Committee on cost justification.

He has authored the following publications:

"The Control of Industrial Costs"
Year Book of National Association of Cost Accountants—1938
"Cost Accounting Opportunities under the Robinson-Patman Act"
Bulletin; National Association of Cost Accountants
Vol. XVIII, No. 12—February 15, 1937;
"Cost Accounting as Evidence in Cases Arising Under the Robinson-Patman Act"
Bulletin; National Association of Cost Accountants
Vol. XIX, No. 12—February 15, 1938;
"Accounting and Distribution Techniques as Voluntary Devices to Eliminate Abuses in Marketing"
The Accounting Review -June 1939;

[fol. 1112] "Round Table Discussion of the Robinson-Patman Act"
Year Book of National Association of Cost Accountants—1939;
"The Commission's Administration of Paragraph 2(a) of the Robinson-Patman Act: An Appraisal."
The George Washington Law Review—January-February 1940
A special symposium commemorating the 25th anniversary of the Federal Trade Commission;
"Robinson-Patman Act Symposium"
Commerce Clearing House, Inc., Publishers of Topical Law Reports—1948;
"Uniform Delivered Price, Under Recent Court Decisions, 1948"
Institute of Trade and Commerce Professions
Current Business Studies No. 1;
"Accounting and Statistical Proof in Price Discrimination Cases"
Iowa Law Review, Vol. 36, No. 2 Winter 1951;
McGraw-Hill Executive Course in Profitable Business Management
J. K. Lasser—Albert E. Sawyer.

He has membership in the following professional societies:

American Bar Association—Member Committee on F.T.C
Bar Association of the District of Columbia;
Society of Business Advisory Professions, Inc. (President 1953)—Chairman of the Board 1954—Director 1949—to date;
National Industrial Conference Board;
American Economic Association;
American Marketing Association;
American Statistical Association;
The Business Historical Association, Cambridge, Mass.;
National Association of Cost Accountants.

16. Mr. Sawyer would further testify that representatives of plaintiff conferred with him during July through

[fol. 1113] September of 1957 and tendered for his review a copy of the plaintiff's pre-trial order—Bowman, the preliminary draft of defendant Bowman's pre-trial order, and the deposition of Mr. Albert J. Bergfeld. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of the Robinson-Patman Act, he would testify substantially as follows that:

(a) The costs that are eligible for consideration under the cost proviso of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act are those which result from certain differences in the procedure of dealing with particular purchasers or classes of purchasers, to wit, those paying the higher of two prices and those paying the lower. The excuse or justification for the two prices rests in a difference either in *quantity* purchased or *method* of sale or delivery. Each of the differing methods or quantities must be assigned a cost—*a partial cost*—of the total operation of producing, selling, and delivering the products in question. The field of inquiry is further narrowed by requiring the differing methods to be related to particular customers or classes of customers receiving the differing treatment on the part of the seller.

(b) So circumscribed and delimited, the application of this proviso deals with a highly synthetic concept which has little or no direct relationship to ordinary every day steps taken in recording the transactions which constitute the selling and delivering of products to customers. "Robinson-Patman Accounting" must, therefore, be distinguished from cost accounting in the ordinary course of business in that it is not a matter of record keeping on a day to day basis and provable as such, but consists essentially of numerous series of estimates, the validity of which rests, in large measure, upon the standard of care and good faith which brings them into being.

(c) Where alternative methods of allocation are available, the considerations which dictated the ultimate choice should be stated as a part of the direct

presentation of the justification. If there is reliance upon historical precedence in the particular business or trade, the validity of the continued [fol. 1114] use of the precedent should be justified. Experience has dictated that so-called "normal and accepted accounting practices" used for management purposes, or other general every day purposes, are not necessarily applicable for the purposes dictated by the Robinson-Patman Act.

(d) In segregating distribution costs for cost justification purposes, the functional approach is to be preferred although other approaches may be appropriate under some cost categories, costs are then subdivided into two groups. The first comprises these costs which are readily defined as directly applicable to a given functional segment. This involves no problem of allocation as between two or more segments.

(e) The costs of functions which are not chargeable directly must be assigned by allocation. The process of allocation involves the measurement of the activity or output of the function in terms of appropriate units and then applying to each business segment the amount of the functional cost which is in proportion to its use of or responsibility for the units of functional service. The choice of the appropriate service unit which will adequately measure indirectly related functions to the costing segments is crucial to the validity of the results of a cost justification study. The two main considerations in making this choice is rationality and practicality of the selection.

(f) There is no single set of accounting principles by which to reach a determination of what constitutes "due allowance" for differences in the cost of distribution to one type of buyer as against other types. The care and reasonableness of the method of allocation are paramount considerations. Where a particular method of allocation tends toward a bias in favor of the discount to be justified there is a special obligation upon the pro

ponent to establish the soundness of the selection of method.

(g) The cost justification of the discounts or price differentials employed by Bowman in the sale of fluid milk involve a complex of joint cost relationships which requires an allocation of internal costs among various classes of products and classes of customers. The problems of proof center upon the question whether such presentations as have been developed in justification of these differentials, resting as they do in large measure upon [fol. 1115] the subjective qualities and judgments of the individuals who have executed or directed them, constitute acceptable evidence.

(h) Bowman's route drivers perform dual functions, one of which is the physical movement of fluid milk products from platform to the customer. In the performance of this function, the route man is a truck driver and time devoted to the performance of this function should be allocated as an element of the transportation cost. The second function is the placement of the fluid milk products in the customer's place of business. This includes a variety of activities dependent upon the nature and location of the customer's business. In the performance of these activities, the route man provides a service for the customer, more or less depending upon the customer's requirements. Time devoted to these service activities should be accounted for as an element of customer service costs, and taken into account in the determination of the aforesaid transportation costs.

(i) The allocation of the transportation costs to customers provides a choice of methods, the choice being dependent upon whether the tonnage or volume carried directly affects the elements of transportation cost, i.e., the cost of operating the vehicle and the time consumed in driving it on the route. If this is the case, then weight or bulk, whichever has the direct effect upon the cost, should become a factor in the allocation. Customers taking heavy weight or large bulk should

bear proportionately heavier costs than those who take less.

(j) The allocation of the drivers' costs for customer services performed is a matter of a time study reporting of the route man's time devoted to these activities on a customer basis. In grouping the results of such studies into customer or discount classes, the usual rules relating to proper averaging should be observed, i.e., of homogeneous classes.

(k) Central overhead, or what is sometimes known as General Office Expense, includes broadly, billing, credits, and collection, general accounting and general administrative staff, and executives' time. Where the organization operates through numerous branches, each with important central overhead functions, these should be brought into this category of cost analysis. Many of the costs involved [fol. 1116] under this heading may readily be classified as of proportionate application to all discount classes and therefore outside of the scope of the justification study. Care should be taken to avoid a hasty determination of this condition. It is incumbent upon the proponent of a cost justification to ascertain if there are indirect costs among the general overhead accounts which tend to counter-act savings claimed at other levels of distribution. Do the larger customers who benefit from larger discounts impose greater accounting burdens upon the seller by requiring special distribution reports or particularly burdensome billing techniques? It is *particularly incumbent upon the proponent of one of these studies to ascertain in some reasonable fashion the added cost in top administrative personnel required to solicit and maintain the business of the larger customers who enjoy the larger discounts.* This is seldom possible by ordinary appraisal methods. Time is seldom a relevant measure of such costs. *Where the calibre (and the salary) of the executive responsible for the larger units of business is conditioned upon his ability to get and to hold these accounts, the cost in added salary and expense should be allocated to those accounts.* The witness would state

upon examination that, in his professional capacity as advisor in these matters to many large corporations, it is his practice to stress the importance of this aspect of the cost of getting big business and holding it, and to advise that a realistic study be made and a careful appraisal of the added cost be undertaken. *His experience indicates that this element of cost is not de minimis and that in his judgment a cost justification may well be considered incomplete without a showing that this effort has been seriously made.*

In Bowman's cost study, no attempt was made to allocate central office expenses as between chains and independent stores, although the defendant conceded that the getting and holding of chain store business was the function of top management. However, Bowman did charge their independent stores with a cost of solicitation, but did not make an equivalent charge to the chains. The witness considers the failure to make these allocations and the further failure to explain such omissions, other than to cite the fact that such allocations are difficult to make, constitutes a significant weakness in Bowman's cost study. *His professional experience has indicated such costs are not de minimis, and that a study is incomplete that does not* [fol. 1117] *make a reasonable allowance for such costs known to be applicable to the favored customer classification.*

(l) As to driver's commissions, there would seem to be sufficient indication from the Union contract formula to warrant the conclusion these costs were directly related to volume purchased by each customer. It then follows that these costs should have been allocated to each customer on a volume basis unless this could be demonstrated to be unfair or inequitable.

(m) In other respects, the witness is of the opinion that the Bowman study attempts to convert data developed for internal management control purposes into a cost justification defense and that the result is not a relevant measure of the cost differ-

ential between the several customer or discount classifications. At best, the result is a crude approximation which might be tolerated if thoroughly consistent within itself. The witness observes, however, that the data seems to indicate results which are inconsistent.

17. Plaintiff and defendant Bowman have agreed that the deposition of Albert E. Sawyer taken on April 16 and 17, 1958 is herewith incorporated as a part of the record of this case.

18. Otto F. Taylor of the firm of Bacon, Taylor & Beairsto, New York City, New York, if called to the stand as a rebuttal witness, would testify substantially that his qualifications are as follows:

Birthplace: Lawrence, Massachusetts
Date of Birth: February 16, 1889
Home Address: 86 Blackburn Road, Summit, New Jersey
Home Telephone: Crestview 7-2120

Education:

Academic—Dartmouth College, AB, 1910
Accountancy—Amos Tuck School of Business Administration, MCS, 1911.

Certified Public Accountant Certificates:

New York	1919
Connecticut	1929
New Jersey	1934

[fol. 1118] *Registered Municipal Accountant Certificate:*

New Jersey	1935

Admissions to Practice:

U. S. Treasury Department	1921
U. S. Board of Tax Appeals	1924
Securities & Exchange Commission	1935

Societies:

Phi Beta Kappa	1910
American Institute of Accountants	1920
New York State Society of C.P.A.'s	1919
New Jersey Society of C.P.A.'s	1934
National Assn. of Cost Accountants	1920
American Management Association	1935

War Service:

First Lieutenant Air Service,	1917 to 1919

Experience:

Niles & Niles, C.P.A.'s—Staff,	1911 to 1917
Haskins & Sells, C.P.A.'s,—Staff,	1919
Thomason & Black, Accountants and Engineers—Staff,	1920-1923
Otto F. Taylor, Principal,	1923 to 1927
Webster, Blanchard & Taylor, Partner, June 1, 1927 to May 31, 1937	
O. F. Taylor & Co., Partner, June 1, 1937 to date	

Other:

President, N. Y. Alumni Amos Tuck School of Business Administration
Director, Summit Trust Co.
Member, Federal Trade Commission Advisory Committee on Cost Justification

19. Mr. Taylor would testify further that in the months of July through September 1957, representatives of the plaintiff conferred with him and tendered for his review a copy of the plaintiff's pre-trial order—Bowman, the preliminary draft of Bowman's pre-trial order, and the deposition of Mr. Albert J. Bergfeld. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the re- [fol. 1119] quirements of Section 2(a) of the Robinson-Patman Act, he would testify substantially as follows that:

(a) Although the general principles of accounting applicable in any instance are the same, the techniques by which they are applied differ according to the purpose to be served. Cost accounting for management purposes, for example, may compare standards of performance with what actually occurs and explain the amount and sources of variation. On the other hand, cost justification under the Robinson-Patman Act is of an entirely different character. Such a study is for the purpose of comparing differences in prices of goods of like grade and quality sold to competing customers with relevant costs which result from differences in the method of sale, differences in the method of delivery, and differences in the quantity. Inasmuch as price means, in ordinary terms, the money charged per unit, cost from a Robinson-Patman study must also be in terms of cost per unit or the equivalent.

(b) The basic technique which the accountant will follow is that of long division. First of all, he must find the dividends of his problems. These dividends will be the various categories of money spent by a seller during a period of time, including all of those categories with respect to which variations in cost may occur by reason of the differences in quantity or in method of sale or delivery. All other kinds of expenses may well be excluded because they have no bearing on a cost justification problem. The important thing for the accountant to have in mind in this analysis of money spent is that each of the categories must be homogeneous whether they be products, classes of trade, customers, or activities. The reason for this should be obvious when it is considered that cost accounting of necessity deals with averages, otherwise there would be no end of it; and averages to be useful must be averages of like items. The average weight of elephants and mice means nothing; neither does the average cost per minute of transporting goods and selling them. This analysis of expenditures is often referred to as "func-

tional analysis" of expenses which means dividing expenses into separate parts, each part representing the cost of a certain homogeneous activity.

The next step in this task of long division is to find the proper divisors to be applied to the dividends. These divisors should be those units which [fol. 1120] for each individual function most nearly reflect or cause the variations in the amount spent. For example: if the dividend is the money cost of typing invoices, and if the amount of that cost varies according to the number of lines typed, then invoice lines is a proper divisor in that case. If truck transportation costs vary by distance, then mileage is a proper divisor for that cost category.

When the accountant has broken down the expenses of a period by functional groups, and has related to each of those groups the best available unit of measure, he is prepared to complete his long division example and state his quotient or series of quotients consisting of unit costs. The applicable unit costs may then be grouped, the total of them found, the difference calculated, and compared with the price difference in question.

(c) Calculation of the cost differences which result from different quantities or methods of sale between competing retail stores should include the cost of executive time and expense attributable to securing and maintaining customer accounts and the salaries and expense of billing, accounting, credit, statistical, and other office operations. If such costs may properly be allocated according to customer classes (for example, chain stores and others), and if one class (say chain stores), required a disproportionate amount of such services, then naturally the costs allocated to that class of customer would reflect that fact.

(d) The route drivers perform two functions identified as: the service function in which the driver performs certain services at and in the store of the customer, and the transportation function which is necessarily involved in moving the goods from

TABLE 11

Borden Wholesale Accounts: Rebuttal Allocation of Delivery Costs Among Store Discount Classes (June of 1954)
Distribution of Cost of Driver Service and Transportation Time (Based on Sample Months of July and August 1955)

Cost of Driver Time from Platform To and On Route and Return

Store Discount Class	Total Driver Costs[1]	Costs of Driver's Transportation Time[4]						Total Cost of Driver Service Time[4,10]	Costs Excluding Commissions[11]	
		Drive to and from Route[5]	Drive on Route[6]	Loading Gasoline[7]	Park Truck at Plant[8]	Vehicle Breakdown[9]	Total		Driver Transport Time	Driver Service Time
	$	$	$	$	$	$	$	$	$	$
Other Customers[2]	3,478	548	618	15	54	4	1,239	2,239	809	1,462
Independents:										
0%	3,397	574	660	17	56	4	1,311	2,086	856	1,362
2%	7,047	839	1,109	28	82	6	2,064	4,983	1,348	3,254
3%	4,720	405	602	15	40	4	1,066	3,654	696	2,386
4%	2,230	117	219	5	12	1	354	1,876	231	1,225
Total	17,394	1,935	2,590	65	190	15	4,795	12,599	3,131	8,227
Chain Stores (8.5%)[3]	8,370	372	744	19	36	4	1,175	7,195	767	4,698
Total All Customers	29,242	2,855	3,952	99	280	23	7,209	22,033	4,707	14,387

[1] Average Weekly Cost of Drivers' Salaries and Wages (incl. Commissions) spent on all wholesale routes during July and August, 1955.
[2] Non-store accounts: industrial, shops, drug stores, restaurants, bakeries, etc., served from these wholesale routes. Not subject to discounts.
[3] Chains are A & P and Jewel.
[4] Average weekly Direct Labor Costs including Commissions ($10,148) of Regular Drivers from Table 16 (Col. 2).
[5] Average weekly Driver Salaries and Wages (including prorated Commissions) Item #25, Par. 184, and Schedules XXVI, XXVIII, and XXIX of Borden Pre-trial Order.
[6] Average weekly Driver Salaries and Wages (including prorated Commissions) Item #26, Par. 184, and Schedules XXVI, XXVIII, and XXIX of Borden Pre-trial Order.
[7] Average weekly Driver Salaries and Wages (including prorated Commissions) Item #31, Par. 184, and Schedules XXVI, XXVIII, and XXIX of Borden Pre-trial Order.
[8] Average weekly Driver Salaries and Wages (including prorated Commissions) Item #32, Par 184, and Schedules XXVI, XXVIII, and XXIX of Borden Pre-trial Order.
[9] Average weekly Driver Salaries and Wages (including prorated Commissions) Item #36, Par. 184, and Schedules XXVI, XXVIII, and XXIX of Borden Pre-trial Order.
[10] Total Driver Costs (Col. 1) minus Total Cost of Driver Transportation Time.
[11] Exclusion based on ratio of Commissions to Total Driver Costs (Col. 1) ($\frac{10,148}{29,242} = .3470350$)

[fol. 1100] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 947

[Title omitted]

PLAINTIFF'S REBUTTAL PRE-TRIAL ORDER AS TO BOWMAN DAIRY COMPANY—December 16, 1958

The Court, pursuant to Rule 16 of the Federal Rules of Civil Procedure, having held pre-trial conferences from time to time, and the plaintiff and the defendant Bowman Dairy Company (hereinafter called "Bowman") having come to certain agreements in the course of said conferences,

It is Ordered:

1. This Order pertains only to the plaintiff and the defendant Bowman.

2. The introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff and the defendant Bowman that the evidence sought to be introduced is immaterial or irrelevant, and the same reservation and objection shall apply to all [fol. 1101] stipulations, agreements, and admissions of fact contained in this order.

3. Plaintiff does not concede herewith that all or any part of the cost differentials as derived by Bowman fall within the scope of Section 2A of the Clayton Act.

4. This rebuttal pre-trial order and all matters herein referred to and all admissions of fact and agreements with respect to the further trial of this action shall be used for no other purpose than the trial of this action and are made solely for the purposes of this trial.

5. The testimony of Herbert F. Taggart, Otto F. Taylor, Albert E. Sawyer, and Elliott B. Woolley, as set forth in this order, is subject to correction, explanation, or amplification by reference, on behalf of either party, to the depositions of these four individuals which are filed in this case and constitute a part of this record.

6. Either party in briefs and arguments may refer to and quote material appearing in any article or publication written or edited by Messrs. Taggart, Taylor, and Sawyer, which are referred to in their respective depositions without the necessity of identifying or introducing said material into the record of this case.

[fol. 1102] Agreements as to Facts and Exhibits Pertaining to:

I. Wholesale Stores (Chain vs. Independents)

A. Customer Competition [1]

7. In answer to paragraphs 1 through 14, inclusive, of the Bowman defensive pre-trial order, the plaintiff submits selected material from the *Local Community Fact Book for Chicago, 1950*, as submitted by Bowman, where on page 238 it says:

> Archer Avenue still is the leading business street, with fewer shops and more vacant frontage west of Kedzie Avenue. In 1948 there was only one community center, at Archer and Sacramento Avenues, which ranked 53rd among the 60 leading retail shopping centers in Chicago. *Residents also have access to the center at 47th and Ashland Avenue in New City and that at Halsted and 35th Streets in Bridgeport.* [Emphasis supplied]

This refers to Community Area No. 58, otherwise known as Brighton Park. The Brighton Park Community Area No. 58 contains the Gus Psomakos Spotlite Store identified in Schedule II of the plaintiff's supplemental pre-trial order. Goldblatt's in Schedule II is located in the business center at 47th and Ashland Avenue, referred to in the aforestated quotation.

8. With reference to Schedule II of the plaintiff's supplemental pre-trial order, the A & P Store is located in the Gage Park Community Area No. 63 regarding which the *Local Community Fact Book* at page 258 states:

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[1] The exhibits and tables referred to in this section are in the accompanying *Folder A*.

[fol. 1103] Most residents did their shopping at the two centers that were developing at the intersections of 63rd Street and Western Avenue and 63rd Street and Kedzie Avenue in Chicago Lawn. The large shopping center at 63rd and Halsted Streets in Englewood also drew patrons from Gage Park.

A minor shopping center has developed at 59th Street and Western Avenue and a larger center at Garfield Boulevard and California Avenue. *Gage Park residents still do some of their shopping at the centers in Chicago Lawn and Englewood mentioned above, as well as at the new business development, Evergreen Plaza, at 95th Street and Western Avenue.* [Emphasis supplied]

9. In answer to paragraphs 19 through 26, inclusive, of the Bowman Defensive Pre-Trial Order, on about January 17, 1956, the plaintiff mailed a questionnaire to the customers who had been interviewed by Elrick & Lavidge, Inc., of the Bowman store customers referred to in Schedules I and II of the plaintiff's supplemental pre-trial order — Bowman, said stores to be hereinafter referred to as "sample stores."

10. Copies of these mail questionnaires are identified as Rebuttal Exhibits G-(1 & 2) and H-(1 & 2), are in the accompanying Folder A, and are made a part hereof. There was only one mailing of these questionnaires to the 1,378 customers of the "sample stores," which customers were taken from the survey conducted by Elrick, Lavidge & Company for the defendant Bowman. The names and addresses of these customers, as thus furnished by Bowman, were prepared as the Master List referred to as Plaintiff Bulk Exhibit 1—Bowman, which is not included with the accompanying exhibits but is available for inspection and made a part hereof.

[fol. 1104] 11. The results of this mail questionnaire are summarized in *Tables 1-7*, inclusive, which are in the accompanying Folder A and made a part hereof. The results show for each of the sample stores indicated thereon: the degree of response to the questionnaire (*Table 1*), the degree of home delivery existing among the customers of the "sample stores" (*Table 2*), the degree to which these customers purchase their milk requirements from various

pairs of Bowman chain and independent stores, and the extent to which these customers buy their milk requirements solely from at least one pair of the Bowman chain and independent "sample stores" (*Tables 3-7*).

B. Bowman Cost Defense[2]

12. Professor Herbert F. Taggart, if called to the stand as a rebuttal witness, would testify as follows:

> I am a professor of accounting and formerly Assistant Dean, School of Business Administration, University of Michigan, Ann Arbor Michigan, and have held other teaching positions at Kansas University and the University of California. I am a graduate of the University of Michigan with a Ph. D. degree in Economics. I am a certified public accountant, State of Michigan, and since 1929 have engaged in the private consulting practice of accounting, especially in connection with pricing problems.
>
> I have held the following positions: Chief, Cost Accounting Unit, Research and Planning Division, National Recovery Administration, Washington, D. C., 1933-1935; Consultant on Distribution Costs, Department of Commerce, 1938-1939; Director of Accounting and Assistant Administrator, Office of Price Admin- [fol. 1105] istration, 1940-1943; Chief, Contract Termination Section, Audit Division, Office of the Fiscal Director, Army of the United States, 1943-1946; Consultant on accounting problems to ECA, Air Force, and other government departments; Chairman, Advisory Committee on Cost Justification under the Robinson-Patman Act, Federal Trade Commission, 1953-1956.
>
> I am currently a member of the following professional organizations: American Institute of Certified Public Accountants; Michigan Association of Certified Public Accountants; National Association of Cost Accountants (President, Washington Chapter, 1945; National Director 1947-1948); American Accounting Association (President, 1942); and Controllers Institute of America (associate member).

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[2] Exhibits and tables referred to in this section are in the accompanying *Folder B*.

I have written the following books and articles: *Minimum Prices Under the N.R.A.; The Cost Principle in Minimum Price Regulation; Distribution Cost Accounting for Wholesaling;* Sections on distribution costs in the second and third editions of the *Accountants' Handbook;* and many articles in professional journals, including especially "The Standard Brands Case," in the *N.A.C.A. Bulletin* for October 15, 1939.

13. Professor Taggart would further testify that representatives of plaintiff conferred with him in June and July of 1957 and tendered for his review a copy of the plaintiff's pre-trial order—Bowman, the preliminary draft of defendant Bowman's pre-trial order, and the deposition of Mr. Albert J. Bergfeld. With regard to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of the Robinson-Patman Act, he would testify substantially as follows that:

(a) The field of distribution involves a multiplicity of functional activities, each of which is inherently different with respect to purpose and the economic conditions applicable thereto. Each of these functional activities with its attending economic conditions peculiar to it will engender different cost elements.

[fol. 1106] (b) Because of the foregoing inherent characteristics of the distribution function, each cost element (or homogeneous grouping of same) should be identified and analyzed separately to ascertain the various economic conditions and factors which create such cost and then be allocated to its sources (functions, products, and customers) in relation to its respective factor or combination of factors creating it. This general principle is in harmony with the requirements of the Robinson-Patman Act accounting objectives.

(c) Central Office Expenses, omitted by defendant Bowman, consisting of the time of the executives and their office staff spent in obtaining and maintaining customer accounts, including clerical time for billing, accounting, and additional statistical

services, should be determined and allocated to the respective store customers in proportion to the use of this time among them.

(d) The route drivers perform two functions identified as:

(1) The service function in which the driver performs certain services at and in the store of the wholesale customers, other activities relating to determining the store's needs for the day, and to doing the necessary route bookkeeping, and loading and unloading at platform; and

(2) The transportation function which is necessarily involved in moving the goods from the platform to the wholesale customers on the route. A portion of driver's time is necessarily involved in this function.

(e) In view of the nature of his service function as thus defined in (d), the driver's salaries and wages (including personnel benefits and vacation costs) should be prorated to the driver's service function and his transportation function on the basis of an appropriate time study, which includes the time from the platform to, at, and in each store and return to the platform, the time spent on route bookkeeping, the time spent determining the day's requirements, and the time spent on daily reports.

[fol. 1107] (f) The driver service costs then should be allocated among the store customers on the basis of the time study of his activities performed only at and in the stores of the customers on the routes, including time spent preparing and checking orders, loading and unloading at platform, and other route bookkeeping tasks.

(g) Transportation costs must include not only the cost of operating the vehicle involved, but also the driver's wages apportioned to the transportation function as defined in paragraph (d) above. Such total transportation costs will most logically be allocated to the stores on the basis of their respective volumes delivered. With respect to transpor-

tation costs, customers on delivery routes are responsible for truck operating expense in proportion to their physical volumes purchased.

(h) If drivers do exercise some influence on volume delivered, then commissions paid to them should be allocated to the store customers on the basis of volume of product delivered to each. Under this procedure, commissions would be essentially a direct charge exactly determinable for each customer on every route. To justify allocating commissions on any other basis would require a definite showing that such direct charge produces inequitable or illogical results. If an expense is such that it would be eliminated if the customers were dropped, it is hard to say that it is not a specific cost to that customer.

14. Plaintiff and defendant Bowman have agreed that the deposition of Professor Taggart taken on April 14 and 15, 1958, is herewith incorporated as a part of the record of this case.

15. Albert E. Sawyer of Albert E. Sawyer Company in New York City, if called to the stand as a rebuttal witness, would testify that he has the educational and professional background substantially as follows:

He received a Bachelor of Law, June 1929, University of Michigan Law School and engaged in pre-law studies at the College of Literature, Science and the Arts, University of Michigan, completed June 1924.

[fol. 1108] His professional experience consists of:

Factory accountant for the Dort Motor Car Company, Flint, Michigan (1918 through 1923);

Employed on a part-time basis as an accountant on the administrative staff of the University of Michigan (September 1923 to November 1927);

At the special request of Dr. Clarence C. Little, then president of the University of Michigan, he accepted the assignment on a full time basis to re-organize all *business and accounting procedures* incident to the administration of the University Hospital (November 1927 to October 1928);

TABLE 10

Borden's Distribution Costs as Allocated Among Store Classes and Average Unit Distribution Costs, and Discounts Granted (June 1954)

Store Discount Classes	No. Points Delivered Weekly[1]	Average Weekly Allocation Costs							Average Unit Costs
		Direct Labor[2]	Special Delivery[3]	Transportation[4]	Office Personnel[5]	Loss on Returns[6]	Bad Debts[7]	Total	
	(1,000)	$	$	$	$	$	$		(¢ per point)
Other	86.3	3,478	57	1,172	616	102	—	5,425	6.286
Independents:									
0%	30.8	3,397	8	1,237	465	110	9	5,226	16.968
2%	157.5	7,047	23	2,085	673	391	14	10,233	6.497
3%	171.3	4,720	35	1,139	327	304	7	6,532	3.813
4%	110.9	2,230	47	426	104	168	2	2,977	2.684
Total	470.5	17,394	113	4,887	1,569	973	32	24,968	5.307
Chains (8.5%)	913.5	8,370	174	1,450	916	1,139	—	12,049	1.319
Total All Stores	1,470.3	29,242	344	7,509	3,101	2,214	32	42,442	2.887

[1] From paragraph 270, Schedule XXXIV of the Borden Pre-Trial Order.
[2] Schedules XXVI-XXIX of the Borden Pre-Trial Order. Includes the commissions paid ($10,148) as in Schedule XXV. Consist of Drivers Wages, Salaries, Personnel Benefits, and Vacation Pay.
[3] Schedules XXX and XXXI and paragraphs 210–224 of the Borden Pre-Trial Order.
[4] Schedules XXXII and paragraphs 225–230 of the Borden Pre-Trial Order. Includes freight on leased trucks.
[5] *Table 9*. Includes Borden Division and District main office and personnel costs.
[6] Paragraphs 264–266 of the Borden Pre-Trial Order.
[7] Paragraphs 262–263 of the Borden Pre-Trial Order.

TABLE 12

Borden Wholesale Accounts:
Rebuttal Allocation of Average Weekly Delivery Costs Among Store Discount Classes (June 1954) by Cost Classes.
Total Number Points Delivered Weekly and Average Total Delivery Costs per Unit (Based on Sample Months of July and August 1955)

Store Discount Class	Number of Points Delivered		Average Weekly Delivery Costs							Average Delivery Cost per Unit
	Total Weekly[1]	Avge. per Day per Store	Driver Service Cost[2]	Driver Commission Expense[2]	Transportation Costs[3] Driver[4]	Transportation Costs[3] Vehicle[5]	Special Delivery Costs[6]	All Other Allocated Costs[7]	Total Delivery Costs	
	(1,000)		$	$	$	$	$	$	$	(¢ per point)
Other Customers[8]	86.3	38.5	1,462	596	276	441	57	718	3,550	4.1136
Independents:										
0%	30.8	13.1	1,362	213	99	157	8	584	2,423	7.8669
2%	157.5	45.8	3,254	1,087	504	805	23	1,078	6,751	4.2863
3%	171.3	103.1	2,386	1,182	548	875	35	638	5,664	3.3065
4%	110.9	231.0	1,225	765	355	566	47	274	3,232	2.9143
Total	470.5	59.3	8,227	3,247	1,506	2,403	113	2,574	18,070	3.8406
Chain Stores (8.5%)[9]	913.5	599.0	4,698	6,305	2,925	4,665	174	2,055	20,822	2.2794
Total All Customers	1,470.3	125.7	14,387	10,148	4,707	7,509	344	5,347	42,442	2.8866

[1] Source: *Table 8*.
[2] From *Table 11* as allocated by Borden Time Study, but excluding Commission Expense.
[3] Allocated on basis of Number of Points Delivered.
[4] Source: Total Driver Transportation Costs as derived in *Table 11* but excluding Commission Expense. Allocated on volume basis.
[5] Source: Total Vehicle Costs from *Table 10*. Excludes Freight Costs on Leased Trucks. Allocated on volume basis.
[6] From *Table 10*. Consists of Drivers Wages, Salaries, Personnel Benefits and Vacation Pay.
[7] Sum of Office Personnel, Loss on Returns, and Bad Debts as stated in *Table 10*.
[8] Non-store accounts: industrial shops, drug stores, restaurants, schools, etc., served on wholesale routes.
[9] A & P and Jewel chain units.

the platform to the customers on the route, and in which a portion of the driver's time is necessarily involved.

(e) In view of the nature of his service function, as defined above, the driver's salaries and wages (including personnel benefits and vacation costs) should be prorated to driver's service function and his transportation function on the basis of an appropriate time study, which includes the time from the platform to and at each store and return to the platform as well as the time spent on miscellaneous activities such as route bookkeeping, checking orders and daily reports, and loading and unloading at platform.

[fol. 1121] (f) The driver service costs, as defined above, then should be allocated among the store customers on the basis of the time study of his activities performed at and in the stores of the customers on the routes, including time spent preparing and checking orders, loading and unloading at platform, and other route bookkeeping tasks.

(g) Transportation costs must include not only the cost of operating the vehicle involved, but also the driver's wages apportioned to the transportation function as defined above. Such total transportation costs will be most logically allocated to the stores on the basis of their respective volumes delivered. With respect to transportation costs, customers on delivery routes are responsible for truck operating expenses in proportion to their physical volume purchased. A route delivery truck in this business may well be looked upon as a moving warehouse and that the cost of moving it with its load should be allocated very much like the cost of a central warehouse; say, at the pasteurizing plant. Since the total quantity of fluid milk is not allocated to any one store until after the truck reaches that store, all of the cost of getting it there becomes merged and spread over the whole load. Such aggregated transportation costs may, therefore, be divided into parts only on a volume basis. Having reached the store, the additional

costs incurred at that location, including the segregated portion of the driver's pay, may properly be assigned to that particular store. It makes no difference whether this store is a chain store unit or an independent store, because it is not owners which compete but particular stores. One owner may have a lot of stores or only one but in this business finance is irrelevant.

(h) The allocation of joint costs involves the selection of units of measurement, or yardsticks as they are sometimes called. Frequently, the problem resolves itself into a choice between available units none of which is perfect. Good accounting practice dictates the selection of that basis which is most closely related to the activity or function, the cost of which is being allocated. In the case of commissions paid to milk route drivers based on volume of products delivered, the correct basis of apportioning the cost among customers is obviously the relative volume delivered to individual stores. It could probably be demonstrated that variations in any unit other than volume, such for example, [fol. 1122] as minutes at location, are less closely associated with variations in amount of commissions than are variations in volume delivered.

20. Plaintiff and defendant Bowman have agreed that the deposition of Otto F. Taylor taken on April 28, 1958 is herewith incorporated as a part of the record of this case.

21. Elliott B. Woolley, if called to the stand as a rebuttal witness, would testify as follows: He was graduated from Leland Stanford University, Palo Alto, California in 1937, with an AB degree in economics, statistics, and mathematics. From 1940 to 1942, he engaged in graduate studies in economics, statistics, mathematics, and accounting while a resident in Washington, D. C., at American University and Graduate School of the United States Department of Agriculture. He has written an article for publication in the *Econometrica*, entitled "Method of Minimized Areas for Correlation Analysis." He has since 1937 been employed by the Federal Government in various capacities as statistician and economic analyst until 1948, at which time he was employed by the Antitrust Division of the Department

of Justice as an economist and is at the present assigned to the Chicago field office.

22. Mr. Woolley would testify further that he has reviewed all of the material submitted by the defendant Bowman pertaining to their offer of defense relating to the existence of competition and cost defense of price differences among their wholesale customers, and the existence of competition and cost defense of price differences among [fol. 1123] their bulk wholesale customers. He has conducted on behalf of the plaintiff a rebuttal mail questionnaire of the wholesale customers of the aforesaid sample stores, and has analyzed the results as they relate to the question of competition which are presented in Section 1-A of this rebuttal pre-trial order. He also has analyzed the defendant Bowman's cost study as presented, the results of which are submitted in answer thereto in the paragraphs to follow. With respect to the principles underlying a properly conceived system of distribution cost accounting and allocation compatible with the requirements of the Robinson-Patman Act, he would testify as follows: that he agrees in substance with the controlling principles of cost accounting, their application to, and criticism of the Bowman cost defenses as stated by the foregoing three expert testimonies.

In addition, he would state that in his opinion total transportation cost is incurred by virtue of the prior existence of the customer demand that the fluid milk product be brought to them, rather than having each customer go to the platform himself. Hence each is proportionately responsible for the creation of this cost to Bowman; obviously if none demanded such door delivery, this transportation cost would not exist. Each truck has a volume capacity in which all the amounts of fluid milk to be delivered on that day's trip is carried. Each store customer participates in this total volume proportionately to the amount delivered that day. Since each store's volume occupies a proportionate amount of cubic space in the truck, the total transporta- [fol. 1124] tion costs thereof should be equally applicable to each unit of volume of space so occupied. Hence, the only rational basis of allocation of this cost to the respective customers is in proportion to the volume of fluid milk products delivered to each. Each unit of volume will be charged the same rate of this total transportation cost.

and will be most equitably allocated thereby to the store customers.

With regard to the proper allocation of commissions paid to drivers, he would state that the calculation of driver's commission, in conformity with the provisions of the "Milk Driver's Union Contract" (Exhibit N of their order), is based on the total physical volume of fluid milk products delivered to the independent and general store customers on the route; and that each such store contributes its share of volume to that total. The commission is based on a progressive rate scale, as evidenced in the Union Contract formula, and hence, in order to enhance his commission receipts, provides the incentive for the driver to endeavor to maximize his volume delivered—limited only to customer demand experience and the opposing health requirement that fluid milk must be returned to the supplier for other non-fluid milk uses if not sold within three days. Since drivers may exercise some influence on volume delivered, then commissions paid them should be allocated to the store customers on the basis of volume of product delivered to each. Commissions are essentially by nature a direct charge exactly determinable for each customer on [fol. 1125] every route, because the elimination of, or variation in the volume of any one customer, will of necessity affect the amount of commissions paid to the driver.

23. Plaintiff and defendant Bowman have agreed that the deposition of Elliott B. Woolley taken on June 23, 1958 is herewith incorporated as a part of the record of this case.

24. In answer to paragraphs 27 and 32 and Exhibits 4, 14, 15, and 16 of defendant Bowman's defensive pre-trial order, plaintiff submits Rebuttal Exhibit J in the accompanying Folder B, which graphically portrays the nature of the route driver's functions involved in Bowman's distribution system, and the various cost centers which should be allocated separately in accordance with the foregoing applicable cost accounting principles consistent with the requirements of Section 2(a) of the Robinson-Patman Act. This exhibit shows for each cost center the economic factor or basis by which it should be allocated to the size classes of Bowman's store customers in harmony with said cost accounting principles.

25. In answer to paragraphs 27 and 32 and Exhibits 4, 14, 15 and 16 of Bowman's defensive pre-trial order, plain-

tiff offers Rebuttal Exhibits K-1 through K-3, consisting of transmittal letter from Bowman to plaintiff dated July 25, 1957, enclosing the requested additional statistics relating to the three wholesale store divisions (Elston, Forest, and South) for each of the months of March and December 1955. These additional statistics consist of: (a) the total points delivered; (b) the total number of glass containers delivered; (c) the total number of case equivalents deliv- [fol. 1126] ered; (d) the total number of customers served; (e) the total route days; (f) the total number of routes; and (g) the totals of each of the itemized sales, delivery, and collection expenses of these three distribution divisions combined.

26. Plaintiff also submits *Tables 8-A through 8-G*, which consist of plaintiff's calculation of Bowman Miscellaneous Divisional Expense cost rate per customer per day *(Table 8-A)*; the Bowman Divisions' Office Personnel cost per day *(Table 8-B)*; the Bowman Bottle Expenses per glass container delivered *(Table 8-C)*; Bowman Milk Room Wages (including pro rata vacation and benefits) per case delivered *(Table 8-D)*; Bowman Route Drivers Commissions per point delivered *(Table 8-E)*; Bowman Route Drivers Service Wages (including pro rata vacation and benefits) per minute of service time spent at and in the stores on the routes *(Table 8-F)*; and Bowman's Route Transportation Costs per point delivered, composed of vehicle expenses, truck drivers' wages (including pro rata vacation and benefits), and route driver transportation time cost (including pro rata vaction and benefits) *(Table 8-G)*. These statistics relate respectively to the months of March and December 1955 for use in the plaintiff's rebuttal re-allocation of Bowman's direct and indirect distribution expenses. The data for the month of December 1955 were selected initially by Bowman for use with their January 1956 discount schedules.

27. Plaintiff offers the further rebuttal evidence contained in *Table 9*. On request of plaintiff, Bowman fur- [fol. 1127] nished the following additional statistics from their 1949 time study of Elston Division routes: (a) the total paid time spent by each route driver in his working day; (b) the total amount of service time spent by each route driver at and in the customer's establishment performing the time study work elements (other than those

included in his transportation function) plus his route-bookkeeping time, loading and unloading of fluid milk products at the plant, checking the load, preparing the day's reports, and the performance of other driver office time; and (c) the amount of driver transportation time spent by the driver during the day operating the vehicle, parking it, getting it from the garages and regaraging it at the end of the day, and any time spent during the day waiting for repair of the vehicle. The basic data for this *Table 9* were furnished for each store on each route, and, while not included in the rebuttal evidence submitted herewith, are available as Rebuttal Bulk Exhibit No. 2—Bowman and made a part hereof. These foregoing exhibits and *Tables 8 and 9*, respectively, are located in the accompanying Folder B and are made a part hereof.

28. In answer to Appendix A of Exhibit 4 of Bowman's defensive pre-trial order, Mr. Woolley would testify that *Tables 10 (A & B) and 11, and Charts I (A & B) and II*, consist of rebuttal data with regard to Bowman's Customer Services performed at the independent stores and sampled on the 33 Elston Division routes to demonstrate the more correct relationship of the amount of route driver's performance time to the size of stores served on the routes [fol. 1128] (*Table 10* and *Charts I and II*). He would also testify that the proportion of stores receiving said customer services on all sample days, one sample day, or none of the sample days are shown in *Table 11*. In addition that these data are from the Bowman 1949 time study work sheets on each store in the 33 Elston Division sample routes, all furnished by Bowman upon request and identified collectively as Rebuttal Bulk Exhibit No. 3—Bowman. This rebuttal bulk exhibit is not included herewith but is available upon request and made a part hereof. The *Tables 10 and 11* and *Charts I and II* are located in the accompanying Folder B and made a part hereof.

29. In answer generally to paragraph 27 and 33 and Exhibits 4, 14, 15, and 16 of Bowman's defensive pre-trial order, and specifically to representations to plaintiff by R. G. Havemeyer of Stevenson, Jordan & Harrison, Inc. on behalf of defendant Bowman, regarding the modification of their cost determining formula, introduced for the first time in September 1955, to reflect the differential proportion of fiber and glass containers between chain and

independent stores, plaintiff offers *Rebuttal Exhibits L-1 through L-3, Tables 12 (A & B), 13 (A & B),* and *14,* and *Charts III (A & B)* and *IV (A & B),* consisting of letters of transmittal and summaries of additional data requested of Bowman by the plaintiff, derived from the required 1/3 route-sample of the three Divisions (Elston, South, and Forest) with respect to: (a) the total number of points delivered in fibre and glass containers, and the total number of points delivered in only glass containers separately for [fol. 1129] each size of independent store and chain store in the sample; (b) the total number of fibre and glass containers delivered daily, and the total number of glass containers delivered daily for each size of independent and chain store in the sample; and (c) the average size of independent and chain store in the sample. Mr. Woolley would testify that *Charts III (A & B)* show the highly significant relationship of the number of fibre and glass containers delivered daily per customer to the number of points delivered daily per customer for chain and independent stores respectively. *Charts IV (A & B)* show the relationship of the percentage of glass containers in total containers delivered daily per customer to size of independent and chain store respectively. The basic sample data, from which these tables and exhibits were prepared, were initially processed by the FBI. They are collectively known as Rebuttal Bulk Exhibit 4—Bowman, which is available on request and herewith made a part hereof. This 1/3 sample of wholesale routes was drawn by Bowman according to the following procedure for each Wholesale Division (Elston, Forest, and South) as requested by plaintiff: (a) each of the three Divisions' route total of points delivered during September 1955 was ascertained; (b) each route of the Division then was ranked according to its size or volume; and (c) each smallest and largest route in the Division was selected together with every third one of the remaining routes. The resulting 55 routes from all three Divisions yielded the sampling of independent and chain stores as requested by plaintiff. *Exhibits L-1 through L-3; Tables* [fol. 1130] *12, 13, and 14;* and *Charts I through IV,* are included in the accompanying Folder B and are made a part hereof.

30. In answer to Exhibit 16 of Bowman's defensive pre-

trial order, plaintiff offers *Table 15*, consisting of a summary of the estimated number of cases and estimated number of glass containers delivered per store per day as determined from their respective relationships to size of store based upon the material in *Tables 12 through 14* and *Charts I through IV*, by size of independent and chain store. In addition, *Table 15* is offered to show: (a) the extension of driver service time by size of store for each stated group of elements in the driver's service function performed for the independent and chain stores, as calculated according to their respectively indicated time-rate formula; and (b) the translation of the resulting total service time for the independents and for the chains into driver service unit-cost for each size of store for the months of March and December 1955. *Table 15* is in the accompanying Folder B, and is made a part hereof.

31. Plaintiff offers further rebuttal evidence in *Table 16 (A & B)*. *Table 16-A* identifies the costs of the relevant cost elements for each size of store as calculated from the preceding tables for the independent and chain stores separately, their combined total costs for said classes of store, and their respectively computed average daily unit total cost, for the month of March 1955. *Table 16-B* contains the same data for the month of December 1955. Both tables are in the accompanying Folder B and made a part hereof.

[fol. 1131] 32. In answer to paragraph 27 and Exhibits 14 and 16 of Bowman's Defensive Pre-Trial Order, plaintiff offers *Table 17 (A & B)* relating respectively to the months of March and December 1955, each of which compares the rebuttal unit delivery cost differences, Bowman's unit cost differences, and the chain and independent discount differences for each size of store. In *Table 17-B* the comparisons relate to January 1956 discount differences and December 1955 unit cost differences. These tables are in the accompanying Folder B and made a part hereof.

33. Plaintiff further offers Rebuttal Exhibit N consisting of a copy of the *Milk Drivers' Union Articles of Agreement*, which is located in Folder B. This contract sets forth the formula used by Bowman to calculate the commissions to be paid each route driver for the volume of fluid milk products delivered on the route during the stated applicable

period. Plaintiff and defendant Bowman have agreed that the formula used by Bowman to calculate said commissions is set forth in Article 42(A) of said contract.

II

Bowman's Downtown Restaurant Customers Chicago Loop

A. Restaurant Competition[3]

34. In answer to paragraph 75 of Bowman's Defensive Pre-Trial Order, plaintiff submits that if Duncan A. Welty [fol. 1132] were cross-examined, he would testify substantially as follows:

> He has been in the restaurant business for many years and has always purchased his milk from the Bowman Dairy Company. When he purchased the restaurants in the Field Building, 130 S. Clark Street, Chicago, in August of 1953, he contacted his old friend, Walter Kettell, vice president of the Bowman Dairy Company, and made an agreement on the prices he was to pay for fluid milk products to be sold in these restaurants, the Welty's Field Building Restaurants. All contacts with the Bowman Dairy Company since that time have also been with Walter Kettell. Welty has never had any contacts at any time with Jack Means, manager of the Central Wholesale Division of the Bowman Dairy Company. Sometime during the summer and later in the fall of 1954, Mr. Welty received notice from Kettell that Bowman was increasing its prices. From time to time Mr. Welty has had calls made on him by solicitors for other dairies. The only name of any dairy calling on him, which he can remember, is the Beloit Dairy Company. Mr. Welty cannot remember the name of any solicitor for Beloit. It is his recollection that sometime during the summer and fall of 1954, a Beloit representative called on him to advise him that they would furnish him milk at the same price that he was paying Bowman. He believes that he communicated this information to Kettell but has no recollection of any negotiations over

[3] Exhibits referred to in this section are in the accompanying Folder C.

prices with Kettell. Bowman did not, except on Half and Half cream, raise its prices to Welty during the remainder of 1954.

35. In further answer to paragraph 75, if Simms T. McGuire, former president of the Beloit Dairy Co., were called as a witness he would testify that during the period of August 1953 through 1954 Beloit had two solicitors: Charles (Chick) Evans and A. C. Ehman. If Evans, now employed as a solicitor for Hawthorn Mellody Farms Dairy, Chicago, Illinois, and Ehman, retired and residing in LaGrange, Illinois, were called as witnesses they, as well as McGuire, would testify that they had no recollection of making any contact with Duncan A. Welty, proprietor of the Welty's Field Building Restaurant.
[fol. 1133] Defendant Bowman moves that the proffered testimony of Messrs. McGuires, Evans, and Ehman be stricken on the following grounds and for the following reasons:

(1) Defendant has not had an opportunity to interview or cross-examine any of said proposed witnesses;
(2) The proposed testimony of these witnesses is irrelevant on the issue of defendant's good faith.

For the foregoing reasons, defendant does not consent to this paragraph of this Order.

36. In answer to paragraph 76 of Bowman's Defensive Pre-Trial Order, plaintiff offers Rebuttal Exhibits "O" and "P" to refute defendant's claim in paragraph 76 that the prices of the La Salle Pharmacy were the result of meeting Beloit's prices at the La Salle Hotel and at the Hilton Hotel, and Borden's prices at the Palmer House. Rebuttal Exhibit "O" shows the dates and price changes made by Bowman, Beloit, and Borden relating to gallon dispenser milk distributed to the La Salle Hotel Pharmacy, the La Salle Hotel, and bulk gallon milk to the Hilton Hotel, and the Palmer House. Rebuttal Exhibit "P" shows the dates and prices changes made by Bowman, Beloit, and Borden for half pints of milk and cottage cheese for the year 1952 and half pints of buttermilk for the years 1953 and 1954 delivered to the La Salle Hotel Pharmacy, the La Salle Hotel, the Hilton Hotel, and the Palmer House.

This data was obtained by the FBI from these hotels. It is to be noted that the Borden prices quoted to the Palmer [fol. 1134] House are formulated from the basic milk prices paid to the farmer which were changed regularly on the first of each month during the year.

Plaintiff further submits, as a result of an FBI investigation, that if James Lake, manager of the La Salle Pharmacy, were cross-examined, he would testify that the La Salle Pharmacy commenced buying milk from the Bowman Dairy Company in April of 1952 as the result of his placing a telephone call to Frank Johns, an old personal friend of his, who was and is an employee of the Bowman Dairy Company. Mr. Lake would further testify that the price changes referred to in paragraph 76 were not the result of any negotiations between him and the Bowman Dairy Company.

37. In answer to paragraph 77 of Bowman's Defensive Pre-Trial Order, plaintiff offers Rebuttal Exhibit "Q" consisting of a tabulation of bulk gallon milk, ½ pint milk, and 18% cream prices and the dates changes were made by Bowman and Beloit Dairy at the Sheraton, Sheraton-Blackstone, and Edgewater Beach hotels during the year 1954. This evidence was tabulated from reports of investigations by the FBI.

B. Bowman's Cost Defenses[4]

38. In answer to paragraph 61 and Exhibit No. 42 of the Bowman Defensive Pre-Trial Order, plaintiff offers Rebuttal Exhibits M-1 and M-2 constituting, respectively, a letter of transmittal dated December 12, 1956 from R. G. [fol. 1135] Havemeyer, and the requested platform costs by type and size of container for each fluid milk product sold by the Central Wholesale Division to Bowman's restaurant customers in March and November 1955. The data on Exhibit M-2 are incorporated in the average unit costs used in *Tables 20 through 30*, inclusive, since these unit costs do vary according to size and type of containers and accordingly will contribute to the cost differences between those

[4] Exhibits and tables referred to in this section are in the accompanying Folder C.

restaurants who do not buy the same fluid milk product in identically the same size and type of container.

39. Plaintiff offers further rebuttal evidence contained in Rebuttal Bulk Exhibit No. 5 which consists of the Bowman Summary Bills resulting from the normal course of business with each of the 34 restaurants in March 1955. These Summary Bills show the number of units delivered and the price charged the restaurant for each of the fluid milk products delivered during March 1955, and are the bases of the compilations of *Table 19*. This Rebuttal Bulk Exhibit No. 5 is not included in the accompanying Folder C, but is made a part hereof and is available upon request.

40. Plaintiff further offers *Tables 18 (A & B)* and contends they constitute summaries of the degree of non-cost justified price differences for fluid milk products sold in March 1955, based on the detailed analysis of *Tables 19 to 30*, inclusive. Plaintiff contends that *Table 18-A* shows for each of the fifteen fluid milk products the degree of non-cost justified price differences of all the Bowman downtown [fol. 1136] Chicago restaurant customers combined. Plaintiff contends that *Table 18-B* shows for each of the Bowman downtown Chicago restaurant customers the degree of non-cost justified price differences for each of the indicated sizes of fluid milk containers, which range from 52.4% to as high as 98.3% for all products.

41. Plaintiff further offers *Table 19* which summarizes for each of the 34 indicated Bowman restaurant customers in downtown Chicago the various statistics necessary to determine, from data supplied by Bowman, the total and average delivery costs per gallon of fluid milk products delivered in March 1955. To derive this required average per gallon delivery cost, the following procedure was used:

(a) From Schedule III of plaintiff's Supplemental Pre-Trial Order of November 4, 1955 as to Bowman was itemized the total dollar value, based on sales prices, of *all products* sold by Bowman to each restaurant in March 1955. From Bowman's Summary Bills for each restaurant for the month of March 1955 (Rebuttal Bulk Exhibit No. 5) was tabulated the total value of purchases of non-fluid milk products by the respective restaurants. Then

the percentage of *fluid milk* products purchased was calculated from these data.

[fol. 1137] (b) From Bowman's Summary Bills for the month of March 1955 (Rebuttal Bulk Exhibit No. 5) was tabulated for each restaurant the total gallon equivalents of all fluid milk products purchased.

(c) From Schedule IV-A, page 2, of Bowman's Restaurant Cost Study of March 1955 (Exhibit 42 of Bowman's Defensive Pre-Trial Order), was tabulated the total delivery costs for *all products* purchased by each indicated restaurant customer. From these total delivery costs for *all products* was estimated the total delivery costs for *fluid milk products only* for each restaurant based upon its proportion of the total value of fluid milk products to the total value of all purchased products.

(d) The resulting estimate of total delivery cost of fluid milk products for each restaurant customer was then divided by the total number of gallon equivalents of all fluid milk purchased in the month of March to obtain the desired average delivery cost per gallon of fluid milk. The average delivery cost per quart, pint, and half pint, respectively, was derived from the delivery cost per gallon on the basis of the number of each of these smaller containers in a gallon. These average delivery unit costs are used, together with the indicated platform costs to *Exhibit M-2*, to obtain the required total [fol. 1138] unit distribution cost to each restaurant for each of the fifteen fluid milk products shown on *Tables 20 through 30*.

(e) The foregoing method of determining average unit delivery costs is in lieu of a more correctly conceived cost analysis by products and type and size of container purchased which was not, but which plaintiff contends should have been, made by Bowman, the results of which, therefore, are not available to plaintiff. These unit delivery costs are based on Bowman's delivery costs as derived from their own theories of cost accounting and allocation to each restaurant customer. These theories

reflect the same concepts employed in Bowman's analysis and allocation of delivery costs to wholesale customers and, therefore, incorporate the same deficiencies in scope, principle of cost accounting, and methods of allocation as exist with respect to the wholesale customers. The plaintiff's use of Bowman's resulting allocation of delivery costs to restaurants, for these rebuttal purposes, in no sense implies acceptance of nor agreement with Bowman as to the validity of their underlying concepts and methods of allocation.

42. Plaintiff offers as further rebuttal evidence *Tables 20 through 30*, inclusive, each of which shows for the respective [fol. 1139] fluid milk product the prices Bowman charges each restaurant, the total unit distribution cost for the product for each restaurant customer, and the resulting price and unit cost differences indicated. It is to be noted that the indicated price and unit cost differences for each restaurant are those resulting from a comparison of each independently owned restaurant with each other independently owned restaurant in competition therewith. Individual restaurants under common ownership are not paired with each other in this analysis; but each of such chain restaurants is paired with each of the other chain units and individually owned restaurants. Exhibits M-1 and M-2 and *Tables 18 through 30* are included in the accompanying Folder C and made a part hereof.

Enter:

Campbell, United States District Judge.

Date: December 16, 1958.

[fol. 1140]

TABLE 1

Summary of Response to Bowman Dairy Sample Store Customer Mail Questionnaire by Store Groups and Distances Customers are from Store as of January 17, 1956

Sample Store		Total Number of Questionnaires Mailed to Customers as Sampled in Oct. and Nov. 1955	Total Number of Questionnaires Returned by P.O. for "No Such Address or Person"	Questionnaires Available and Replies Received Classified by Distance Customers are from Sample Stores — Total Number										Percentage Response				
				All Areas		Within ¼ Mile		¼–½ Mile		½–¾ Mile		Over ¾ Mile						
Group Number	Name and Address			Questionnaires Available for Reply	Replies	Available	Reply	Available	Reply	Available	Reply	Available	Reply	All Areas	Within ¼ Mile	¼–½ Mile	½–¾ Mile	Over ¾ Mile
I	Psomakos Super Mart 2416 W. 47th St.	245	15	230	92 [1]	188	80	22	9	9	2	11	1	40.0	42.6	40.9	22.2	9.1
II	A & P Store 2601 W. 51st St.	358	19	339	187	292	160	33	17	8	7	6	3	55.2	54.8	51.5	87.5	50.0
III	Goldblatt's Dept. Store 47th and So. Ashland	271 172	20 11	251	101 [2]	33	13	70	30	26	14	122	44	40.2	39.4	42.9	53.8	36.1
IV	Goldenstern's Market 427 W. 69th St.	172	11	161	67 [3]	151	63	6	4	3	0	1	0	41.6	41.7	66.7	0	0
V	A & P Store 6702 S. Wentworth Ave.	88	7	81	26 [3]	70	24	6	1	2	0	3	1	32.1	34.3	16.7	0	33.3
VI	Kroger Store 7260 S. Wentworth Ave.	244	14	230	112 [3]	192	95	19	9	4	1	15	7	48.7	49.5	47.4	25.0	46.7
	All Groups	1378	86	1292	585	926	435	156	70	52	24	158	56	45.3	47.0	44.9	46.2	35.4

Source: Replies to mail questionnaires to customers of the above listed Bowman stores as sampled on October 27–29 and November 4, 5, 1955 by Elrick, Lavidge and Co. for Bowman Dairy Company.

[1] One questionnaire returned unasnwered.
[2] Five questionnaires returned unanswered.
[3] Two questionnaires returned unanswered.

[fol. 1141]

Table 2

Summary of Replies to Question #1 in Questionnaire to Bowman Dairy Sample Store Customers as of January 1956 Replies With Milk Delivered at Home

Sample Store		Number										Percent Delivered				
		All Areas		Within ¼ Mile		¼—½ Mile		½—¾ Mile		Over ¾ Mile						
Group Number	Name and Address	Total Replies	Home Delivered	Total Replies	Home Delivered	Total Replies	Home Delivered	Total Replies	Home Delivered	Total Replies	Home Delivered	All Areas	Within ¼ Mile	¼—½ Miles	½—¾ Miles	Over ¾ Miles
I	Psomakos Super Mart 2416 W. 47th Street	92	25	80	21	9	2	2	2	1	0	27 2	26 3	22 2	100 0	0
II	A & P Store 2601 W. 51st Street	187	64	160	53	17	6	7	3	3	2	34 2	33 1	35 3	42 9	66 7
III	Goldblatt's Dept. Store 47th and South Ashland	101	24	13	3	30	8	14	1	44	12	23 8	23 1	26 7	7 1	27 3
IV	Goldenstern's Market 427 W. 69th Street	67	22	63	21	4	1	0	0	0	0	32 8	33 3	25 0	0	0
V	A & P Store 6702 S. Wentworth	26	4	24	4	1	0	0	0	1	0	15 4	16 7	0	0	0
VI	Kroger Store 7260 S. Wentworth	112	33	95	29	9	3	1	0	7	1	29 5	30 5	33 3	0	14 3
	All Groups	585	172	435	131	70	20	24	6	56	15	29 4	30 1	28 6	25 0	26 8

Source: Replies to Mail Questionnaires to customers of above listed stores as sampled on October 27–29 and November 4 5, 1955 by Elrick, Lavidge & Co. for Bowman Dairy Co.

[fol. 1142]

Table 3

Summary of Replies to Bowman Sample Store Customer Questionnaires of January 1956

Total Number Buying Milk from at Least one Pair of Bowman Chain & Independent Stores

Total Number and Percentage Buying at a Pair of Bowman Chain and Independent

At Sample Store Only.

Home Delivery and No-Home Delivery Customers

Sample Store			Home Delivery			No-Home Delivery		
Group No.	Name	Areas	Total No. Buying from at least one pair Bowman Chain and Indep't. Stores[1]	Buying from at least one pair of Sample Stores		Total No. Buying from at least one pair Bowman Chain and Indep't. Stores[1]	Buying from at least one pair of Sample Stores	
				No. [1]	%		No. [1]	%
Groups I—III		All Areas	11	2	18.2	44	7	15.9
		within ¼ Mi.	7	1	14.3	40	6	15.0
I	Psomakos	All Areas	4	1	25.0	16	5	31.3
	2416 W. 47th St.	within ¼ Mi.	4	1	25.0	14	5	35.7
II	A & P Store	All Areas	4	1	25.0	27	1	3.7
	2601 W. 51st St.	within ¼ Mi.	3	–	0	26	1	3.8
III	Goldblatt's	All Areas	3	–	–	1	1	–
	47th & S. Ashland	within ¼ Mi.	–	–	–	–	–	–
		¼—¾ Mi.	1	–	–	–	–	–
		Over ¾ Mi.	2	–	–	1	1	–

[Table 3—Continued on Page 450]

Groups IV—VI		All Areas	3	–	–	21	6	28 6
		within ¼ Mi	3	–	–	21	6	28 6
IV	Goldenstern's	All Areas	–	–	–	13	4	30 8
	427 W. 69th St.	within ¼ Mi	–	–	–	13	4	30 8
V	A & P Stores	All Areas	–	–	–	1	1	–
	6702 S. Wentworth	within ¼ Mi	–	–	–	1	1	–
VI	Kroger	All Areas	3	–	–	7	1	14 3
	7206 S. Wentworth	within ¼ Mi	3	–	–	7	1	14 3

[1] Source: Table 7-A

[fol. 1143]

Table 4—Home Delivery

Summary of Replies to Bowman Sample Store Customer Questionnaires of January 1956; Total Number of Replies, % Response

Percentage of Customers Buying at 2 or more Different Stores

Percentage of Customers Buying at Pairs of Bowman Chain and Independent Stores[1]

Sample Store			Total No. Replies[2]	Percentage Buying from at Least	
Group No.	Name	Areas		2 or More Stores[3]	One Pair of Bowman Chain & Independent Stores[4]
Groups I—III		All Areas	113	27.4	14.3
		within ¼ Mi.	77	23.4	12.1
I	Psomakos	All Areas	25	32.0	21.0
	2416 W. 47th St.	within ¼ Mi.	21	33.3	23.5
II	A & P Store	All Areas	64	23.4	9.1
	2601 W. 51st St.	within ¼ Mi.	53	20.8	7.5
III	Goldblatt's	All Areas	24	33.4	21.4
	47th & S. Ashland	within ¼ Mi.	3	–	–
		½—¾ Mi.	9	33.3	20.0
		Over ¾ Mi.	12	41.7	25.0
Groups IV—VI		All Areas	59	24.4	6.7
		within ¼ Mi.	54	25.9	7.2
IV	Goldenstern's	All Areas	22	13.6	–
	427 W. 69th	within ¼ Mi.	21	14.3	–
V	A & P Store	All Areas	4	25.0	–
	6702 S. Wentworth	within ¼ Mi.	4	25.0	–
VI	Kroger	All Areas	33	33.3	11.1
	7260 S. Wentworth	within ¼ Mi.	29	34.5	12.5

[1] Includes customers who buy also at both non-Bowman stores along with their trade at both Bowman chain and independent stores.
[2] Source: Table 2.
[3] Source: Table 6–B
[4] Source: Table 7–B

[fol. 1144]

Table 5—No Home Delivery

Summary of Replies to Bowman Sample Store Customer Questionnaires of January 1956; Total Number of Replies, [illegible] Response

Percentage of Customers Buying at 2 or more Different Stores

Percentage of Customers Buying at Pairs of Bowman Chain and Independent Stores[1]

Sample Store			Total No. Replies[2]	Percentage Buying from at Least	
Group No.	Name	Areas		2 or More Stores[2]	One Pair of Bowman Chain and Independent Stores[4]
Groups I—III		All Areas	267	50.6	16.9
		within ¼ Mi.	235	47.7	22.7
I	Psomakos	All Areas	67	37.3	23.9
	2416 W. 47th St.	within ¼ Mi.	59	35.6	23.7
II	A & P Store	All Areas	123	52.1	21.8
	2601 W. 51st St.	within ¼ Mi.	107	51.4	24.1
III	Goldblatt's	All Areas	77	60.0	1.5
	47th & So. Ashland	within ¼ Mi.	10	80.0	–
		¼—¾ Mi.	35	56.2	–
		Over ¾ Mi.	32	57.5	3.3

Table 6A

Bowman Sample Store Customer Questionnaire Replies of January 1956: Number of Customers, With Home and No Home Delivery, Buying Their Milk From The Indicated Number of Different Stores

Sample Store			Customers With Home Delivery							Customers With No Home Delivery						
				1—Store							1—Store						
Group Number	Name and Address	Areas	Total	No Store	At Sample Store	Other Than at Sample Store	2 Stores	3 Stores	4 Stores	Total	No Store	At Sample Store	Other Than at Sample Store	2 Stores	3 Stores	4 Stores	5 or 6 Stores[1]
I	Psomakos Super	All Areas	25	6	10	1	7	1	–	67	1	35	6	18	4	1	2
	2416 W. 47th	Within ¼ mi.	21	4	9	1	6	1	–	59	–	34	4	15	4	–	2
		¼—½ mi.	2	–	1	–	1	–	–	7	–	1	2	3	–	1	–
		Over ½ mi.	2	2	–	–	–	–	–	1	1	–	–	–	–	–	–
II	A & P Store	All Areas	64	15	31	3	11	3	1	123	–	49	10	44	17	2	1
	2601 W. 51st.	Within ¼ mi.	53	13	26	3	8	3	–	107	–	46	6	42	11	1	1
		¼—½ mi.	6	1	4	–	1	–	–	11	–	3	3	1	3	1	–
		Over ½ mi.	5	1	1	–	2	–	1	5	–	–	1	1	3	–	–
III	Goldblatt's	All Areas	24	9	2	5	8	–	–	75	2	4	24	24	14	4	3
	47th & S. Ashland	Within ¼ mi.	3	1	2	–	–	–	–	10	1[2]	–	1	7	1	–	–
		¼—½ mi.	8	3	–	2	3	–	–	22	–	3	6	6	6	–	1
		½—¾ mi.	1	1	–	–	–	–	–	11[3]	3[3]	–	5	3	2	–	–
		Over ¾ mi.	12	4	–	3	5	–	–	32	–	1	12	8	5	4	2
Total Groups		All Areas	113	30	43	9	26	4	1	265	3	88	40	86	35	7	6
	(I, II & III)	Within ¼ mi.	77	18	37	4	14	4	–	176	1	80	11	64	16	1	3
		¼—½ mi.	16	4	5	2	5	–	–	40	–	7	11	10	9	2	1
		Over ½ mi.	20	8	1	3	7	–	1	49	2	1	18	12	10	4	2
IV	Goldenstern's Mart	All Areas	22	8	11	–	2	1	–	43	1	13	2	10	12	3	2
	427 W. 69th St.	Within ¼ mi.	21	7	11	–	2	1	–	41[4]	–	13	1	10	12	3	2
		¼—½ mi.	1	1	–	–	–	–	–	2[4]	1[2]	–	1	–	–	–	–
		Over ½ mi.	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–
V	A & P Store	All Areas	4	2	1	–	1	–	–	20	1	9	–	6	3	–	1
	6702 S. Wentworth	Within ¼ mi.	4	2	1	–	1	–	–	18[5]	1	8	–	6	3	–	–
		¼—½ mi.	–	–	–	–	–	–	–	1	–	1	–	–	–	–	–
		Over ½ mi.	–	–	–	–	–	–	–	–	–	–	–	–	–	–	1
VI	Kroger Store	All Areas	33	7	10	5	7	1	–	77	–	20	12	29	9	7	–
	7260 S. Wentworth	Within ¼ mi.	29	6	9	4	6	4	–	65[4]	–	18	8	26	8	5	–
		¼—½ mi.	3	–	1	1	1	–	–	5[4]	–	1	2	1	1	–	–
		Over ½ mi.	1	1	–	–	–	–	–	7	–	1	2	2	–	2	–
Total Groups		All Areas	59	17	22	5	10	5	–	140	2	42	14	45	24	10	3
	(IV, V & VI)	Within ¼ mi.	54	15	21	4	9	5	–	124	1	39	9	42	23	8	2
		¼—½ mi.	4	1	1	1	1	–	–	8	1	2	3	1	1	–	–
		Over ½ mi.	1	1	–	–	–	–	–	8	–	1	2	2	–	2	1

Source: Replies to Mail Questionnaires to Customers of above listed stores as sampled on October 27-29 and November 4-5, 1955 by Elrick-Lavidge & Co. for Bowman Dairy Co.

[1] No customer reported as buying milk from more than six different stores.

[2] Does not use fluid milk.

[3] Uses canned milk only.

[4] Excludes one unresponsive reply.

[5] Excludes two unresponsive replies.

[fol. 1146]

TABLE 6B

Bowman Sample Store Customer Questionnaire Replies of January 1956: Percentage of Customers, with Home and No Home Delivery, Buying Their Milk from the Indicated Number of Different Stores

Sample Store			Customers with Home Delivery					Customers with No Home Delivery				
					1-Store					1-Store		
Group Number	Name and Address	Area	Total %	No Store %	At Sample Store %	Other than at Sample Store %	2 or More Stores %	Total %	No Store %	At Sample Store %	Other than at Sample Store %	2 or More Stores %
Groups I–III		All Areas	100	26 5	38 1	8 0	27 4	100	1 1	33 2	15 1	50 6
		Within ¼ Mile	100	23 4	48 0	5 2	23 4	100	6	45 5	6 2	47 7
I	Psomakos Super (2416 W. 47th St.)	All Areas	100	24 0	40 0	4 0	32 0	100	1 5	52 2	9 0	37 3
		Within ¼ Mile	100	19 0	42 9	4 8	33 3	100	—	57 6	6 8	35 6
II	A & P Store (2601 W. 51st St.)	All Areas	100	23 4	48 5	4 7	23 4	100	—	39 8	8 1	52 1
		Within ¼ Mile	100	24 5	49 0	5 7	20 8	100	—	43 0	5 6	51 4
III	Goldblatt's (47th & S. Ashland Ave.)	All Areas	100	37 5	8 3	20 8	33 4	100	2 7	5 3	32 0	60 0
		Within ¼ Mile	100	33 5	66 7	—	—	100	10 0	—	10 0	80 0
		¼–¾ Mile	100	44 4	—	22 2	33 3	100	3 1	9 4	31 3	56 2
		Over ¾ Mile	100	33 3	—	25 0	41 7	100	—	3 0	39 4	57 6
Groups IV–VI		All Areas	100	28 8	37 3	8 5	25 4	100	1 4	30 0	10 0	58 6
		Within ¼ Mile	100	27 8	38 9	7 4	25 9	100	8	31 5	7 3	60 5
IV	Goldenstern's Mart (427 W. 69th St.)	All Areas	100	36 4	50 0	—	13 6	100	2 3	30 2	4 7	62 8
		Within ¼ Mile	100	33 3	52 4	—	14 3	100	—	31 7	2 4	65 9
V	A & P Store (6702 S. Wentworth Ave.)	All Areas	100	50 0	25 0	—	25 0	100	5 0	45 0	—	50 0
		Within ¼ Mile	100	50 0	25 0	—	25 0	100	5 6	44 4	—	50 0
VI	Kroger Store (7260 S. Wentworth Ave.)	All Areas	100	21 2	30 3	15 2	33 3	100	—	26 0	15 6	58 4
		Within ¼ Mile	100	20 7	31 0	13 8	34 5	100	—	27 7	12 3	60 0

Source: Replies to mail questionnaires to customers of the above listed stores as sampled on October 27–29 and November 4–5, 1955 by Ehrick, Lavidge & Co., for Bowman Dairy Company.

[fol. 1147]

TABLE 7A

Bowman Sample Store Customer Questionnaire Replies January 1956

Number of Customers With Home and No Home Delivery, Buying Their Milk from One of the Indicated 7 Combinations of Bowman Chain, Bowman Independent and Non-Bowman Stores

Sample Store			Customers With Home Delivery Buying at:								Customers With No Home Delivery Buying at:							
				Only								Only						
				Bowman								Bowman						
Group Number	Name and Address	Areas	Total [1]	Chain Stores (1 or More)	Indep. Stores (1 or More)	Non-Bowman Stores (1 or More)	Bowman Chain & Independent Stores [2]	Bowman Chain & Non-Bowman Stores	Bowman Indep. & Non-Bowman Stores	Bowman Chain & Indep. Sample Stores Only [3]	Total [1]	Chain Stores (1 or More)	Indep. Stores (1 or More)	Non-Bowman Stores (1 or More)	Bowman Chain & Independent Stores [2]	Bowman Chain & Non-Bowman Stores	Bowman Indep. & Non-Bowman Stores	Bowman Chain & Indep. Sample Stores Only [3]
Groups I–III		All Areas	77	38	12	6	11	7	3	(2)	260	79	38	30	44	57	12	(7)
		Within ¼ Mi.	58	32	10	2	7	4	3	(1)	176	57	37	6	40	26	10	(6)
I	Psomakos 2416 W. 47th St.	All Areas	19	—	11	1	4	—	3	(1)	67	1	35	6	16	—	9	(5)
		Within ¼ Mi.	17	—	9	1	4	—	3	(1)	59	1	34	3	14	—	7	(5)
		Over ¼ Mi.	2	—	2	—	—	—	—	—	8	—	1	3	2	—	2	—
II	A & P Store 2601 W. 51st St.	All Areas	44	33	1	2	4	4	—	(1)	124	52	3	7	27	32	3	(1)
		Within ¼ Mi.	40	31	1	1	3	4	—	—	108	48	3	3	26	25	3	(1)
		Over ¼ Mi.	4	2	—	1	1	—	—	(1)	16	4	—	4	1	7	—	—
III	Goldblatt's 47th & So. Ashland	All Areas	14	5	—	3	3	3	—	—	69	26	—	17	1	25	—	(1)
		Within ¼ Mi.	1	1	—	—	—	—	—	—	9	8	—	—	—	1	—	—
		¼–¾ Mi.	5	3	—	1	1	—	—	—	30	11	—	7	—	12	—	—
		Over ¾ Mi.	8	1	—	2	2	3	—	—	30	7	—	10	1	12	—	(1)
Groups IV–VI		All Areas	45	16	14	4	3	5	3	—	139	48	14	9	21	33	14	(6)
		Within ¼ Mi.	42	15	14	3	3	4	3	—	124	41	14	5	21	29	14	(6)
IV	Goldenstern's 427 W. 69th	All Areas	17	—	14	—	—	—	3	—	43	1	13	1	13	1	14	(4)
		Within ¼ Mi.	17	—	14	—	—	—	3	—	42	—	13	1	13	1	14	(4)[4]
		Over ¼ Mi.	—	—	—	—	—	—	—	—	1	1	—	—	—	—	—	—
V	A & P Store 6702 So. Wentworth	All Areas	1	—	—	—	—	1	—	—	19	11	—	—	1	7	—	(1)
		Within ¼ Mi.	1	—	—	—	—	1	—	—	17	10	—	—	1	6	—	(1)
		Over ¼ Mi.	—	—	—	—	—	—	—	—	2	1	—	—	—	1	—	—
VI	Kroger 7260 So. Wentworth	All Areas	27	16	—	4	3	4	—	—	77	36	1	8	7	25	—	(1)
		Within ¼ Mi.	24	15	—	3	3	3	—	—	65	31	1	4	7	22	—	(1)
		Over ¼ Mi.	3	1	—	1	—	1	—	—	12	5	—	4	—	3	—	—

Source: Replies to Mail Questionnaires to customers of the above listed stores as sampled on October 27–29 and November 4–5, 1955, by Elrick, Lavidge & Co. for Bowman Dairy Co.

[1] Excludes customers who have home delivery for all their milk requirements which is the difference between this table's totals and those of Table 6A, also replies indicating no milk purchased.

[2] Includes those replies showing customers trading at 3 or more stores at least two of which are Bowman Chain and Independent Stores.

[3] These replies are duplicated in those tabulated as "Bowman Chain & Independent Stores" (Col. 5 and 13 respectively for Home Delivery and No Home Delivery).

[4] Includes those customers trading also at Kroger Store at 6914 So. Wentworth.

[fol. 1148]

TABLE 7B

Bowman Sample Store Customer Questionnaire Replies January 1956

Percentage of Customers With Home and No Home Delivery, Buying Their Milk from one of the Indicated 7 Combination of Bowman Chain, Bowman Independent, and Non-Bowman Stores

Group Number	Sample Store: Name and Address	Areas	Customers With Home Delivery Buying at: Total %	Only: Bowman: Chain Stores (1 or more) %	Only: Bowman: Indep. Stores (1 or more) %	Only: Non-Bowman: Stores (1 or more) %	Bowman Chain and Indep. Stores[1] %	Bowman Chain and Non-Bowman Stores %	Bowman Indep. and Non-Bowman Stores %	Customers With No Home Delivery at: Total %	Only: Bowman: Chain Stores (1 or more) %	Only: Bowman: Indep. Stores (1 or more) %	Only: Non-Bowman: Stores (1 or more) %	Bowman Chain and Indep. Stores[1] %	Bowman Chain and Non-Bowman Stores %	Bowman Indep. and Non-Bowman Stores %	Bowman Chain and Indep. Sample Stores Only %
Groups I-III		All Areas	100	49.3	15.6	7.8	14.3	9.1	3.9	100	30.4	14.6	11.5	16.9	21.9	4.6	2.7
		Within ¼ Mile	100	55.2	17.2	3.4	12.1	6.9	5.2	100	32.4	21.0	3.4	22.7	14.8	5.7	3.4
I	Psomakos 2416 W. 47th St.	All Areas	100	—	57.9	5.3	21.0	—	15.8	100	1.5	52.2	9.0	23.9	—	13.4	7.5
	—	Within ¼ Mile	100	—	53.0	5.9	23.5	—	17.6	100	1.7	57.6	5.1	23.7	—	11.9	8.5
II	A & P Stores 2601 W. 51st St.	All Areas	100	75.0	2.3	4.5	9.1	9.1	—	100	41.9	2.4	5.7	21.8	25.8	2.4	8
		Within ¼ Mile	100	77.5	2.5	2.5	7.5	10.0	—	100	44.4	2.8	2.8	24.1	23.1	2.8	9
III	Goldblatt's 47th & So. Ashland Ave.	All Areas	100	35.8	—	21.4	21.4	21.4	—	100	37.7	—	24.6	1.5	36.2	—	1.4
		Within ¼ Mile	100	100.0	—	—	—	—	—	100	88.9	—	—	—	11.1	—	—
		¼-¾ Mile	100	60.0	—	20.0	20.0	—	—	100	36.7	—	23.3	—	40.0	—	—
		Over ¾ Mile	100	12.5	—	25.0	25.0	37.5	—	100	23.4	—	33.3	3.3	40.0	—	3.3
Groups IV-VI		All Areas	100	35.5	31.1	8.9	6.7	11.1	5.7	100	34.5	10.1	6.5	15.1	23.7	10.1	4.3
		Within ¼ Mile	100	35.7	33.3	7.1	7.2	9.5	7.2	100	33.1	11.3	4.0	16.9	23.4	11.3	4.8
IV	Goldenstern's 427 W. 69th St.	All Areas	100	—	82.4	—	—	—	17.6	100	2.3	30.3	2.3	30.2	2.3	32.6	9.3
		Within ¼ Mile	100	—	82.4	—	—	—	17.6	100	—	31.0	2.4	31.0	2.4	33.2	9.5
V	A & P Store 6702 S. Wentworth Ave.	All Areas	100	—	—	—	—	100.0	—	100	57.9	—	—	5.3	36.8	—	5.3
		Within ¼ Mile	100	—	—	—	—	100.0	—	100	58.8	—	—	5.9	35.3	—	5.9
VI	Kroger 7306 S. Wentworth Ave.	All Areas	100	59.3	—	14.8	11.1	14.8	—	100	46.8	1.3	10.3	9.1	32.5	—	1.3
		Within ¼ Mile	100	62.5	—	12.5	12.5	12.5	—	100	47.7	1.5	6.2	10.8	33.8	—	1.5

Source: Based on Table 7A.

[1] Includes those customers buying milk from Bowman chain and independent stores and also from Non-Bowman stores.

[fol. 1149] **Rebuttal Exhibit G-1**

Copy

Department of Justice
Room 404, United States Courthouse
Chicago 4, Illinois

60-139-64 January 17, 1956

On one of the five days during the period October 27 through November 5, 1955, a representative of a local marketing research agency interviewed you as you left one of the three stores located at the following Chicago, Illinois addresses:

1. Psomakos Super Mart, 2416 West 47th Street
2. A & P Store, 2601 West 51st Street
3. Goldblatt's Department Store, 47th & So. Ashland Avenue

This interviewer asked you whether or not you had purchased, at that time, any dairy products from the store you were leaving.

With respect to your purchases of milk, will you therefore kindly check the appropriate answers to the questions in the attached list and return your answers in the enclosed return envelope which requires *no postage*.

Your immediate cooperation in answering these questions will be greatly appreciated.

Sincerely yours, Stanley N. Barnes, Assistant Attorney General. By s/ Earl A. Jinkinson, Chief, Midwest Office, Antitrust Division.

[fol. 1150] REBUTTAL EXHIBIT G-2

Copy

Questionnaire

1. Do you have your milk delivered at home? Yes ____ No ____
2. If you buy milk from the following stores, indicate with an "X" the frequency of your purchases:

Name and Address of Store	Occasionally	Half the Time	All the Time
(a) Psomakos Super Mart, 2416 W. 47th	____	____	____
(b) Kroger Store, So. Archer & So. Kedzie	____	____	____
(c) A & P Store, 2601 W. 51st St.	____	____	____
(d) Food Mart, 2640 W. 51st St.	____	____	____
(e) Goldblatt's Dept. Store, 47th & So. Ashland Ave.	____	____	____
(f) A & P Store, 1615 W. 48th St.	____	____	____
(g) Bill's Grocery and Meats, 4959 So. Laflin St.	____	____	____
(h) Kroger Store, 5104 S. Ashland Ave.	____	____	____
(i) Kroger Store, W. 50th & So. Halsted	____	____	____
(j) Marge's Food Store, 901 W. 51st St.	____	____	____
(k) Other Stores: Give names and addresses	____	____	____

(1-17-56)

[fol. 1151] REBUTTAL EXHIBIT H-1

Copy

Department of Justice
Room 404, United States Courthouse
Chicago 4, Illinois

60-139-64 January 17, 1956

On one of the three days during the period October 27 through October 29, 1955, a representative of a local marketing research agency interviewed you as you left one of the three stores located at the following Chicago, Illinois addresses:

1. Goldenstern's Market (Charlie's Market), 427 W. 69th St.
2. A & P Store, 6702 South Wentworth Avenue
3. Kroger Store, 7260 South Wentworth Avenue

This interviewer asked you whether or not you had purchased, at that time, any dairy products from the store you were leaving.

With respect to your purchases of milk, will you therefore kindly check the appropriate answers to the questions in the attached questionnaire, and return your answers in the enclosed return envelope which requires *no postage*.

You immediate cooperation in answering these questions will be greatly appreciated.

Sincerely yours, Stanley N. Barnes, Assistant Attorney General. By s/ Earl A. Jinkinson, Chief, Midwest Office, Antitrust Division.

[fol. 1152] REBUTTAL EXHIBIT H-2

Copy

Questionnaire

1. Do you have your milk delivered at home? Yes ____ No ____
2. Indicate with an "X" the frequency with which you buy milk from the following store or stores:

Name and Address of Store	Occasionally	Half the Time	All the Time
(a) A & P Store, 6702 So. Wentworth			
(b) Jeanie's Grocery, 224 West 69th St.			
(c) Kroger Store, 6914 So. Wentworth			
(d) Square Deal Grocery & Mart, 339 W. 71st			
(e) Kroger Store, 7260 So. Wentworth			
(f) Grocery Store, 7400 So. Vincennes			
(g) Grocery Store, 77th & So. Vincennes			
(h) High-Low Food Store, Corner of East 71st and South Park Avenue			
(i) Pal-O-Mine Grocery, 500 E. 71st St.			
(j) Busy Bee Grocery, 600 E. 71st St.			
(k) Triangle Market, 603 E. 74st St.			
(l) J. H. Williamson & Chris Miller Meat Mart, 405 East 75th St.			
(m) High-Low Food Store, 7008 So. Halsted			
(n) Square Deal Mart, 6904 So. Halsted			
(o) Grocery and Meat Store, 524 W. 71st St.			
(p) Goldenstern's, 427 W. 69th St.			
(q) Other Stores: Give names and addresses:			

(1-17-56)

Groups IV--VI		All Areas	146	58.6	15.1
		within ¼ Mi.	128	60.5	16.9
IV	Goldenstern's	All Areas	45	62.8	30.2
	427 W. 89th St.	within ¼ Mi.	42	65.9	31.0
V	A & P Store	All Areas	22	50.0	5.3
	6702 S. Wentworth	within ¼ Mi.	20	50.0	5.9
VI	Kroger	All Areas	79	58.4	9.1
	7206 S. Wentworth	within ¼ Mi.	66	60.0	10.8

[1] Includes customers who buy also at both non-Bowman stores along with their trading at both Bowman chain and independent stores.
[2] Source: Table 2
[3] Source: Table 6-B
[4] Source: Table 7-B

CUSTOMER SERVICES TO INDEPENDENTS ON 33 ELSTON DIVISION ROUTES
RELATIONSHIP OF AVERAGE MINUTES PER POINT TO TOTAL NUMBER OF POINTS DELIVERED DAILY TO STORE, BASED ON THE 1949 ROUTE TIME STUDIES.

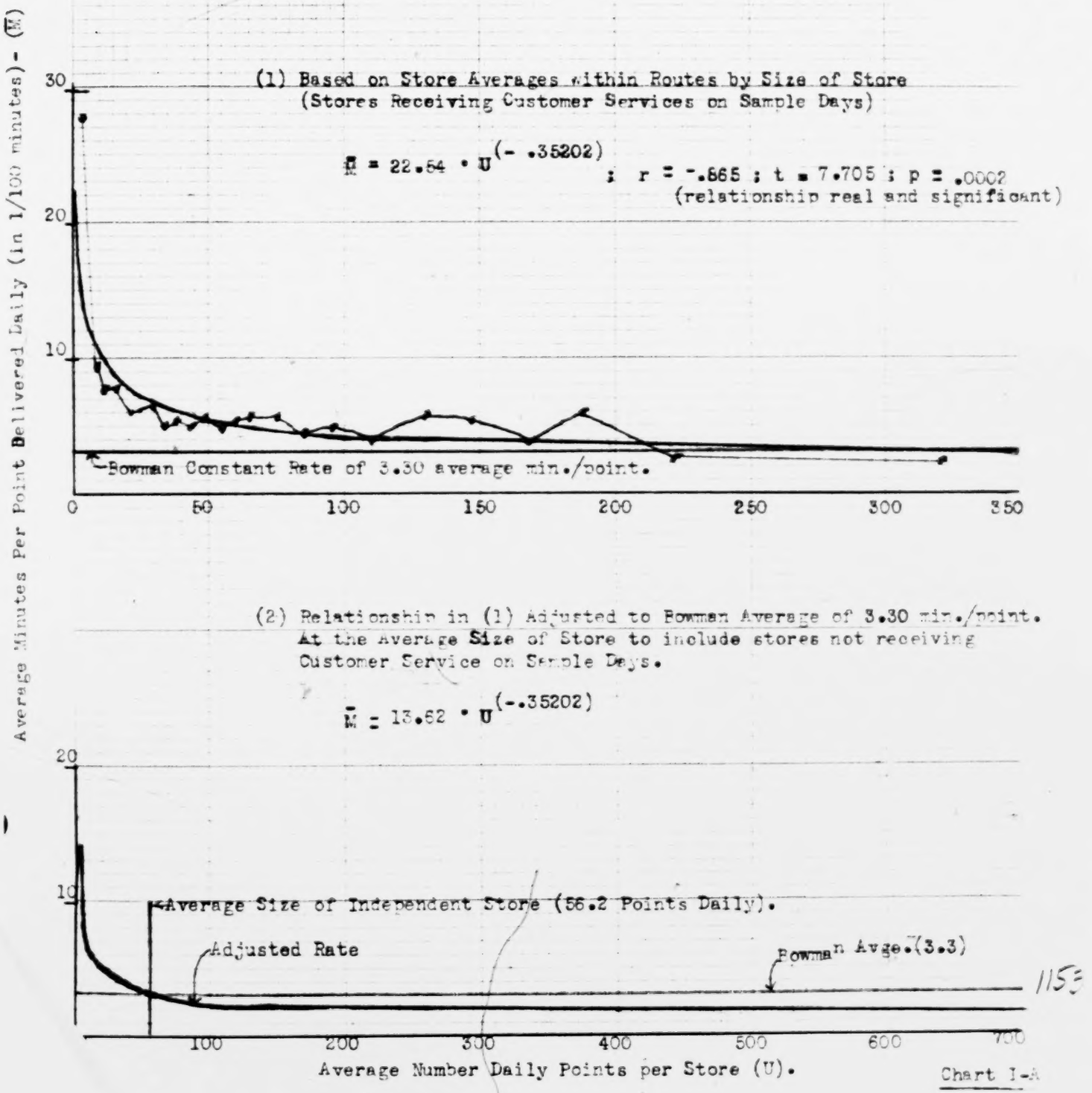
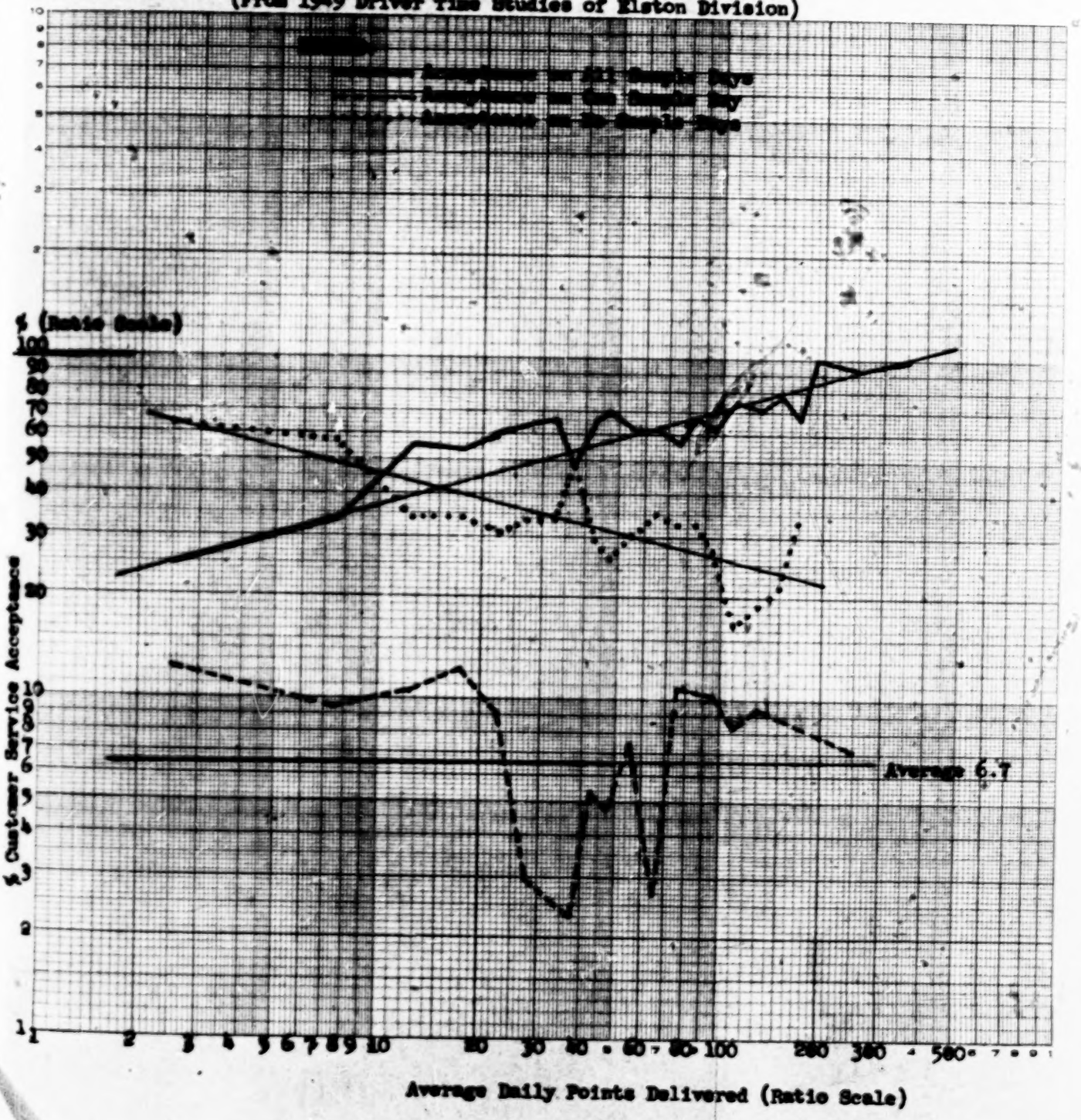


Chart I-A

Relative Customer Service Acceptance
By Size of Independent Store

(From 1949 Driver Time Studies of Elston Division)



1155

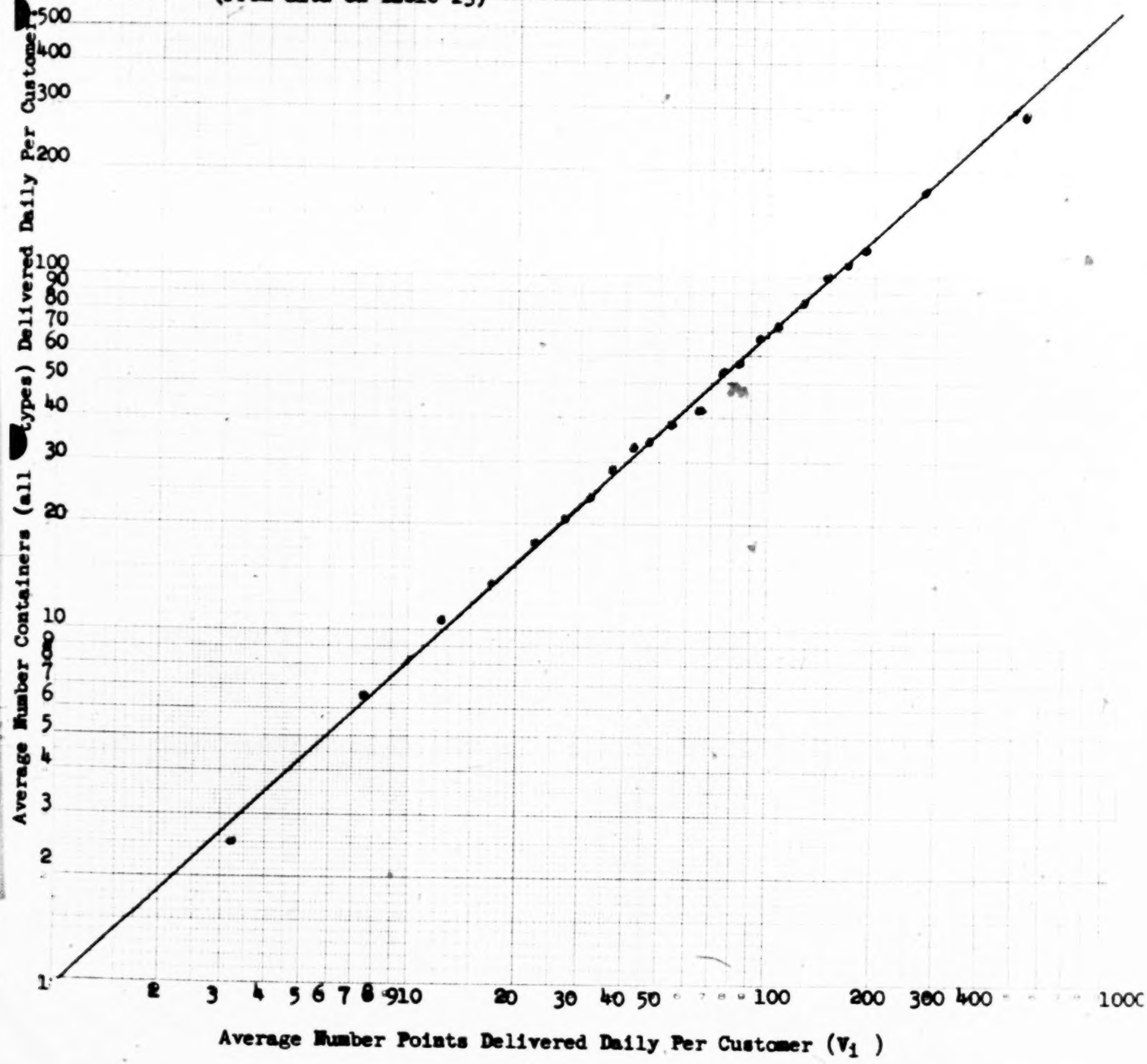
BOWMAN INDEPENDENT STORE CUSTOMERS: REBUTTAL EVIDENCE

RELATIONSHIP OF TOTAL NUMBER OF POINTS AND CONTAINERS DELIVERED DAILY PER CUSTOMER

(Based on 1/3 Sample of Routes of all 3 Divisions for Sept. 1955)

(Estimating equation: $Y_i = .986364 \cdot V_i^{(.919080)}$)

(From data on Table 13)

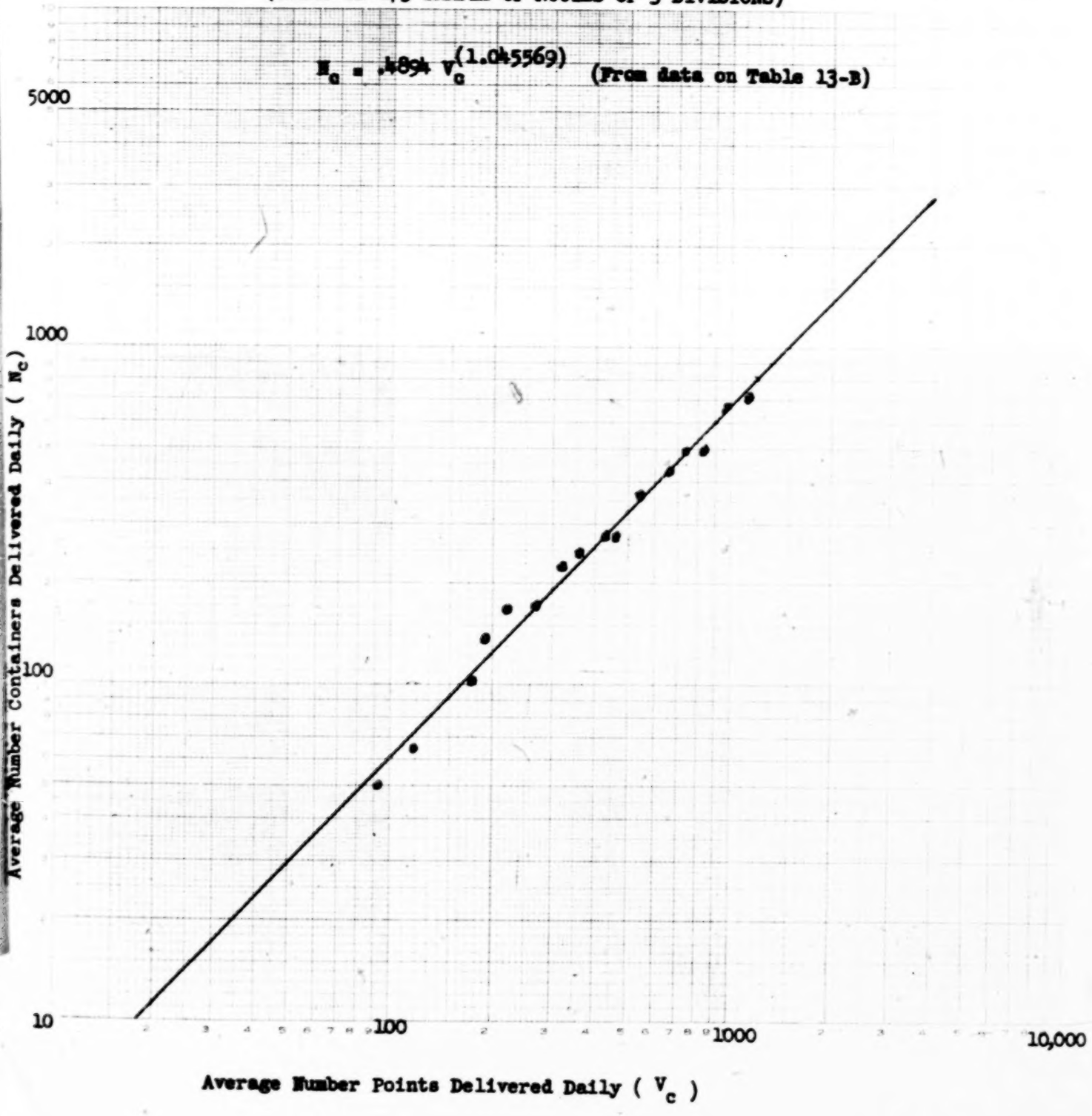


BOWMAN CHAIN STORE CUSTOMERS: REBUTTAL EVIDENCE

RELATIONSHIP OF TOTAL NUMBER POINTS AND CONTAINERS DELIVERED DAILY PER CUSTOMER, SEPT. 1955.

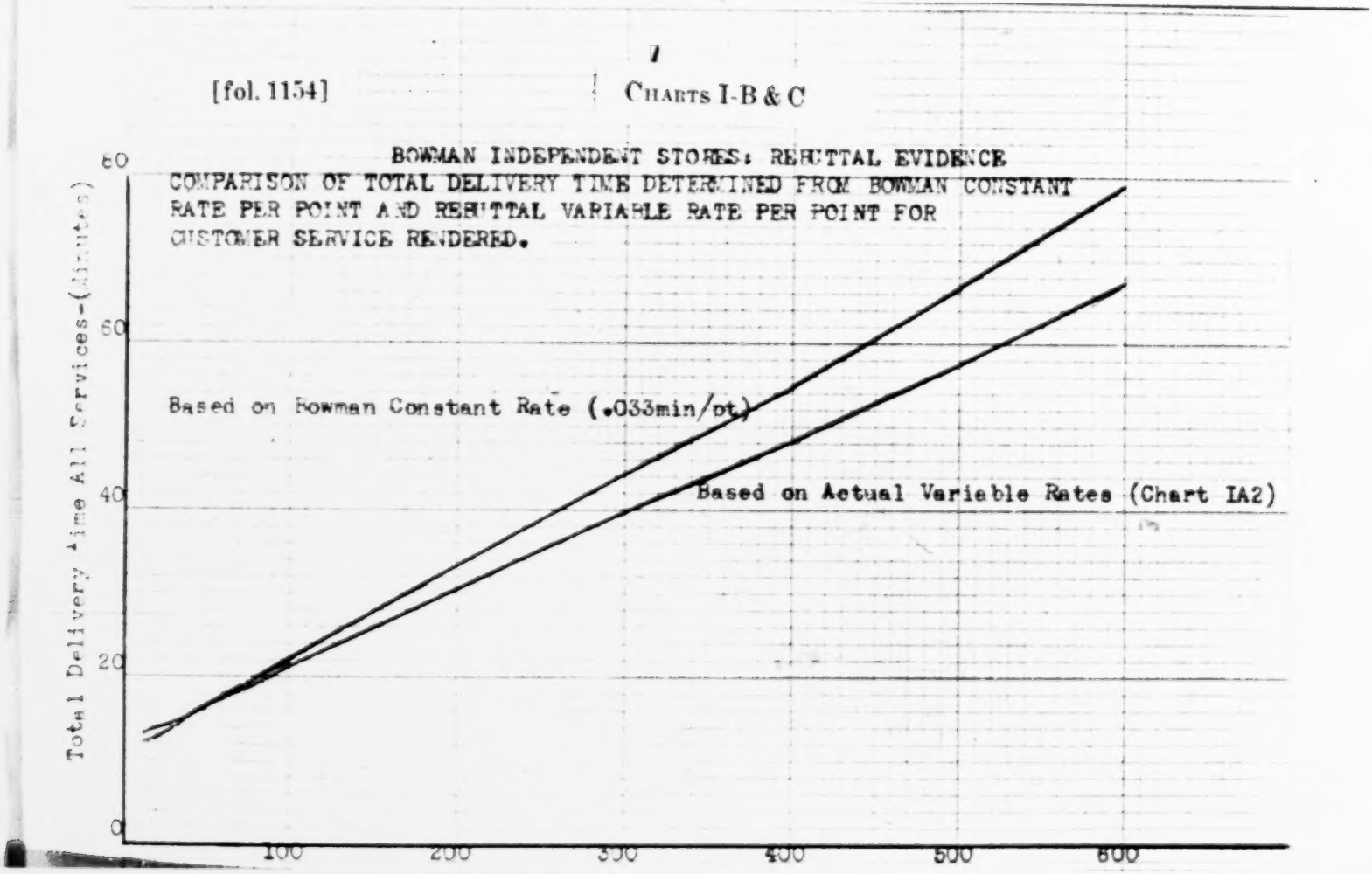
(BASED ON 1/3 SAMPLE OF ROUTES OF 3 DIVISIONS)

$N_c = .4894\ V_c^{(1.045569)}$ (From data on Table 13-B)



[fol. 1154]

CHARTS I-B & C



POWMAN INDEPENDENT STORES: REBUTTAL EVIDENCE

COMPARISON OF DIFFERENCES BETWEEN MAXIMUM AVAILABLE MARGINS OF INDEPENDENTS AND CHAINS BASED ON POWMAN CONSTANT TIME RATES AND ON REBUTTAL VARIABLE TIME RATES FOR CUSTOMER SERVICES RENDERED THE INDEPENDENTS.

BOWMAN INDEPENDENT STORES: REB'TTAL EVIDENCE

COMPARISON OF DIFFERENCES BETWEEN MAXIMUM AVAILABLE MARGINS OF INDEPENDENTS AND CHAINS BASED ON BOWMAN CONSTANT TIME RATES AND ON REBUTTAL VARIABLE TIME RATES FOR CUSTOMER SERVICES RENDERED THE INDEPENDENTS.

[fol. 1158]

CHART IV-A

BOWMAN INDEPENDENT STORES: REBUTTAL EVIDENCE
RELATIONSHIP OF % GLASS CONTAINERS TO NUMBER OF POINTS DELIVERED DAILY
(BASED ON 1/3 ROUTE SAMPLE OF ALL 3 DIVISIONS)
(SEPTEMBER 1955)

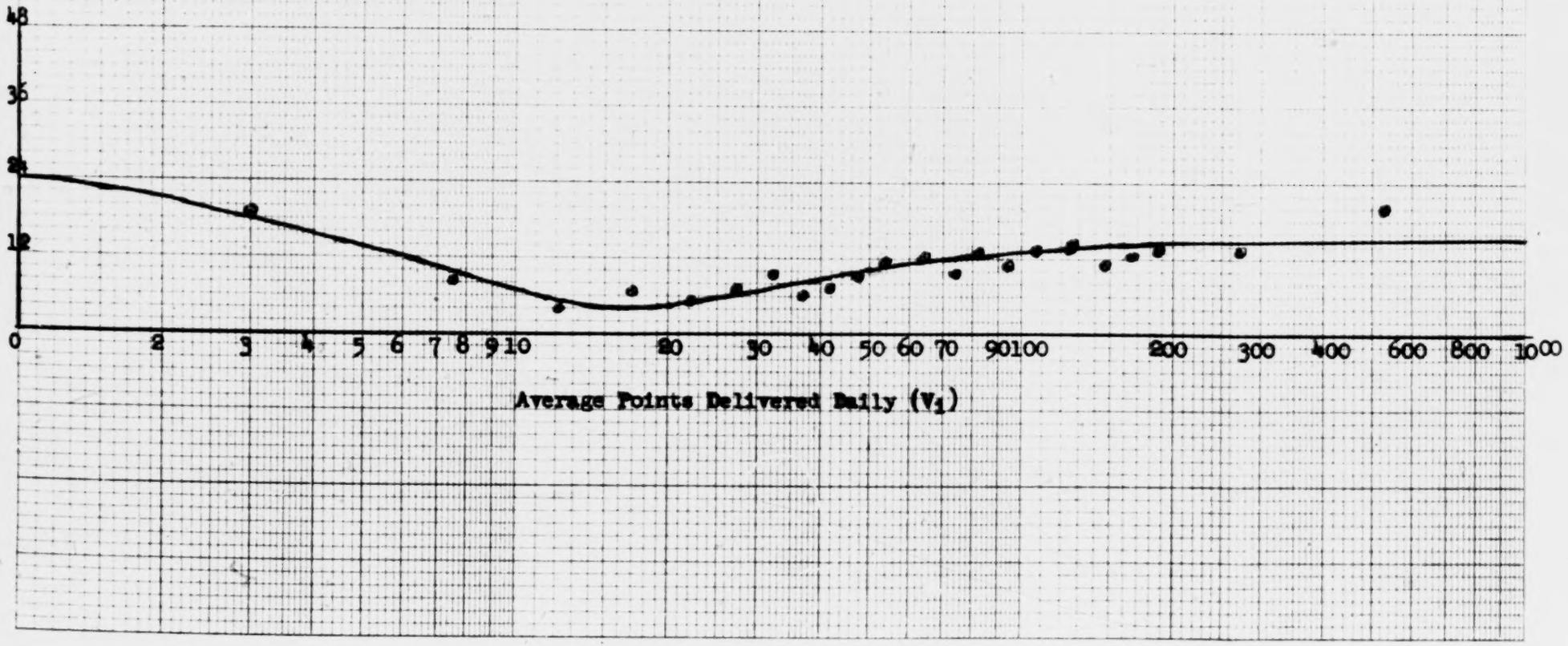
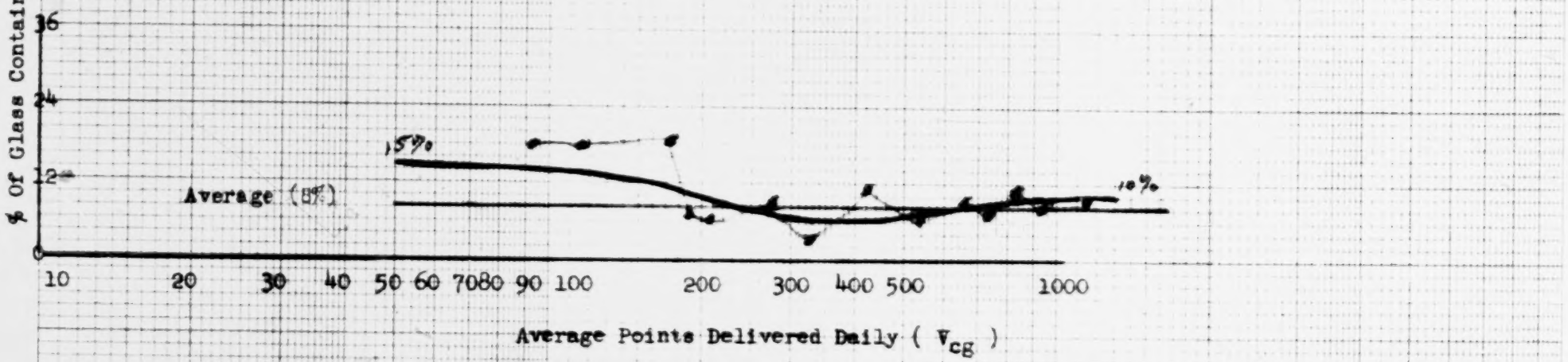


CHART IV-B

BOWMAN CHAIN STORES: REBUTTAL EVIDENCE
RELATIONSHIP OF % GLASS CONTAINERS TO NUMBER OF POINTS DELIVERED DAILY
(Based on 1/3 Sample of 3 Division Routes, September 1955)



[fol. 1160] TABLE 8A: BOWMAN WHOLESALE ACCOUNTS

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

A Miscellaneous Divisional Expense

Basis of Allocation to Customers: Per Customer per day rate
(Tables 16 A and 16 B)

Item	March 1955	December 1955
1 Number of Customers Served	3,389	3,153
2 Number of Delivery Days	27	27
3 Number of Customer Days	91,503	85,131
4 Misc. Division Expenses	$30,186	$25,984
5 Cost per Customer per Day	$.329890	$.30522

Source: *Rebuttal Exhibits K* (1-3), for data supplied by Bowman Co. upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for the March 1955 test and $.185 for the January 1956 test based on December 1955 data, as per Rebuttal Exhibit K-1. All data cover all 3 Bowman wholesale divisions: Elston, Forest, and South

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[fol. 1161] TABLE 8B: BOWMAN WHOLESALE ACCOUNTS

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

B Division Office Personnel

(Incl. Benefits and Vacation Time)
Basis of Allocation to Customers: Per Customer Day
(Tables 16 A and 16 B)

Item	March 1955	December 1955
1 Number Customers Served	3,389	3,153
2 Number Delivery Days	27	27
3 Number Customer Days	91,503	85,131
4 Division Office Salaries & Wages	$17,353	$17,163
Prorata Vacation & Benefit Costs	2,202*	1,776**
Total Division Personnel Cost	$19,555	$18,939
5 Average Day Office Personnel Cost per Customer Day	$.213709	$.222469

* At $.1269134 per Dollar of Salary & Wages — March
** At $.1034958 per Dollar of Salary & Wages — December

Source: *Rebuttal Exhibits K* (1-3), for data supplied by Bowman Co. upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for the March 1955 test and $.185 for the January 1956 test based on December 1955 data, as per Rebuttal Exhibit K-1. All data cover all 3 Bowman wholesale divisions: Elston, Forest, and South

[fol. 1162] TABLE 8C: BOWMAN WHOLESALE ADVOCATE

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

C. Bottle Expenses

Basis of Allocation to Customers: Glass Containers Delivered (Tables 16 A and 16 B)

Item	March 1955	December 1955
1. Total Number Glass Containers Delivered	642,083	1,242,401
2. Total Net Bottle Expenses and Allowances (+ is expense (—) net income)	+$16.643	—$778 *
3. Total Net Bottle Expense per Glass Container	$.0259203	—$.0006263

* This negative Bottle expense means that more Bottle Deposits and Loss were received than paid out

Source: *Rebuttal Exhibits K* (1-3), for data supplied by Bowman Co. upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for their March 1955 test and $.185 for their January 1956 test based on December 1955, as per Rebuttal Exhibit K-1. All data cover all 3 Bowman wholesale divisions: Elston, Forest and South.

[fol. 1163] TABLE 8D: BOWMAN WHOLESALE ADVOCATE

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

D. Milkroom Wages

(Incl. Vacation and Benefits)

Basis of Allocation to Customers: Number of Equivalent Cases Delivered (Tables 16 A and 16 B)

Item	March 1955	December 1955
1. Total Number Cases Delivered	150,019	184,824
2. Milkroom Wages	$30,810	$32,146
Pro rata Vacation and Benefits	3,910*	3,327**
Total Milkroom Cost	$34,720	$35,473
3. Milkroom Cost per Case	$.231437	$.192973

Source: *Rebuttal Exhibits K* (1-3), for data supplied by Bowman Company upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for the March 1955 test and $.185 for the January 1956 test based on December 1955 data, as per Rebuttal Exhibit K-1. All data cover all three Bowman wholesale divisions: Elston, Forest, and South.

* At $.1269134 per dollar of Salaries and Wages for March 1955

** At $.1034958 per dollar of Salaries and Wages for December 1955

TABLE 8 E. BOWMAN WHOLESALE ACCOUNTS

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

E. Driver's Commissions

Basis of Allocation to Customers: Volume as Measured by Number of Points Delivered

(Tables 16 A and 16 B)

Item	March 1955	December 1955
1 Total Number Points Delivered	7 222 640	8 258 700
2 Total Driver's Commission	$44 087	$47 286
3 Commission Cost per Point	$.006104	$.005725

Source: *Rebuttal Exhibits K (1-3)*, for data supplied by Bowman Company upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for the March 1955 test and $.185 for the January 1956 test, the latter being based on December 1955 data as per Rebuttal Exhibit K-1. All data cover all three Bowman wholesale divisions, Elston, Forest, and South.

[fol. 1165] TABLE 8-F: BOWMAN WHOLESALE ACCOUNTS

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

F. Driver's Service Wages
(Including Pro Rata Vacation & Benefits)

Basis of Allocation to Customers: Bowman Driver Service Time Study as of 1949 as modified by revised Customer Service Time Schedule and revised Schedules of Glass Containers and Number of Cases by Size of Store (Table 15)

Item	March 1955	December 1955
1. Total Driver Wages & Salaries	$101,529	$ 98,459
Vacation & Benefits	12,885 [1]	10,190 [2]
Total Driver Costs	$114,414	$108,649
2. Total Time from Plant to, on, and From Route (minutes) [3]	21,380 00	21,380 00
a. Driver Service Time [4]	16,689 89	16,689 89
b. Transportation Time [5]	4,690 11	4,690 11
3. No. Route Sample Days in Study	43	43
4. Allocation of Total Driver Cost For:		
a. Driver Service Time	$ 89,315	$ 84,815
b. Transportation Time	25,099	23,834
c. No. of Delivery Route Days [6]	4,900	4,675
5. Average Driver Cost per Minute of Service Time:		
a. Average No. of Driver Service Minutes per Route per Sample Day	388 14	388 14
b. Average Route Day Driver Service Cost	$ 18 1422	$ 18 1422
c. Average Driver Cost per Minute of Service Time	$ 046961	$ 046741

Source: *Rebuttal Exhibits K-(1-3)*, for data supplied by Bowman Co. upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for the March 1955 test and $.185 for the January 1956 test based on December 1955 data, as per Rebuttal Exhibit K-1. All data, except that from 1949 time study, cover all 3 Bowman wholesale divisions: Elston, Forest and South.

[1] At $.1269134 per dollar of Salaries and Wages for March 1955.

[2] At $.1034958 per dollar of Salaries and Wages for December 1955.

[3] Data are from 1949 Time Study of Elston Division Routes (*Table 9*).

[4] Includes Driver's office time, load and unload truck, route book keeping; but excludes personal, lunch and telephone time.

[5] Time Driver spends on: Get Vehicle (#3), Service Vehicle (4), Wait to Service Vehicle (5), Drive to Route (9), Drive on Route (10), Drive Return to Plant (30), Garage Vehicle (34), Drive to Next Van (32-II), Drive to Unload Return Goods (32-I), as defined in Appendix B of Bowman Pre-trial Order Exhibit 4.

[6] Rebuttal Exhibit K-2.

[fol. 1166]

TABLE 8–G

Bowman Wholesale Accounts

Determination of Daily Cost Rates for Allocation to Independent and Chain Stores for March and December 1955

G. Transportation Costs

Basis of Allocation to Customers: Volume as Measured by Point Values (Tables 16–A and 16–B)

Item	March 1955	December 1955
1. Vehicle Expenses	$37,184	$36,736
2. Route Driver Transport Time Cost [1]	25,099	23,834
3. Truck Driver's Wages	527	552
Truck Driver's Vacation and Benefits	67*	57**
4. Total Transport Cost	$62,877	$61,179
5. Volume Basis Allocation:		
a. Total number points delivered	7,222,640	8,258,790
b. Transport cost per point	$ 00870554	$ 00740774

Source: *Rebuttal Exhibits K (1–3)*, for data supplied by Bowman Company upon request. These data are those from which Bowman derived its estimates of average daily total delivery cost rates of $.182 for March 1955 test and $.185 for January 1956 test, the latter being based on December 1955 data as per Rebuttal Exhibit K–1. All data cover all three Bowman wholesale divisions: Elston, Forest, and South.

* At $.1269134 per dollar of salaries and wages for March 1955.

** At $.1034958 per dollar of salaries and wages for December 1955.

[1] Source: *Table 8–F*

[fol. 1167]

TABLE 9

Bowman Wholesale Customers:

Rebuttal Allocation of Driver Time Spent on Service and Transport Functions
(From 1949 Time Study of Elston Division Route)

Route Number	Sample Day	Total Time[1] (Each Lunch Hour)	Service Time[2]	Transportation Time		
				Total	Route Time[3]	At Plant[4]
				(Minutes per sample day)		
44	January 19	514.00	387.12	126.88	110.88	16.00
52	August 4	520.00	355.20	164.80	159.10	5.70
52	August 5	531.00	351.64	179.36	174.23	5.13
66	July 19	494.00	388.37	105.63	91.86	13.77
66	July 20	528.00	434.81	93.19	88.86	4.33
257	July 12	442.00	338.67	103.33	97.22	6.11
271	July 26	479.00	330.83	148.17	142.69	5.48
271	July 27	469.00	314.97	154.03	149.35	4.68
444	July 26	515.00	409.72	105.28	94.17	11.11
444	July 27	566.00	456.36	109.64	106.33	3.31
590	July 14	465.00	387.67	77.33	67.40	9.93
590	July 15	454.00	371.66	82.34	66.67	15.67
624	January 6	437.00	327.81	109.19	96.69	12.50
636	July 21	551.00	444.74	106.26	103.88	2.38
636	July 22	566.00	446.26	119.74	114.95	4.79
771	August 9	469.00	382.95	86.05	78.15	7.90
914	August 2	474.00	392.72	81.28	76.81	4.47
914	August 3	470.00	374.15	95.85	86.68	9.17
929	July 8	453.00	385.73	67.27	62.31	4.96
1015	July 5	462.00	372.37	89.63	83.92	5.71
1097	July 13	471.00	358.68	112.32	105.12	7.20
1148	July 28	446.00	343.59	102.41	99.51	2.90
1148	July 29	443.00	342.00	101.00	99.90	1.10
1177	July 28	527.00	434.36	92.64	86.01	6.63
1177	July 29	536.00	432.31	103.69	96.29	7.40
1475	July 8	466.00	379.96	86.04	76.94	9.10
1570	August 2	516.00	410.06	105.94	92.01	13.93
1890	September 11	489.00	396.02	92.98	91.74	1.24
1890	September 12	505.00	404.40	100.60	95.02	5.58
1891	July 14	497.00	407.00	90.00	83.03	6.97
1891	July 15	470.00	380.37	89.63	80.99	8.64
1899	January 10	505.00	374.53	130.47	124.07	6.40
1910	January 18	457.00	344.32	112.68	98.68	14.00
1949	January 20	471.00	342.66	128.34	125.64	2.70
2058	July 5	584.00	445.86	138.14	118.13	20.01
2058	July 6	565.00	412.02	152.98	138.86	14.12
2109	January 11	499.00	389.29	109.71	92.51	17.20
2120	July 19	511.00	421.62	89.38	87.59	1.79
2120	July 20	519.00	412.58	106.42	102.77	3.65
2149	January 12	502.00	380.61	121.39	115.99	5.40
2220	July 21	533.00	433.22	99.78	91.07	8.71
2220	July 22	537.00	437.85	99.15	87.75	11.40
2222	January 7	472.00	352.83	119.17	113.67	5.50
Totals		21,380.00	16,689.89	4,690.11	4,355.44	334.67
Percentage of Total (%)		100.00	78.0632	21.9369	20.3716	1.5653

[1] Total work day paid time only, less one hour lunch time allowance. Excludes 12 of the 55 route studies for which the total working time was unavailable.

[2] Driver time spent at and in customer's establishment performing work elements plus route bookkeeping time, loading and unloading fluid milk products at plant, checking load, day's reports, and other office time.

[3] Driver time spent driving from plant to and between customer stops and return, including parking time on route. See Appendix B, Bowman's Pre-Trial Order (Exhibit 4).

[4] Driver time spent at plant getting vehicle, making it ready (loading gas, oil, etc.) for trip driving to next van and for unloading and garaging it at close of day. See Appendix B of Bowman's Pre-Trial Order (Exhibit 4).

Source: Rebuttal Bulk Exhibit 2, as furnished by Bowman upon request.

[fol. 1168]

TABLE 10A

Bowman Wholesale Customers: Rebuttal Evidence of Customer Services Performance Time at Independent Stores on 33 Elston Division Routes Number of Such Stores Receiving and Not Receiving Customer Service Number of Units* Delivered to Stores on Sample Days in 1949 By Size Classes of Stores.

Size Class of Store (No. Daily Units Received)	All Stores		Stores Receiving Customer Services on Sample Day					Calculated Average No. Minutes per Unit	
						Averages			
	Total Number Stores	Total Units Delivered	Number Stores	Number of Units Delivered	Total Number Minutes	Units per Store	Minutes per Unit 1/100 Min.	Sample Stores Receiving Service[1] (1/100 Min.)	Adjusted to Level of All Store Averages[2]
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1-5	20	55	5	11	3.03	2.20	27.55	21.66	13.04
5-10	43	306	16	119	10.73	7.44	9.02	12.50	7.53
10-15	51	602	33	394	30.41	11.94	7.72	9.86	5.94
15-20	51	854	30	511	40.09	17.03	7.85	8.59	5.17
20-25	56	1240	36	802	50.05	22.28	6.24	7.78	4.69
25-30	38	1035	23	630	41.44	27.39	6.58	7.21	4.34
30-35	40	1290	25	808	40.67	32.32	5.03	6.78	4.08
35-40	40	1473	19	698	39.12	36.74	5.60	6.43	3.87
40-45	38	1597	26	1092	55.74	42.00	5.10	6.14	3.70
45-50	44	2079	32	1511	88.25	47.22	5.84	5.90	3.55
50-60	55	3006	36	1982	98.48	55.06	4.97	5.69	3.43
60-70	40	2568	25	1609	91.15	64.36	5.67	5.35	3.22
70-80	53	3956	31	2305	123.12	74.35	5.34	5.07	3.05
80-90	32	2735	22	1874	90.21	85.18	4.81	4.85	2.92
90-100	28	2651	19	1800	86.04	94.74	4.78	4.66	2.81
100-120	42	4566	31	3392	135.50	109.42	3.99	4.49	2.70
120-140	20	2578	16	2063	122.33	128.94	5.93	4.22	2.54
140-160	15	2205	11	1626	87.86	147.82	5.40	4.00	2.41
160-180	10	1698	7	1184	42.48	169.14	3.59	3.83	2.31

[TABLE 10-A—CONTINUED ON PAGE 478]

180–200	6	1125	6	1125	67.02	187.50	5.96	3.67	2.21
200–250	12	2634	12	2634	74.45	219.50	2.83	3.54	2.13
250 and over	3	899	2	642	15.05	321.00	2.34	3.28	1.98
300	—	—	—	—	—	—	—	3.09	1.86
400	—	—	—	—	—	—	—	2.80	1.69
500	—	—	—	—	—	—	—	2.59	1.56
600	—	—	—	—	—	—	—	2.44	1.47
Total	737	41,152	463	28,812	1433.22	—	—	—	—
Averages	22	55.84	—	—	—	62.23	4.97	5.48	3.30

Source: Bowman 1949 Time Study Work Sheets on each store in 33 Elston Division Routes collectively identified as Rebuttal Bulk Exhibit 3.

[1] Calculated from the significant logarithmic relationship to size of store as measured by number of daily units delivered. Representing calculated values corresponding to the lower limits of the size class.

[2] Adjusting ratio is the ratio of the calculated average minutes per unit (5.48) for the average store (55.8 units) to Bowman's 3.30 average rate for all stores including those not receiving customer service on the sample days. By this procedure the time curve of relationship is preserved but adjusted to reflect the average time savings to the company because not all stores will necessarily receive customer service on any given day for comparability with Bowman treatment of this Customer Service data.

[3] A unit is a single container.

[fol. 1169]

TABLE 10-B

Bowman Wholesale Customers: Rebuttal Evidence of Maximum Available Margins for Independent Stores Based on Rebuttal Customer Service Average Minutes Per Unit* Rates

Volume Schedule (No Daily Units Delivered)	Delivery Time All Services				Distribution Costs (Adjusted)			Maximum Available Margin [3]
	Total Under Bowman Formula [1]	Bowman Customer Service Time [1]	Correct Customer Service Time [2]	Total Time Adjusted	Delivery Costs (¢)		Unit Costs Plus 14¢ Platform Cost	(1-Col. 7 / 20.5)
					Total at 15¢/min.	Av. Unit Costs		
	(1)	(2)	(3)	(4)=(1)−(2)+(3)	(5)	(6)	(7)	%
10	12.232	.33	.59	12.492	187.38	18.738	32.738	—
20	12.939	.66	.94	13.219	198.29	9.915	23.915	—
30	13.908	.99	1.22	14.138	212.07	7.069	21.069	—
40	15.046	1.32	1.48	15.206	228.09	5.702	19.702	3.89
50	16.167	1.65	1.72	16.237	243.56	4.871	18.871	7.95
60	17.307	1.98	1.93	17.257	258.86	4.314	18.314	10.66
70	18.443	2.31	2.14	18.273	274.10	3.916	17.916	12.60
80	19.564	2.64	2.34	19.264	288.96	3.612	17.612	14.09
90	20.703	2.97	2.53	20.263	303.95	3.377	17.377	15.23
100	21.840	3.30	2.70	21.240	318.60	3.186	17.186	16.17
120	24.100	3.96	3.05	23.190	347.85	2.899	16.899	17.57
140	26.360	4.62	3.37	25.110	376.65	2.690	16.690	18.59
160	28.636	5.28	3.70	27.056	405.84	2.537	16.537	19.33
180	30.897	5.94	3.98	28.937	434.06	2.411	16.411	19.95
200	33.154	6.60	4.26	30.814	462.21	2.311	16.311	20.43
250	38.773	8.25	4.95	35.473	532.10	2.128	16.128	21.33
300	44.392	9.90	5.58	40.072	601.08	2.004	16.004	21.93
400	54.652	13.20	6.76	48.212	723.18	1.808	15.808	22.89
500	67.017	16.50	7.80	58.317	874.76	1.750	15.750	23.17
600	78.370	19.80	8.82	67.390	1010.85	1.685	15.685	23.49

[1] From Schedule 2, pages 1 and 2, and Schedule 2A, page 2, of Bowman Exhibit 4.
[2] Col. 9 times the corresponding lower limits of volumes class in *Table 10-A*.
[3] Based on Bowman's List Price per quart of 20.5¢.
* A unit is a single container.

5 under 10	42	14	4	24	100.0	55.3	10.6	34.0
10 under 15	47	26	5	16	100.0	55.3	10.6	34.0
15 under 20	41	22	5	14	100.0	53.7	12.2	34.1
20 under 25	55	33	5	17	100.0	60.0	9.1	30.9
25 under 30	33	21	1	11	100.0	63.6	3.0	33.3
30 under 35	38	25	—	13	100.0	65.8	—	34.2
35 under 40	39	19	1	19	100.0	48.7	2.6	48.7
40 under 45	37	24	2	11	100.0	64.9	5.4	29.7
45 under 50	42	29	2	11	100.0	69.0	4.8	26.2
50 under 60	53	33	4	16	100.0	62.3	7.5	30.2
60 under 70	37	23	1	13	100.0	62.2	2.7	35.1
70 under 80	46	26	5	15	100.0	56.5	10.9	32.6
80 under 90	31	21	—	10	100.0	67.7	—	32.3
90 under 100	29	18	3	8	100.0	62.1	10.3	27.6
100 under 120	36	27	3	6	100.0	75.0	8.3	16.7
120 under 140	21	15	2	4	100.0	71.4	9.5	19.0
140 under 160	14	11	—	3	100.0	78.6	—	21.4
160 under 180	9	6	—	3	100.0	66.7	—	33.3
180 under 200	6	6	—	—	100.0	100.0	—	—
200 under 300	14	13	1	—	100.0	92.9	7.1	—
300 under 400	1	1	—	—	100.0	100.0	—	—
Total	687	417	46	224	100.0	60.7	6.7	32.6

* A unit is a single container.

[fol. 1171]

TABLE 12-A

Bowman Wholesale Customers: Rebuttal Evidence—Independent Stores Average Per Cent of
in Glass Containers by Size of Store in September 1

(Based on 1-3 Sample of All Routes in Each Division: Elston, Fo

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Store Size	Average Daily Points Delivered				Number of Stores				All Containers		
(Daily Points Delivered)	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.
0 under 5	3 25	3 54	2 53	3 29	27	14	6	7	87 7	49 5	15 2
5 under 10	7 65	7 85	7 33	7 77	61	21	20	20	466 6	164 8	146 5
10 under 15	12 44	12 33	12 46	12 56	60	24	20	16	746 1	295 9	249 2
15 under 20	17 11	17 12	16 78	17 48	72	30	23	19	1,231 6	513 5	386 0
20 under 25	22 53	22 89	22 48	22 74	55	21	16	18	1,239 1	470 2	359 6
25 under 30	27 34	27 40	27 21	27 39	49	21	13	15	1,339 8	575 3	353 7
30 under 35	32 40	32 66	32 53	32 85	48	21	14	13	1,555 3	685 9	455 4
35 under 40	37 24	37 68	36 60	37 50	41	10	14	17	1,526 7	376 8	512 4
40 under 45	42 48	42 86	42 27	42 35	38	12	13	13	1,614 4	514 3	549 5
45 under 50	47 36	47 43	47 23	47 44	41	15	16	10	1,941 6	711 5	755 7
50 under 60	54 64	54 43	54 91	54 53	60	24	24	12	3,278 5	1,306 3	1,317 9
60 under 70	65 08	64 73	65 50	65 06	55	22	19	14	3,579 4	1,424 0	1,244 5
70 under 80	74 93	74 45	76 05	74 68	46	15	11	20	3,446 7	1,116 7	836 5
80 under 90	83 61	83 13	84 04	83 50	26	7	10	9	2,173 8	581 9	840 4
90 under 100	95 49	96 34	94 66	94 47	33	17	10	6	3,151 1	1,637 7	946 6
100 under 120	108 03	108 28	108 04	107 63	46	15	21	10	4,969 4	1,624 2	2,268 9
120 under 140	127 09	128 58	127 58	125 77	31	7	12	12	3,939 9	899 7	1,531 0
140 under 160	148 27	145 92	147 97	150 77	15	6	3	6	2,224 0	875 5	443 9
160 under 180	167 62	167 00	170 30	167 40	12	8	2	2	2,011 4	1,336 0	340 6
180 under 200	188 43	189 95	180 60	189 63	7	2	1	4	1,349 0	379 9	180 6
200 under 400	274 63	282 45	308 30	276 08	12	6	2	4	3,295 6	1,574 7	616 6
400 and over	536 38	424 80	—	647 95	4	2	0	2	2,145 5	849 6	—
Total & Average	56 36	56 14	53 15	60 11	839	320	270	249	47,283 2	17,963 9	11,350 7

[fol. 1172]

TABLE 12-B

Bowman Wholesale Customers: Rebuttal Evidence—Chain Stores Average Per Cent of To
in Glass Containers by Size of Store in September 1

(Based on 1/3 Sample of All Routes in Each Division: Elston, F

Store Size (Daily Points Delivered)	Average Daily Points Delivered				Number of Stores				All Containers		
	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.
0 under 80	—	—	—	—	—	—	—	—	—	—	—
80 under 90	—	—	—	—	—	—	—	—	—	—	—
90 under 100	93.5	—	—	93.5	1	—	—	1	93.5	—	—
100 under 120	117.7	—	—	117.7	1	—	—	1	117.7	—	—
120 under 140	—	—	—	—	—	—	—	—	—	—	—
140 under 160	—	—	—	—	—	—	—	—	—	—	—
160 under 180	175.6	—	—	175.6	1	—	—	1	175.6	—	—
180 under 200	191.7	186.1	—	197.2	2	1	—	1	383.3	186.1	—
200 under 250	220.6	229.9	—	201.9	3	2	—	1	661.7	459.8	—
250 under 300	273.4	278.5	264.7	277.5	9	2	3	4	2,460.8	556.9	794.1
300 under 350	322.4	316.9	328.0	—	4	2	2	—	1,289.6	633.7	655.9
350 under 400	360.2	352.4	360.7	365.9	8	3	1	4	2,881.5	1,057.1	360.7
400 under 450	429.1	426.1	—	433.7	5	3	—	2	2,145.7	1,278.3	—
450 under 500	459.5	—	—	459.5	1	—	—	1	459.5	—	—
500 under 600	539.9	542.6	559.0	529.0	8	2	2	4	4,319.2	1,085.2	1,117.9
600 under 700	656.9	623.7	—	676.9	8	3	—	5	5,255.4	1,871.1	—
700 under 800	733.2	729.6	753.8	721.8	7	2	2	3	5,132.2	1,459.2	1,507.5
800 under 900	832.6	—	841.1	828.3	3	—	1	2	2,497.7	—	841.1
900 under 1000	966.3	988.8	957.4	952.8	3	1	1	1	2,899.0	988.8	957.4
1000 and over	1,129.5	—	1,054.4	1,204.6	2	—	1	1	2,259.0	—	1,054.4
Totals	—	—	—	—	66	21	13	32	33,031.4/	9,576.2	7,289.0
Average	500.48	456.01	560.69	505.19	—	—	—	—	—	—	—

TABLE 12-B

holesale Customers: Rebuttal Evidence—Chain Stores Average Per Cent of Total Points in Fluid Milk Products Delivered in Glass Containers by Size of Store in September 1955

(Based on 1/3 Sample of All Routes in Each Division: Elston, Forest, and South)

Number of Stores			Number Points Delivered in:								Percentage Points Delivered in Glass Containers			
			All Containers				Glass Containers							
Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
—	—	1	93.5	—	—	93.5	35.8	—	—	35.8	38.29	—	—	38.29
—	—	1	117.7	—	—	117.7	46.0	—	—	46.0	39.08	—	—	39.08
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
—	—	1	175.6	—	—	175.6	70.9	—	—	70.9	40.38	—	—	40.38
1	—	1	383.3	186.1	—	197.2	46.7	25.0	—	21.7	12.18	13.43	—	11.00
2	—	1	661.7	459.8	—	201.9	63.0	32.5	—	30.5	9.52	7.07	—	15.11
2	3	4	2,460.8	556.9	794.1	1,109.8	539.4	111.4	151.6	276.4	21.92	20.00	19.09	24.91
2	2	—	1,289.6	633.7	655.9	—	87.0	42.4	44.6	—	6.75	6.69	6.80	—
3	1	4	2,881.5	1,057.1	360.7	1,463.7	424.3	67.5	11.6	345.2	14.72	6.39	3.22	23.58
3	—	2	2,145.7	1,278.3	—	867.4	440.4	230.1	—	210.3	20.52	18.00	—	24.24
—	—	1	459.5	—	—	459.5	130.0	—	—	130.0	28.29	—	—	28.29
2	2	4	4,319.2	1,085.2	1,117.9	2,116.1	658.2	140.5	183.4	334.3	15.24	12.95	16.41	15.80
3	—	5	5,255.4	1,871.1	—	3,384.3	1,004.0	343.0	—	661.0	19.10	18.33	—	19.53
2	2	3	5,132.2	1,459.2	1,507.5	2,165.5	852.4	234.6	148.7	469.1	16.61	16.08	9.86	21.66
—	1	2	2,497.7	—	841.1	1,656.6	628.8	—	231.0	397.8	25.18	—	27.46	24.01
1	1	1	2,899.0	988.8	957.4	952.8	519.1	224.1	71.3	223.7	17.91	22.66	7.45	23.48
—	1	1	2,259.0	—	1,054.4	1,204.6	494.9	—	144.4	350.5	21.91	—	13.69	29.10
21	13	32	33,031.4	9,576.2	7,289.0	16,166.2	6,040.9	1,451.1	986.6	3,603.2	—	—	—	—
—	—	—	—	—	—	—	—	—	—	—	18.29	15.15	13.54	22.29

TABLE 12-A

sale Customers: Rebuttal Evidence—Independent Stores Average Per Cent of Total Points of Fluid Milk Products Delivered in Glass Containers by Size of Store in September 1955

(Based on 1/3 Sample of All Routes in Each Division: Elston, Forest, and South)

Number of Stores			Number Points Delivered in:								Percentage Points Delivered in Glass Containers			
			All Containers				Glass Containers							
Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.	All Divisions	Elston Div.	Forest Div.	South Div.
14	6	7	87.7	49.5	15.2	23.0	27.5	14.5	5.6	7.4	31.36	29.29	36.84	32.17
21	20	20	466.6	164.8	146.5	155.3	73.9	36.2	21.1	16.6	15.84	21.97	14.40	10.69
24	20	16	746.1	295.9	249.2	201.0	53.3	24.5	8.7	20.1	7.14	8.28	3.49	10.00
30	23	19	1,231.6	513.5	386.0	332.1	189.2	75.2	58.8	55.2	15.36	14.64	15.23	16.62
21	16	18	1,239.1	470.2	359.6	409.3	157.4	59.3	62.5	35.6	12.70	12.61	17.38	8.70
21	13	15	1,339.8	575.3	353.7	410.8	223.4	82.0	51.8	89.6	16.67	14.25	14.65	21.81
21	14	13	1,555.3	685.9	455.4	414.0	337.2	120.8	105.3	111.1	21.68	17.61	23.12	26.84
10	14	17	1,526.7	376.8	512.4	637.5	218.6	40.5	108.0	70.1	14.32	10.75	21.08	11.00
12	13	13	1,614.4	514.3	549.5	550.6	274.8	79.0	127.6	68.2	17.02	15.36	23.22	12.39
15	16	10	1,941.6	711.5	755.7	474.4	376.4	155.3	154.3	66.8	19.39	21.83	20.42	14.08
24	24	12	3,278.5	1,306.3	1,317.9	654.3	810.7	323.5	318.3	168.9	24.73	24.76	24.15	25.81
22	19	14	3,579.4	1,424.0	1,244.5	910.9	975.3	405.4	371.0	198.9	27.25	28.47	29.81	21.84
15	11	20	3,446.7	1,116.7	836.5	1,493.5	713.9	257.3	251.1	205.5	20.71	23.04	30.02	13.76
7	10	9	2,173.8	581.9	840.4	751.5	610.9	180.7	235.0	195.2	28.10	31.05	27.96	25.97
17	10	6	3,151.1	1,637.7	946.6	566.8	735.8	399.8	178.5	157.5	23.35	24.41	18.86	27.79
15	21	10	4,969.4	1,624.2	2,268.9	1,076.3	1,412.2	437.1	669.1	306.0	28.42	26.91	29.49	28.43
7	12	12	3,939.9	899.7	1,531.0	1,509.2	1,173.1	335.7	474.8	362.6	29.77	37.31	31.01	24.03
6	3	6	2,224.0	875.5	443.9	904.6	538.8	176.7	104.2	257.9	24.23	20.18	23.47	28.51
8	2	2	2,011.4	1,336.0	340.6	334.8	560.7	416.6	21.3	122.8	27.88	31.18	6.25	36.68
2	1	4	1,319.0	379.9	180.6	758.5	396.8	130.6	26.3	239.9	30.08	34.38	14.56	31.63
6	2	4	3,295.6	1,574.7	616.6	1,104.3	967.9	437.5	154.9	375.5	29.37	27.78	25.12	34.00
2	0	2	2,145.5	849.6	—	1,295.9	911.4	401.5	—	509.9	42.48	47.26	—	39.35
320	270	249	47,283.2	17,963.9	14,350.7	14,968.6	11,739.2	4,589.7	3,508.2	3,641.3	24.83	24.82	24.45	24.33

TABLE 14

Bowman Wholesale Customers: Rebuttal Evidence for Independents and Chains Determination of Schedules of Total Number of: Containers, Cases and Glass Containers from Total Number of Points Delivered Daily by Size of Store

(Based on 1/3 Sample of Routes of Elston, Forest and South Divisions as of Sept. 1955)

	Independents					Chains				
		Glass Containers		Cases		Glass Containers			Cases	
Size of Store No. of Daily Points (V) (Col. 1)	Number of All Containers (N_i)[1] (Col. 2)	Ratio (F_{ig})[2] (Col. 3)	Number $N_{ig} = N_i (F_{ig})$ (Col. 4)	$(1+F_{ig})$[3] (Col. 5)	Number $C_i = N_i (1+F_{ig})$ 24 (Col. 6)	Number of All Containers (N_c)[4] (Col. 7)	Ratio (F_{cg})[5] (Col. 8)	Number $N_{cg} = N_c(F_{cg})$ (Col. 9)	$(1+F_{cg})$[6] (Col. 10)	Number $C_g = N_c (1+F_{cg})$ 24 (Col. 11)
5	4.33	.1400	.60620	1.1400	.20568	—	—	—	—	—
10	8.19	.0700	.57330	1.0700	.36514	—	—	—	—	—
15	11.88	.0450	.53460	1.0450	.51728	—	—	—	—	—
20	15.48	.0450	.69660	1.0450	.67403	—	—	—	—	—
25	19.00	.0600	1.14000	1.0600	.83917	—	—	—	—	—
30	22.47	.0650	1.46055	1.0650	.99711	—	—	—	—	—
40	29.27	.0800	2.34160	1.0800	1.31715	—	—	—	—	—
50	35.94	.0950	3.41430	1.0950	1.63976	—	—	—	—	—
60	42.49	.1050	4.46145	1.1050	1.95631	29.25	.150	4.38750	1.1500	1.40156
70	48.96	.1150	5.63040	1.1150	2.27460	35.39	.149	5.27311	1.1490	1.69430
80	55.35	.1200	6.64200	1.1200	2.58300	41.58	.148	6.15384	1.1480	1.98891
90	61.68	.1250	7.71000	1.1250	2.89125	47.81	.146	6.98026	1.1460	2.28293
100	67.95	.1300	8.83350	1.1300	3.19931	54.07	.143	7.73201	1.1430	2.57508
120	80.35	.1350	10.84725	1.1350	3.79989	60.37	.140	8.45180	1.1400	2.86758
140	92.58	.1400	12.96120	1.1400	4.39755	73.05	.135	9.86175	1.1350	3.45466
160	104.66	.1410	14.75706	1.1410	4.97571	85.82	.130	11.15660	1.1300	4.04069
180	116.63	.1420	16.56146	1.1420	5.54964	98.68	.120	11.84160	1.1200	4.60507
190	122.57	.1430	17.52751	1.1430	5.83740	111.61	.110	12.27710	1.1100	5.16196
200	128.49	.1440	18.50256	1.1440	6.12469	118.10	.105	12.40050	1.1050	5.43752
225	143.18	.1445	20.68951	1.1445	6.82790	124.61	.100	12.46100	1.1000	5.71129
250	157.74	.1450	22.87230	1.1450	7.52551	140.94	.085	11.97990	1.0850	6.37166
300	186.51	.1455	27.13721	1.1455	8.90197	157.35	.075	11.81025	1.0750	7.04797
315	195.07	.1460	28.48022	1.1460	9.31459	190.40	.065	12.37600	1.0650	8.44900
330	203.59	.1465	29.82594	1.1465	9.72566	200.37	.0635	12.72350	1.0635	8.87890
340	209.25	.1470	30.75975	1.1470	10.00041	210.35	.0620	13.04170	1.0620	9.30799
350	214.90	.1475	31.69775	1.1475	10.27491	217.62	.0610	13.23822	1.0610	9.59409
355	217.72	.1480	32.22256	1.1480	10.41427	223.70	.0600	13.42200	1.0600	9.88008
375	228.97	.1485	34.00205	1.1485	10.95717	227.04	.0600	13.62240	1.0600	10.02760
400	242.96	.1490	36.20104	1.1490	11.63171	240.43	.0610	14.66623	1.0610	10.62901
450	270.74	.1495	40.47563	1.1495	12.96732	257.22	.0620	15.94764	1.0620	11.58199
500	298.27	.1500	44.74050	1.1500	14.29210	290.93	.0650	18.91045	1.0650	12.91002
550	325.57	.1500	48.83550	1.1500	15.60023	324.81	.0700	22.73670	1.0700	14.48111
600	352.68	.1500	52.90200	1.1500	16.89925	358.85	.0750	26.91375	1.0750	16.07349
700	406.36	.1500	60.95400	1.1500	19.47142	393.02	.0800	31.44160	1.0800	17.68590
800	459.42	.1500	68.91300	1.1500	22.01388	461.76	.0850	39.24960	1.0850	20.87540
900	511.94	.1500	76.79100	1.1500	24.53046	530.94	.090	47.78460	1.0900	24.11353
1000	564.00	.1500	84.60000	1.1500	27.02500	600.53	.095	57.05035	1.0950	27.39918
1100	615.63	.1500	92.34450	1.1500	29.49894	670.46	.100	67.04600	1.1000	30.72942
1200	666.88	.1500	100.03200	1.1500	31.95467	740.72	.100	74.07200	1.1000	33.94967
						811.27	.100	81.12700	1.1000	37.18321

[1] From estimating equation of Chart III-A: $N_i = (.986364)\ V^{(.919080)}$.
[2] From estimating curve of *Chart IV* for each level of volume (V) for Independents.
[3] Where (F_{ig}) is the ratio of Glass Containers to All Containers for same volume for Independents.
[4] From estimating equation of *Chart III-B*: $N_c = (.4894)\ V^{(1.045569)}$.
[5] From estimating curve of *Chart IV* for each level of volume (V) for Chains.
[6] (F_{cg}) is ratio of Glass Containers to All Containers for same volume for Chains.

[fol. 1176]

TABLE 15

Bowman Wholesale Customers: Rebuttal Allocation—Driver Service Time and Cost Between Independents and Chains by Size of Store as of March 1955 and December 1955

(Based on Bowman 1949 Time Studies, and 1/3 Route Sample of Container Data—Sept. 1955)

Store Size	Independents		Chains		Driver Service Time Schedules (Daily Minutes per Customer of Stated Size)							Driver Daily Service Cost[11]			
						Work Elements for Independents[9] at:				Work Elements for Chains at:					
(Number Points Delivered Daily per Store	Number of Cases[1]	Number Glass Containers[1]	Number of Cases[2]	Number Glass Containers[4]	Work Elements at Constant Rate per Customer[5]	Per Case Rates[6]	Glass Container Rates[7]	Customer Service Rates[8]	Total Time[10]	Per Case Rates[6]	Glass Container Rates[7]	Total Time[10]	March 1955[12]		December 1955[12]	
													Independent	Chain	Independent	Chain
10	.36514	.57330	—	—	4.4400	2.0547	.0143	.5205	7.0295	—	—	—	.33011	—	.32857	—
20	.67403	.69660	—	—	4.4400	2.6509	.0174	.7917	7.9000	—	—	—	.37099	—	.36925	—
25	.83917	1.14000	—	—	4.4400	2.9696	.0285	.9062	8.3443	—	—	—	.39186	—	.39002	—
30	.99711	1.46055	—	—	4.4400	3.2744	.0365	1.0119	8.7628	—	—	—	.41151	—	.40958	—
40	1.31715	2.34160	—	—	4.4400	3.8921	.0585	1.2043	9.5949	—	—	—	.45059	—	.44848	—
50	1.63976	3.41430	1.40156	4.38750	4.4400	4.5147	.0854	1.3784	10.4185	4.0550	.1097	8.6047	.48926	.40409	.48697	.40219
60	1.95631	4.46145	1.69430	5.27311	4.4400	5.1257	.1115	1.5392	11.2164	4.6200	.1318	9.1918	.52673	.43166	.52427	.42963
70	2.27460	5.63040	1.98891	6.15384	4.4400	5.7400	.1408	1.6896	12.0104	5.1886	.1538	9.7824	.56402	.45939	.56138	.45724
80	2.58300	6.64200	2.28283	6.98026	4.4400	6.3352	.1664	1.8318	12.7731	5.7561	.1745	10.3706	.59984	.48701	.59703	.48473
90	2.89125	7.71000	2.57508	7.73201	4.4400	6.9301	.1928	1.9671	13.5300	6.3199	.1933	10.9532	.63538	.51437	.63241	.51196
100	3.19931	8.83350	2.86758	8.45180	4.4400	7.5247	.2208	2.0966	14.2821	6.8844	.2113	11.5357	.67070	.54173	.66756	.53919
120	3.79989	10.84725	3.45466	9.86175	4.4400	8.6838	.2712	2.3412	15.7362	8.0175	.2465	12.7040	.73899	.59659	.73553	.59380
140	4.39755	12.96120	4.04060	11.15660	4.4400	9.8373	.3240	2.5701	17.1714	9.1485	.2789	13.8674	.80639	.65123	.80261	.64818
160	4.97571	14.75706	4.60507	11.84160	4.4400	10.9531	.3689	2.7863	18.5483	10.2378	.2960	14.9738	.87105	.70318	.86697	.69989
180	5.54964	16.56146	5.16196	12.27710	4.4400	12.0008	.4140	2.9922	19.9070	11.3126	.3069	16.0595	.93485	.75417	.93047	.75064
190	5.83740	17.52751	5.43752	12.40050	4.4400	12.6162	.4382	3.0917	20.5861	11.8444	.3100	16.5944	.96674	.77929	.96221	.77564
200	6.12469	18.50256	5.71129	12.46100	4.4400	13.1707	.4626	3.1891	21.2624	12.3728	.3115	17.1243	.99850	.80417	.99383	.80041
225	6.82790	20.68051	6.37166	11.97990	4.4400	14.5278	.5172	3.4247	22.9097	13.6473	.2995	18.3868	1.07586	.86346	1.07082	.85942
250	7.52551	22.87230	7.04797	11.80125	4.4400	15.8742	.5718	3.6502	24.5362	14.9526	.2950	19.6876	1.15224	.92455	1.14685	.92022
300	8.90197	27.13721	8.44990	12.37600	4.4400	18.5308	.6784	4.0759	27.7251	17.6566	.3094	22.4060	1.30200	1.05221	1.29590	1.04728
315	9.31459	28.48022	8.87890	12.72350	4.4400	19.3272	.7120	4.1980	28.6772	18.4863	.3181	23.2444	1.34671	1.09158	1.34040	1.08647
330	9.72566	29.82594	9.30799	13.04170	4.4400	20.1205	.7456	4.3179	29.6240	19.3144	.3260	24.0804	1.39117	1.13084	1.38466	1.12554
340	10.00041	30.75975	9.59409	13.23822	4.4400	20.6508	.7690	4.3966	30.2564	19.8666	.3310	24.6376	1.42087	1.15701	1.41421	1.15159
350	10.27491	31.69775	9.88008	13.42200	4.4400	21.1806	.7924	4.4744	30.8874	20.4186	.3356	25.1942	1.45050	1.18314	1.44371	1.17760
355	10.41427	32.22256	10.02760	13.62240	4.4400	21.4495	.8056	4.5129	31.2080	20.7033	.3406	25.4839	1.46556	1.19675	1.45869	1.19114
375	10.95717	34.00205	10.62901	14.66623	4.4400	22.4973	.8501	4.6651	32.4525	21.8640	.3667	26.6707	1.52400	1.25248	1.51686	1.24662
400	11.63171	36.20104	11.38199	15.94764	4.4400	23.7992	.9050	4.8509	33.9951	23.3172	.3987	28.1559	1.59644	1.32223	1.58896	1.31603
450	12.96732	40.47563	12.91002	18.91045	4.4400	26.3769	1.0119	5.2092	37.0380	26.2663	.4728	31.1791	1.73934	1.46420	1.73119	1.45734
500	14.29210	44.74050	14.48111	22.73670	4.4400	28.9338	1.1185	5.5521	40.0444	29.2985	.5684	34.3069	1.88053	1.61109	1.87172	1.60354
550	15.60023	48.83550	16.07349	26.91375	4.4400	31.4584	1.2209	5.8817	43.0010	32.3718	.6728	37.4846	2.01937	1.76031	2.00991	1.75207
600	16.89925	52.90200	17.68500	31.44160	4.4400	33.9656	1.3226	6.1997	45.9279	35.4838	.7860	40.7098	2.15682	1.91177	2.14672	1.90282
700	19.47142	60.95400	20.87540	39.24960	4.4400	38.9298	1.5239	6.8058	51.6995	41.6395	.9812	47.0607	2.42786	2.21002	2.41649	2.19966
800	22.01388	68.91300	24.11353	47.78460	4.4400	43.8368	1.7228	7.3785	57.3781	47.8891	1.1946	53.5237	2.69453	2.51353	2.68191	2.50175
900	24.53046	76.79100	27.39918	57.05035	4.4400	48.6938	1.9198	7.9236	62.9772	54.2304	1.4263	60.0967	2.95747	2.82220	2.94362	2.80898
1000	27.02500	84.60000	30.72942	67.04600	4.4400	53.5083	2.1150	8.4452	68.5085	60.6578	1.6762	66.7740	3.21723	3.13577	3.20216	3.12108
1100	29.49894	92.34450	33.94967	74.07200	4.4400	58.2830	2.3086	8.9465	73.9781	66.8729	1.8518	73.1647	3.47409	3.43589	3.45781	3.41779
1200	31.95467	100.03200	37.18321	81.12700	4.4400	63.0225	2.5008	9.4302	79.3935	73.1136	2.0281	79.5818	3.72840	3.73724	3.71093	3.71973

[1] From Table 14, Col. 6.
[2] From Table 14, Col. 4.
[3] From Table 14, Col. 11.
[4] From Table 14, Col. 9.
[5] Combined minutes per customer for work elements: *Get Order* (1.37), *Delay to Get Order* (.11), *Make Out Delivery Slip* (2.14), *Check Slip* (.19), and *Route Bookkeeping* (.63); these are common equally to both classes of customers as per Appendix A, Exhibit 4 of Bowman's defensive pre-trial order.
[6] Combined minutes per Case (1.35+1.93 Min/Case) of Driver Work Elements: *Unload, Deliver to Store, Load Empties, Rearrange Load, Load and Unload Cases at Plant, Pick Up Empties,* and *Select Merchandise,* as per Appendix A, Exhibit 4 of Bowman's defensive pre-trial order.
[7] Driver work element: Sort Glass Bottles @ .025 Min/Bottle from Bowman time study 1949. (Bowman Exhibit 4.)
[8] Derived from formula based on 1949 Elston Division 33 route sample data from independent stores: $M_i = .1304\ N_i^{(1-.3161)}$; where M_i equals total number of customer service minutes for total number of containers (N_i) delivered to Independents, as applied to Column 2 of Table 14.
[9] Excludes Driver time spent on "Collection" and "Delay to Collect" from Independents for comparability with cost of billing and collection from Chains omitted by Bowman and which is unavailable.
[10] Vehicle Operating Time is omitted, the Driver Cost of which is allocated in the Transportation Function.
[11] Costs are respectively as of March 1955 and December 1955 and refer only to that portion of Driver's Wages (including Vacation and Benefit Costs) allocated to Service Function, but omitting that portion chargeable to Driver Collecting and Delay to Collect from Independents since the corresponding unavailable billing and collection costs to Chains also are omitted by Bowman.
[12] At $.046961 per minute for March 1955 and $.046741 per minute for December 1955 as calculated in *Table 8-F.*

[fol. 1177]

TABLE 16-A

Bowman Wholesale Customers: Summary of Rebuttal Delivery Cost Allocation Between Independents and Chains by Cost Elements and Size of Customers for Average Daily Costs in March 1955[1]
(Based on Bowman Time Studies of 1949 and Supplementary 1/3 Route Sample data of Sept. 1955)

Size of Store (Points Delivered Daily)	Miscellaneous Divisional Expenses[2]	Divisional Offices Personnel Wages and Salaries[3]	Bottle Expenses[4]		Milk Room Wages[5]		Drivers' Commissions[6]	Drivers' Service Costs[7]		Transportation Costs[8]	Total Daily Costs per Store		Daily Unit Costs per Store[9]	
			Independents	Chains	Independents	Chains		Independents	Chains		Independents	Chains	Independents	Chains
	$	$	$	$	$	$	$	$	$	$	$	$	$	$
10	.32989	.21371	.01486	—	.08451	—	.06104	.33011	—	.08706	1.12118	—	.112118	—
20	.32989	.21371	.01806	—	.15600	—	.12208	.37099	—	.17411	1.38484	—	.069242	—
30	.32989	.21371	.03786	—	.23077	—	.18312	.41151	—	.26117	1.66803	—	.055601	—
40	.32989	.21371	.06069	—	.30484	—	.24416	.45059	—	.34822	1.95210	—	.048803	—
50	.32989	.21371	.08850	.11373	.37950	.32437	.30520	.48926	.40409	.43528	2.24134	2.12627	.044827	.042525
60	.32989	.21371	.11564	.13668	.45276	.39212	.36624	.52673	.43166	.52233	2.52730	2.39263	.042122	.039877
70	.32989	.21371	.14594	.15951	.52643	.46031	.42728	.56402	.45939	.60939	2.81666	2.65948	.040238	.037993
80	.32989	.21371	.17216	.18093	.59780	.52835	.48832	.59984	.48701	.69644	3.09816	2.92465	.038727	.036558
90	.32989	.21371	.19985	.20042	.66914	.59597	.54936	.63538	.51437	.78350	3.38083	3.18722	.037565	.035414
100	.32989	.21371	.22897	.21907	.74044	.66366	.61040	.67070	.54173	.87055	3.66466	3.44901	.036647	.034490
120	.32989	.21371	.28116	.25562	.87944	.79954	.73248	.73899	.59659	1.04466	4.22033	3.97249	.035170	.033104
140	.32989	.21371	.33596	.28918	1.01776	.93517	.85456	.80639	.65123	1.21878	4.77705	4.49252	.034122	.032090
160	.32989	.21371	.38251	.30694	1.15156	1.06578	.97664	.87105	.70318	1.39289	5.31825	4.98903	.033239	.031181
180	.32989	.21371	.42928	.31823	1.28439	1.19467	1.09872	.93485	.75417	1.56700	5.85784	5.47639	.032544	.030424
200	.32989	.21371	.47959	.32299	1.41748	1.32180	1.22080	.99850	.80417	1.74110	6.40109	5.95446	.032005	.029772
225	.32989	.21371	.53628	.31052	1.58023	1.47464	1.37340	1.07586	.86346	1.95875	7.06812	6.52437	.031414	.028997
250	.32989	.21371	.59286	.30589	1.74168	1.63116	1.52600	1.15224	.92455	2.17639	7.73277	7.10759	.030931	.028430
300	.32989	.21371	.70340	.32079	2.06025	1.95541	1.83120	1.30200	1.05221	2.61166	9.05211	8.31487	.030174	.027716
350	.32989	.21371	.82162	.34790	2.37799	2.28662	2.13640	1.45050	1.18314	3.04694	10.37705	9.54460	.029649	.027270
400	.32989	.21371	.93834	.41337	2.69201	2.63421	2.44160	1.59644	1.32223	3.48222	11.69421	10.83723	.029236	.027093
500	.32989	.21371	1.15969	.58934	3.30772	3.35146	3.05200	1.88053	1.61100	4.35277	14.29631	13.50017	.028593	.027000
600	.32989	.21371	1.37124	.81498	3.91111	4.09317	3.66240	2.15682	1.91177	5.22332	16.86849	16.24924	.028114	.027082
700	.32989	.21371	1.57995	1.01736	4.50641	4.83134	4.27280	2.42786	2.21002	6.09388	19.42450	18.96900	.027749	.027099
800	.32989	.21371	1.78625	1.23859	5.09483	5.58076	4.88320	2.69453	2.51353	6.96443	21.96684	21.72411	.027459	.027155
900	.32989	.21371	1.99045	1.47876	5.67726	6.34118	5.49360	2.95747	2.82220	7.83499	24.49237	24.51433	.027219	.027238
1000	.32989	.21371	2.19286	1.73785	6.25458	7.11192	6.10400	3.21723	3.13577	8.70554	27.01781	27.33868	.027018	.027339
1100	.32989	.21371	2.39360	1.91997	6.82715	7.85721	6.71440	3.47409	3.43589	9.57609	29.52893	30.04716	.026844	.027316
1200	.32989	.21371	2.59286	2.10284	7.39549	8.60557	7.32480	3.72840	3.73724	10.44665	32.03180	32.76070	.026693	.027301

[1] Omit Solicitors Wages for comparable omission of cost of solicitations and maintaining Chain Store accounts by Bowman.
[2] From Bowman Cost Schedule in Rebuttal Exhibit K-3 for March 1955 @ $.32989 per customer per day, as calculated on *Table 8-A*.
[3] From Bowman Cost Schedule in Rebuttal Exhibit K-3 for March 1955 @ $.213709 per customer per day, as calculated on *Table 8-B* for lack of a more appropriate time study. Includes prorated Vacation Benefits costs.
[4] Derived from cost rate in *Table 8-C* applied to the respective Number of Glass Containers in *Table 14*.
[5] Derived from cost rate in *Table 8-D* applied to the respective Number of Cases in *Table 14*.
[6] Derived from cost rate in *Table 8-E* applied to the Number of Points in Col. 1.
[7] From *Table 15*.
[8] Derived from cost rate in *Table 8-G* applied to the Number of Points in Col. 1.
[9] Average cost per point delivered daily.

[fol. 1178]

Table 16-B

Bowman Wholesale Customers: Summary of Rebuttal Delivery Cost Allocation Between Independents and Chains by Cost Elements and Size of Customers for Average Daily Costs in December 1955[1]

(Based on Bowman Time Studies of 1949 and Supplementary 1/3 Route Sample data of Sept. 1955)

Size of Store (Points Delivered Daily)	Miscellaneous Divisional Expenses[2]	Divisional Offices Personnel Wages and Salaries[3]	Bottle Expense[4]		Milk Room Wages[5]		Driver's Commissions[6]	Driver's Service Costs[7]		Transportation Costs[8]	Total Daily Costs per Store		Daily Unit Costs per Store[9]	
			Independents	Chains	Independents	Chains		Independents	Chains		Independents	Chains	Independents	Chains
	$	$	$	$	$	$	$	$	$	$	$	$	$	$
25	.30522	.22247	−.00071	—	.16194	—	.14313	.39002	—	.18519	1.40726	—	.056290	—
30	.30522	.22247	−.00091	—	.19242	—	.17175	.40958	—	.22223	1.52276	—	.050759	—
40	.30522	.22247	−.00147	—	.25417	—	.22900	.44848	—	.29631	1.75418	—	.043855	—
50	.30522	.22247	−.00214	−.00275	.31643	.27046	.28625	.48697	.40219	.37039	1.98559	1.85423	.039712	.037085
60	.30522	.22247	−.00279	−.00330	.37752	.32695	.34350	.52427	.42963	.44446	2.21465	2.06893	.036911	.034482
70	.30522	.22247	−.00352	−.00385	.43894	.38381	.40075	.56138	.45724	.51854	2.44378	2.28418	.034911	.032631
80	.30522	.22247	−.00416	−.00437	.49845	.44054	.45800	.59703	.48473	.59262	2.66963	2.49921	.033370	.031240
90	.30522	.22247	−.00483	−.00484	.55793	.49692	.51525	.63241	.51196	.66670	2.89515	2.71368	.032168	.030152
100	.30522	.22247	−.00553	−.00529	.61738	.55337	.57250	.66756	.53919	.74077	3.12037	2.92823	.031204	.029282
120	.30522	.22247	−.00679	−.00617	.73328	.66666	.68700	.73553	.59380	.88893	3.56564	3.35791	.029714	.027983
140	.30522	.22247	−.00811	−.00698	.84861	.77974	.80150	.80261	.64818	1.03708	4.00938	3.78721	.028638	.027052
160	.30522	.22247	−.00924	−.00741	.96018	.88865	.91600	.86697	.69989	1.18524	4.44684	4.21006	.027793	.026313
180	.30522	.22247	−.01037	−.00769	1.07093	.99612	1.03050	.93047	.75064	1.33339	4.88261	4.63065	.027126	.025726
190	.30522	.22247	−.01097	−.00776	1.12646	1.04929	1.08775	.96221	.77564	1.40747	5.10061	4.84008	.026845	.025474
200	.30522	.22247	−.01158	−.00780	1.18190	1.10212	1.14500	.99383	.80041	1.48155	5.31839	5.04897	.026592	.025245
225	.30522	.22247	−.01295	−.00750	1.31760	1.22956	1.28813	1.07082	.85942	1.66674	5.85803	5.56404	.026036	.024729
250	.30522	.22247	−.01432	−.00739	1.45222	1.36007	1.43125	1.14685	.92022	1.85194	6.39563	6.08378	.025583	.024335
300	.30522	.22247	−.01699	−.00775	1.71784	1.63043	1.71750	1.29590	1.04728	2.22232	7.46426	7.13747	.024881	.023792
315	.30522	.22247	−.01783	−.00796	1.79746	1.71339	1.80338	1.34040	1.08647	2.33344	7.78454	7.45641	.024713	.023671
330	.30522	.22247	−.01867	−.00816	1.87679	1.79619	1.88925	1.38466	1.12554	2.44455	8.10427	7.77506	.024558	.023561
340	.30522	.22247	−.01926	−.00829	1.92981	1.85140	1.94650	1.41421	1.15159	2.51863	8.31758	7.98752	.024463	.023493
350	.30522	.22247	−.01984	−.00840	1.98278	1.90659	2.00375	1.44371	1.17760	2.59271	8.53080	8.19994	.024374	.023428
355	.30522	.22247	−.02017	−.00853	2.00967	1.93506	2.03238	1.45869	1.19114	2.62975	8.63801	8.30749	.024332	.023401
375	.30522	.22247	−.02129	−.00918	2.11444	2.05111	2.14688	1.51686	1.24662	2.77790	9.06248	8.74102	.024167	.023309
400	.30522	.22247	−.02266	−.00998	2.24461	2.19642	2.29000	1.58896	1.31603	2.96310	9.59170	9.28326	.023979	.023208
450	.30522	.22247	−.02534	−.01184	2.50234	2.49129	2.57625	1.72119	1.45734	3.33348	10.64561	10.37421	.023657	.023054
500	.30522	.22247	−.02801	−.01423	2.75799	2.79446	2.86250	1.87172	1.60354	3.70387	11.69576	11.47783	.023392	.022956
550	.30522	.22247	−.03057	−.01685	3.01042	3.10175	3.14875	2.00991	1.75207	4.07426	12.74046	12.58767	.023164	.022887
600	.30522	.22247	−.03312	−.01968	3.26110	3.41290	3.43500	2.14672	1.90282	4.44464	13.78203	13.70337	.022970	.022839
700	.30522	.22247	−.03816	−.02457	3.75746	4.02839	4.00750	2.41649	2.19966	5.18542	15.85640	15.92409	.022652	.022749
800	.30522	.22247	−.04314	−.02991	4.24808	4.65326	4.58000	2.68191	2.50175	5.92619	17.92073	18.15898	.022401	.022699
900	.30522	.22247	−.04807	−.03571	4.73372	5.28730	5.15250	2.94362	2.80898	6.66697	19.97643	20.40773	.022196	.022675
1000	.30522	.22247	−.05296	−.04197	5.21510	5.92995	5.72500	3.20216	3.12108	7.40774	22.02473	22.66949	.022025	.022669
1100	.30522	.22247	−.05781	−.04637	5.69250	6.55137	6.29750	3.45781	3.41979	8.14851	24.06620	24.89849	.021878	.022635
1200	.30522	.22247	−.06262	−.05079	6.16639	7.17536	6.87000	3.71093	3.71973	8.88929	26.10168	27.13128	.021751	.022609

[1] Omits Solicitors Wages for comparable omission of cost of solicitation and maintenance of Chain Store accounts by Bowman. Cost data for use with January 1956 discount schedules.

[2] From Bowman Cost Schedule in Rebuttal Exhibit K-3 for December 1955 @ $.30522 per customer per day, as calculated on *Table 8-A*.

[3] From Bowman Cost Schedule in Rebuttal Exhibit K-3 for December 1955 @ $.222469 per customer per day rate, as calculated on *Table 8-B*, for lack of a more appropriate time study allocation. Includes prorated Vacation Benefit Costs.

[4] Derived from cost rate in *Table 8-C* applied to the Number of Glass Containers in *Table 15*; negative bottle expenses reflect more deposits received then bottle expenses incurred.

[5] Derived from cost rate in *Table 8-D* applied to the Number of Cases in *Table 15*.

[6] Derived from cost rate per point in *Table 8-E* applied to the number of daily points delivered indicating size of store.

[7] As calculated on *Table 15*.

[8] As calculated on *Table 8-G* by applying the indicated cost rate per point ($.00740774) to the number of average daily points delivered indicating the size of store.

[9] Average cost per point delivered daily.

[fol. 1173]

TABLE 13-A

Bowman Wholesale Customers: Rebuttal Evidence—Independent Stores
Average Number of Glass Containers, and Per Cent of Total Containers Delivered Daily by Size of Store in September 1955

(Based on 1/3 Sample of all Routes in Each Division: Elston, Forest and South)

Store Size (Daily Average Points Delivered)	Average per Store[1]		Number of Containers Delivered Daily								Percentage of Glass Containers Delivered Daily			
			Fiber and Glass Total				Glass Only							
	Points Delivered	All Containers	All Divisions	Elston Division	Forest Division	South Division	All Divisions	Elston Division	Forest Division	South Division	All Divisions	Elston Division	Forest Division	South Division
0 under 5	3.25	2.548	68.8	39.3	10.3	19.2	12.7	8.4	2.2	2.1	18.46	21.37	21.36	10.94
5 under 10	7.65	6.449	393.4	126.4	125.1	141.9	32.5	13.4	11.9	7.2	8.26	10.60	9.51	5.07
10 under 15	12.44	10.665	639.9	256.0	210.3	173.6	26.7	12.6	3.6	10.5	4.17	4.92	1.71	6.05
15 under 20	17.11	13.522	973.6	426.9	299.2	247.5	64.6	27.7	20.9	16.0	6.64	6.49	6.99	6.46
20 under 25	22.53	17.631	969.7	354.5	307.3	307.9	48.4	17.3	21.1	10.0	4.99	4.88	6.87	3.25
25 under 30	27.34	20.745	1,016.5	450.8	271.0	294.7	72.3	25.6	16.6	30.1	7.11	5.68	6.13	10.21
30 under 35	32.40	23.877	1,146.1	517.7	345.0	283.4	112.7	40.4	37.2	35.1	9.83	7.80	10.78	12.39
35 under 40	37.24	28.634	1,174.0	295.1	378.5	500.4	73.4	13.3	35.5	24.6	6.25	4.51	9.38	4.92
40 under 45	42.48	32.961	1,252.5	389.7	435.2	427.6	95.7	25.5	47.4	22.8	7.64	6.54	10.89	5.33
45 under 50	47.36	34.398	1,410.3	514.5	574.1	321.7	135.0	52.9	54.8	27.3	9.57	10.28	9.55	8.49
50 under 60	54.64	38.647	2,318.8	896.8	978.4	443.6	270.8	111.2	106.0	53.6	11.68	12.40	10.83	12.08
60 under 70	65.08	44.289	2,435.9	975.3	829.2	631.4	311.9	129.7	120.3	61.9	12.80	13.30	14.51	9.80
70 under 80	74.93	54.548	2,509.2	800.4	592.5	1,116.3	238.8	73.6	95.8	69.4	9.52	9.20	16.17	6.22
80 under 90	83.61	57.527	1,495.7	388.6	598.9	508.2	192.5	56.3	80.2	56.0	12.87	14.49	13.39	11.02
90 under 100	95.49	67.418	2,224.8	1,148.9	691.8	384.1	243.4	128.1	58.6	56.7	10.94	11.15	8.47	14.76
100 under 120	108.03	72.359	3,328.5	1,076.8	1,552.6	699.1	435.9	138.4	212.8	84.7	13.10	12.85	13.71	12.12
120 under 140	127.09	84.432	2,617.4	544.4	1,055.5	1,017.5	366.2	99.7	158.3	108.2	13.99	18.31	15.00	10.63
140 under 160	148.27	99.853	1,497.8	634.4	268.1	595.3	164.7	54.4	32.2	78.1	11.00	8.58	12.01	13.12
160 under 180	167.62	108.167	1,298.0	837.7	259.9	200.4	160.5	118.6	6.3	35.6	12.37	14.16	2.42	17.76
180 under 200	188.43	119.143	834.0	230.1	119.2	484.7	114.7	37.9	7.1	69.7	13.75	16.47	5.96	14.38
200 under 400	274.63	173.483	2,081.8	1,064.8	355.3	661.7	273.5	132.9	39.0	101.6	13.14	12.48	10.98	15.35
400 and over	536.38	287.825	1,151.3	455.0	—	696.3	234.2	106.4	—	127.8	20.34	23.38	—	18.35
Total	—	—	32,838.0	12,424.1	10,257.4	10,156.5	3,681.1	1,424.3	1,167.8	1,089.0	11.21	11.46	11.38	10.72

[1] All Divisions.

[fol. 1174]

TABLE 13-B

Bowman Wholesale Customers: Rebuttal Evidence—Chain Stores
Average Number of Glass Containers, and Per Cent of Total Containers Delivered Daily by Size of Store in September 1955

(Based on ⅓ Sample of all Routes in Each Division—Elston, Forest and South)

Store Size (Daily Points Delivered)	Average per Store[1]		Number of Containers Delivered Daily								Percentage of Glass Containers Delivered Daily			
			Fiber and Glass				Glass Only							
	Points Delivered	All Containers	All Divisions	Elston Division	Forest Division	South Division	All Divisions	Elston Division	Forest Division	South Division	All Divisions	Elston Division	Forest Division	South Division
0 under 90	—	—	—	—	—	—	—	—	—	—	—	—	—	—
90 under 100	93 5	50 80	50 8	—	—	50 8	8 9	—	—	8 9	17 52	—	—	17 52
100 under 120	117 7	64 90	64 9	—	—	64 9	11 5	—	—	11 5	17 72	—	—	17 72
120 under 140	—	—	—	—	—	—	—	—	—	—	—	—	—	—
140 under 160	—	—	—	—	—	—	—	—	—	—	—	—	—	—
160 under 180	175 6	101 80	101 8	—	—	101 8	19 2	—	—	19 2	18 86	—	—	18 86
180 under 200	191 7	137 45	274 9	135 5	—	139 4	15 0	9 6	—	5 4	5 46	7 08	—	3 87
200 under 250	220 6	157 47	472 4	336 6	—	135 8	19 3	11 1	—	8 2	4 09	3 30	—	6 04
250 under 300	273 4	171 68	1 545 1	374 2	498 6	672 3	145 9	30 3	39 4	74 2	9 31	8 10	7 90	11 04
300 under 350	322 4	225 83	903 3	443 8	459 5	—	28 2	12 3	15 9	—	3 12	2 77	3 46	—
350 under 400	360 2	247 13	1 977 0	768 1	274 6	934 3	119 0	22 9	6 4	89 7	6 02	2 98	2 33	9 60
400 under 450	429 1	277 36	1 386 8	862 3	—	524 5	119 1	63 3	—	55 8	8 59	7 34	—	10 64
450 under 500	459 5	274 90	274 9	—	—	274 9	33 2	—	—	33 2	12 08	—	—	12 08
500 under 600	539 9	366 06	2 928 5	771 7	735 9	1 420 9	188 6	42 0	49 0	97 6	6 44	5 44	6 66	6 87
600 under 700	656 9	431 15	3 449 2	1 209 7	—	2 293 5	271 0	91 1	—	179 9	7 86	7 53	—	8 03
700 under 800	733 2	496 63	3 476 4	993 8	1 073 5	1 409 1	249 4	65 7	48 1	135 6	7 17	6 61	4 48	9 62
800 under 900	832 6	497 87	1 493 6	—	485 2	1 008 4	459 7	—	57 7	102 0	10 69	—	11 89	10 12
900 under 1,000	966 3	667 80	2 003 4	641 8	751 9	609 7	159 5	63 5	33 6	62 4	7 96	9 89	4 47	10 23
1,000 and over	1 129 5	705 25	1 410 5	—	687 1	723 4	129 8	—	37 7	92 1	9 20	—	5 49	12 73
Total[2]	—	—	21 813 5	6 537 5	4 966 3	10 309 7	1 675 3	411 8	287 8	975 7	7 68	6 17	5 80	9 46

[1] All Divisions.

[fol. 1179]

TABLE 17-A

Bowman Wholesale Customers: Summary of Rebuttal and Bowman Unit Delivery Cost and Discount Differences Between Independent and Chain Customers By Size of Store for March 1955

Size of Store (Points Delivered Daily)	Rebuttal Unit Costs[1]			Discount Differences	Bowman Unit Costs[4]		
	Independents	Chains	Relative Difference[2]	(Chain Less Independent)[3]	Relative Difference[2]	Chains[4]	Independents[4]
	¢	¢	%	¢	%	¢	¢
10	11 2118	–	–	–	–	–	23 04
20	6 9242	–	–	–	–	–	12 62
30	5 5601	–	–	–	–	–	9 26
40	4 8803	–	–	–	–	–	7 70
50	4 4827	4 2525	1 123	6 00	5 27	5 59	6 67
60	4 2122	3 9877	1 095	5 80	4 88	5 06	6 07
70	4 0238	3 7993	1 095	5 60	4 59	4 62	5 56
80	3 8727	3 6558	1 058	5 40	4 39	4 34	5 24
90	3 7565	3 5414	1 049	5 20	4 24	4 08	4 95
100	3 6647	3 4490	1 052	5 00	4 10	3 91	4 75
120	3 5170	3 3104	1 008	4 60	3 90	3 62	4 42
140	3 4122	3 2090	991	4 20	3 76	3 42	4 19
160	3 3239	3 1181	1 004	3 80	3 66	3 27	4 02
180	3 2544	3 0424	1 034	3 40	3 56*	3 15	3 88
200	3 2005	2 9772	1 089	3 00	3 51*	3 05	3 77
225	3 1414	2 8967	1 179	3 00	3 46*	2 96	3 67
250	3 0931	2 8430	1 220	3 00	3 37*	2 87	3 56
300	3 0174	2 7716	1 199	3 00	3 32*	2 76	3 44
350	2 9649	2 7270	1 160	3 00	3 27*	2 67	3 34
400	2 9236	2 7093	1 045	3 00	3 22*	2 62	3 28
500	2 8593	2 7000	777	3 00	3 17*	2 53	3 18
600	2 8114	2 7082	503	3 00	3 12*	2 47	3 11
700	2 7749	2 7099	317	3 00	3 07*	2 43	3 06

[TABLE 17-A—CONTINUED ON PAGE 490]

800	2 7459	2 7155	148	3 00	3 07*	2 46	3 05
900	2 7219	2 7238	− 009	3 00	3 07*	2 37	3 00
1000	2 7018	2 7339	− 157	3 00	3 07*	2 35	2 98
1100	2 6844	2 7316	− 230	3 00	3 02*	2 34	2 96
1200	2 6693	2 7301	− 297	3 00	3 02*	2 33	2 95

[1] From Table 16-A. Excludes the Constant Platform Unit Costs as irrelevant to the cost difference.
[2] Ratio (%) of Cost Difference (Independents Less Chains) to list Price of *20.5¢ per quart*. Where Chain Unit Costs exceed those of Independents, they are indicated by the minus (−) sign.
[3] Difference between Discount Schedules in effect March 1955, as stated in "Discount Schedule Tests-March 1955" and the Chain Discount of 11% then in effect.
[4] From Bowman "Discount Schedule Tests-March 1955", Schedule 5, computed at $.182 of total delivery cost per route minute
[5] From Bowman "Discount Schedule Tests-March 1955," Schedule 4, computed at $.182 of total delivery cost per route minute
[6] Platfrom Constant Unit Costs are omitted as irrelevant to the Cost Difference between Chain and Independent stores.
* Relative Cost Difference equal to or greater than corresponding Discount Difference (cost justified).

[fol. 1180]

TABLE 17-B

Bowman Wholesale Customers: Summary of Rebuttal and Bowman Unit Delivery Cost and Discount Differences Between Independent and Chain Customers By Size of Store as of January 1956

Size of Store (Points Delivered Daily)	Rebuttal Unit Costs[1]			Discount Differences	Bowman Unit Costs[4]		
	Independents	Chains	Relative Difference[2]	(Chain Less Independent)[3]	Relative Difference[2]	Chains[4]	Independents[4]
	¢	¢	¢	¢	¢	¢	¢
25	5 6290	–	–	8 00	9 90*	8 89	10 87
30	5 0758	–	–	7 92	7 95*	7 83	9 42
40	4 3855	–	–	7 77	7 35	6 36	7 83
50	3 9712	3 7085	1 314	7 62	7 00	5 38	6 78
60	3 6911	3 4482	1 215	7 46	6 80	4 81	6 17
70	3 4911	3 2631	1 140	7 31	6 20	4 41	5 65
80	3 3370	3 1240	1 065	6 15	5 80	4 11	5 27
90	3 2168	3 0152	1 008	7 00	5 80	3 87	5 03
100	3 1204	2 9282	961	6 90	5 50	3 68	4 78
120	2 9614	2 7983	866	6 70	5 30	3 40	4 46
140	2 8038	2 7052	793	6 50	5 30	3 16	4 22
160	2 7203	2 6313	740	6 30	5 20	3 01	4 05
180	2 7126	2 5726	700	6 10	5 10	2 90	3 92
190	2 6745	2 5474	686	6 00	4 95	2 85	3 84
200	2 6592	2 5245	674	5 91	5 05	2 80	3 81
225	2 6036	2 4729	654	5 68	4 90	2 70	3 68
250	2 5583	2 4335	624	5 45	4 90	2 62	3 60
300	2 4881	2 3792	545	5 00	4 75	2 51	3 46
315	2 4713	2 3671	521	4 86	4 75	2 48	3 43
330	2 4558	2 3561	499	4 73	4 75*	2 45	3 40
340	2 4463	2 3493	485	4 64	4 80*	2 43	3 39
350	2 4374	2 3428	473	4 55	4 75*	2 42	3 37
355	2 4332	2 3401	466	4 50	4 70*	2 42	3 36

[TABLE 17-B—CONTINUED ON PAGE 492]

375	2 4167	2 3309	429	4 50	4 80*	2 38	3 34
400	2 3979	2 3308	386	4 50	4 65*	2 37	3 30
450	2 3657	2 3054	302	4 50	4 70*	2 31	3 25
500	2 3392	2 2956	218	4 50	4 60*	2 28	3 20
550	2 3164	2 2887	139	4 50	4 60*	2 24	3 16
600	2 2970	2 2839	066	4 50	4 60*	2 21	3 13
700	2 2652	2 2749	− 049	4 50	4 55*	2 17	3 08
800	2 2401	2 2699	− 149	4 50	4 55*	2 14	3 05
900	2 2196	2 2675	− 240	4 50	4 50*	2 12	3 02
1000	2 2025	2 2669	− 322	4 50	4 50*	2 10	3 00
1100	2 1878	2 2635	− 379	4 50	4 50*	2 08	2 98
1200	2 1751	2 2609	− 429	4 50	4 50*	2 07	2 97

[1] From Table 16-B. Excludes the Constant Platfrom Unit Costs as irrelevant to the cost difference.

[2] Ratio (%) of Cost Difference (Independents less Chains) to List Price of *20¢ per quart*. Where Chain Unit Costs exceed those of Independents they are indicated by the minus (−) sign.

[3] Difference between discount schedules in effect in January 1956, as stated in Bowman's "Testing Discount Schedules of January 2, 1956," and the Chains' discount of 10% then in effect.

[4] From Bowman's "Testing Discount Schedules of January 2, 1956," *Schedule 3-B*, computed at $.185 total delivery cost per minute.

[5] From Bowman's "Testing Discount Schedules of January 2, 1956," *Schedule 3-A*, computed at $.185 total delivery cost per route minute.

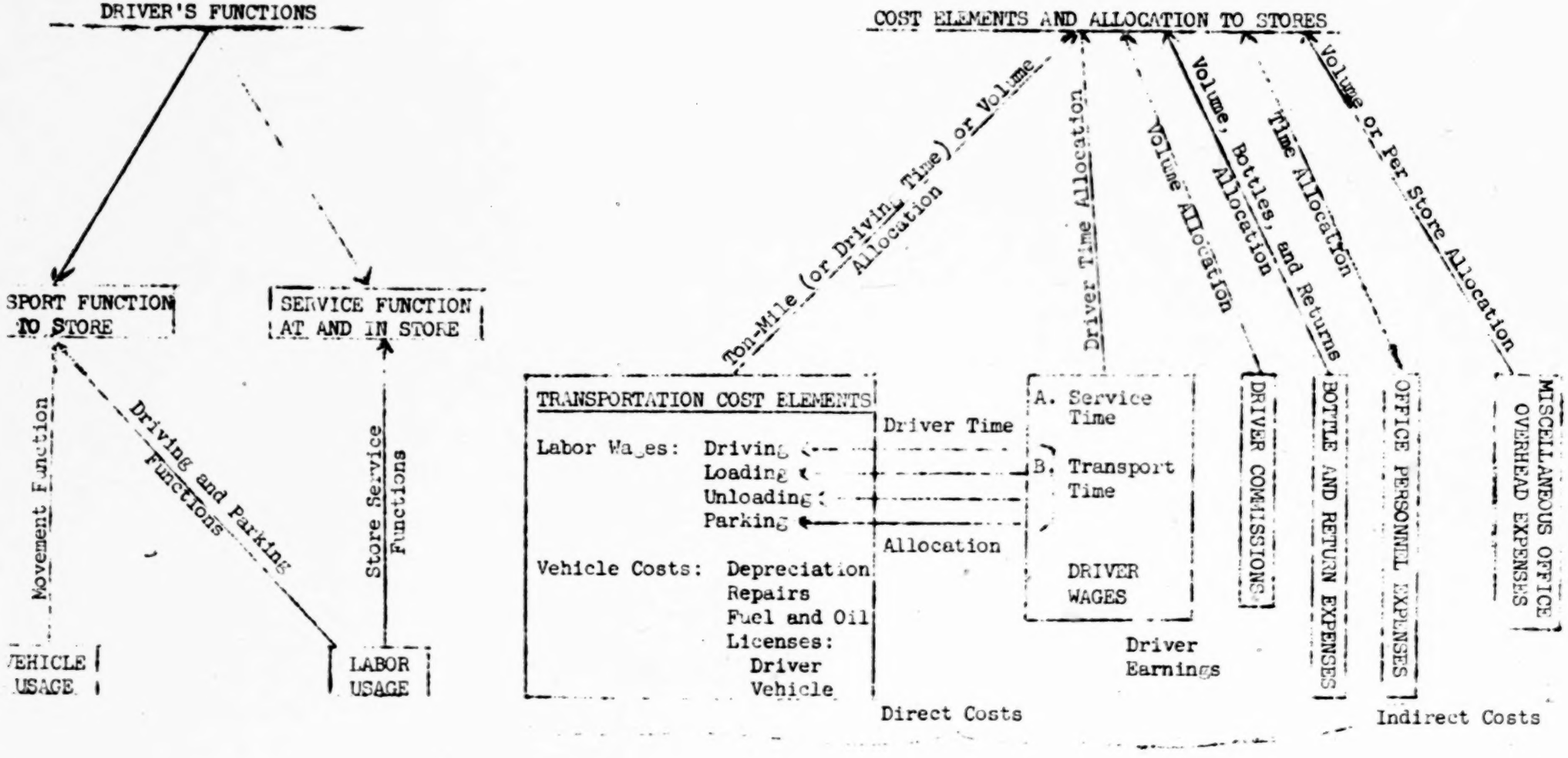
[6] Platfrom Constant Unit Costs are omitted as irrelevant to the Cost Difference between Chain and Independent stores.

* Relative Cost Difference equal to or greater than corresponding Discount Difference (cost justified).

[1181]

REBUTTAL EXHIBIT J

NATURE OF DRIVER'S FUNCTIONS AND COST ELEMENTS
FOR ALLOCATION THROUGH DELIVERY FUNCTIONS



[fol. 1182] REBUTTAL EXHIBIT K-1

Bowman Dairy Company

Copy

July 25th, 1957

Mr. E. Woolley,
U. S. Department of Justice,
Anti-Trust Division,
219 South Clark Street,
Chicago, Illinois.

DEAR MR. WOOLLEY:

The information that you requested of me on Monday of this week is attached.

This includes those monthly summaries of store division delivery expenses from which were derived the $.182 delivery cost rate in the test of March, 1955, and the $.185 delivery cost rate in the test of January, 1956.

For the same divisions and the same periods, the following data is also tabulated: Total points delivered, total glass containers delivered, total number of case equivalents delivered, number of customers served, total number of delivery days.

Figures representing quantities of merchandise delivered, including case equivalents, include the bulk merchandise sold by these divisions.

Very truly yours, Stevenson, Jordan & Harrison, Inc.
R. G. Havemeyer.

RGH:eh
Enclosure
CC: L. E. Hart, Jr.

[fol. 1183] REBUTTAL EXHIBIT K-2

Copy

Elston, Forest and South Store Divisions

	March 1955	December 1955
Total Points Delivered	7,222,640	8,258,790
Total Glass Containers Delivered	642,083	1,242,401
Total Case Equivalents Delivered*	150,019	183,824
Number of Customers Served	3,389	3,153
Total Delivery Days (Route Days)	4,900	4,675
Total Number of Routes**	181	173

* Computed by dividing the total quantity delivered of each item by its appropriate "containers per case."

** Information supplied over the telephone from Mr. Havemeyer to Mr. Woolley.

[fol. 1184] REBUTTAL EXHIBIT K-3(p. 1)

Summary of Sales, Delivery, and Collection Expense

Elston, Forest, and South Divisions

	March 1955	December 1955
Auto Expenses		
Auto Depreciation	$ 6,452 28	$ 6,452 28
Auto Gas and Oil	6,769 66	7,102 22
Auto Insurance	2,181 99	1,639 92
Auto License	2,688 99	2,808 80
Auto Rental Proration	36 00	-
Auto Repairs and Supplies	8,673 18	8,501 00
Auto Repair and Upkeep Wages	9,212 66	9,272 46
Total	$ 36,014 76	$ 35,776 68
Salaries and Wages		
Delivery Wages	$101,528 98	$ 98,458 50
Milkroom Wages	30,810 31	32,145 92
Solicitors' Wages	12,837 56	14,467 58
Office Salaries and Wages	17,353 48	17,162 58
Truck Drivers' Wages	527 45	552 29
Vacation Wages	8,030 00	8,030 00
Personnel Benefits	13,833 43	9,777 41
Total	$184,921 21	$180,584 28
(Total excluding Vacation and Benefits)	163,057 78	162,786 87)
Total Commissions	44,087 30	47,286 26
Bottle Expenses		
Bottle Deposit	499 70	(1,987 44)
Bottle Loss	2,873 36	(909 69)
Foreign Bottles	(67 02)	-
Bottle Expense	757 52	2,118 85
Bottle Allowance	12,579 14	-
Total	$ 16,642 70	$ (778 28)

[fol. 1185] REBUTTAL EXHIBIT K-3 (p. 2)

Other Expense	March 1955	December 1955
Advertising	$ 8,086 52	$ 3,745 70
Bad Debts	647 42	319 74
Bad Debt Collections		(43 71)
Building Repairs	368 85	272 22
Depreciation	1,708 32	1,708 32
Donations	250 00	40 00
Equipment Repairs	301 73	116 38
Expense Transfers	377 68	(41 94)
Ice and Refrigeration	241 45	254 05
Illinois Occupation Tax		
Insurance	38 40	36 81
Laundry	56 28	101 07
License	882 16	934 65
Membership and Dues	206 52	40 52
Miscellaneous Expenses	1,249 92	1,664 99
Office Supplies and Expense	704 01	540 12
Operating Supplies and Expense	351 63	403 39
Painting	84 92	62
Rentals	120 50	137 50
Sales Contest		1,322 69
Store License	345 00	3 00
Store Merchandising	5,440 50	5,727 00
Taxes	1,413 73	1,870 19
Telephone	1,086 63	1,255 62
Trade Expense		
Utilities	2,130 87	2,402 45
Vending Machine Expense	90 34	173 00
Total	$ 30,185 78	$ 25,984 38
Total Expense	$311,851 75	$288,863 32

[fol. 1186] REBUTTAL EXHIBIT L-1

Copy

Bowman Dairy Company

July 10, 1956.

Mr. E. Woolley,
U. S. Department of Justice,
Anti-Trust Division,
219 South Clark Street,
Chicago, Illinois.

DEAR MR. WOOLLEY:

We are forwarding to you under separate cover the September 1955 route books for Forest Division (15 books), South Division (20 books), and Elston Division (19 books).

Each group includes every third route in that division, when they are ranked by volume sold in September 1955, including the largest and smallest volume routes.

The need for reference to route books of previous months frequently arises. We would appreciate their return at your earliest convenience.

Very truly your, Bowman Dairy Company, s/ C. K. Brown, Assistant Controller.

rf.

[fol. 1187] REBUTTAL EXHIBIT L-2

Copy

Bowman Dairy Company

Received from Bowman Dairy Company the following route books for the month of September, 1955.

Elston Division

52	748
88	914
126	1183
190	1475
257	1899
271	2058
590	2069
646	2149
653	2220
	2226

U. S. Department of Justice, Anti-Trust Division, By s/ Elliott B. Woolley.

[fol. 1188] REBUTTAL EXHIBIT L-3

Copy

Bowman Dairy Company

Received from Bowman Dairy Company the following route books for the month of September, 1955

South Division		Forest Division	
33	1537	1263	296
73	1713	92	3
129	1813	1992	783
241	1864	574	3064
777	1876	1566	1960
827	1879	1722	1003
880	1942	1978	1073
1261	1989	1150	
1268	2020		
1343	2232		

U. S. Department of Justice, Anti-Trust Division, By s/ Elliott B. Woolley.

[fol. 1189] REBUTTAL EXHIBIT N (p. 1)

Milk Wagon Drivers' Union

Local 753, I. B. of T., C., W. & H. of A.

Articles of Agreement

Between milk dealer, party of the first part, hereinafter called the Employer, or Processor, and the Milk Wagon Drivers' Union, Local 753, I. B. of T., C., W. & H. of A., party of the second part, hereinafter called the Union.

Article 1. For all types of work coming under the present jurisdiction of the Union, the Employer shall hire members of the Union or those who will become members within thirty (30) days after employment, subject to acceptance by the membership.

Inexperienced men shall have the status of apprentices, relative to wages only, for a period of thirteen (13) weeks from the date of employment.

Article 2. The Employer shall choose men from the eligible list in the order of their company seniority in the respective departments. The Employer agrees when hiring addi-

tional men to refer to the Union's list of unemployed men laid off by the Employer within a period of one year from the date of the vacancy and shall hire eligible men from such list in preference to others. It is further agreed that no man shall be entitled to have his name on the eligible list who has been discharged for cause or who is incompetent in that he is not physically able to perform his duties, has not had at least one year's continuous experience with an employer party to this contract or who has had an unsatisfactory performance record.

Article 3. Seniority in Lay-offs. Departmental Seniority, as defined hereafter, shall prevail when making lay-offs of employees because of the elimination of positions or routes coming under the jurisdiction of this Agreement. The employee in the department with least service, excepting foremen, in which said lay-off or elimination occurs shall be laid off first; provided that preference with respect to service shall not interfere with the selection of competent drivers properly qualified to serve the types of trade involved. In case a foreman is demoted to the status of a routeman, he takes on seniority rating on the basis of his total length of service. Departmental classifications will be as follows:

Classifications:

(a) Department No. 1—Milk sales delivery which includes route-riders, routemen, salesmen and special delivery men. This department shall be confined to the distribution branches of the Employer. Any man transferred from one branch to another with a route or his group of routes shall retain his company seniority. Any man transferred at request of Employer shall retain his company seniority if agreed upon by Union and Employer.

(b) Department No. 2—Transportation men, which includes tank and van drivers. Seniority shall apply to all such men employed by the Employer.

(c) Department No. 3—Truck drivers. Seniority shall apply to all such men employed by the Employer.

(d) Consolidations and Mergers: Company seniority by departments shall govern lay-offs within the branches affected and consolidations of branches owned by the Employer. If the Employer acquires any dairy business by

purchase or merger, employees of the acquired business shall enjoy five years' departmental seniority, provided he has been employed by that company at least five years, in so far as lay-offs are concerned, unless this shall be agreed by both parties to be detrimental to the business. Where the business so acquired has non-union employees, or employees who have been members of the Union for less than five years, the question of seniority for these employees is to be agreed upon between the Employer and the Union, parties to this agreement. This article applies to all consolidations or mergers since 1941.

(e) Seniority in hiring and lay-offs on night routes to be governed same as day routes. No employee with one year or more of continued service shall lose his seniority rating by reason of lay-off, if he is again permanently employed within one year from time of lay-off. Men hired temporarily to run vacation routes or substitute for men on sick leave, shall not be subject to the terms of this article. When it becomes necessary for any employee to leave his employment because of sickness or accident, he shall be given his old position when he again is able in the judgment of competent medical authority, to perform the duties of the job, and shall retain the seniority he had, before he became sick.

(f) The seniority list of men at plant shall be given upon request of the Union steward.

(g) Route bidding. One route pick in six years. If route is taken off, man can rebid in six-year period. Route to be posted for seventy two hours. Two changes on each pick. Preference on route bidding shall not interfere with the selection of competent drivers properly qualified to handle the route. Branch seniority as now in contract. Route Riders jobs to be subject to bid.

Article 4. 40 hours shall constitute a week's work of 5 days of all routemen on retail and store routes, plus eating period of 5 hours per week, and shall include all time required for daily and monthly reports or other book work. Time and one-half for overtime after 45 hours per week with 40 hours computed into base pay to establish hourly rate for overtime pay.

The present delivery system of the six-day operation with No Sunday Delivery shall continue until February 1, 1954, when the Union can request that the sole question of restor-

ing Sunday deliveries shall be determined through the medium of arbitration, such arbiter to be decided by Union and Industry and, if in disagreement, by the Mayor. Throughout this system of delivery, absolutely no deliveries on Sundays or pick-ups allowed.

Each man's time to report and time to unload shall be scheduled. Each man's time shall be recorded on time card by time clock when he starts and finishes his day's work in the make-up room, starting time to be governed by schedules.

Schedules of time, allotting proper number of hours, shall be posted in a prominent place in the office or barn. In case a route is too large to be run within the proper time limit, the load shall be adjusted by the management so that it can be. Routes which pull in when properly serviced in less than the hours scheduled shall be subject to review by the Employer and Union for re-scheduling.

In case a route is too large to be run within the proper time schedule, adjustments when warranted shall be made within two weeks, by the Employer, so that such route can be properly serviced within the Forty-Five hour week. If adjustments are not made within two weeks after request is made by the Union representative, such shall be considered in violation of this Agreement.

The Employer shall provide facilities to load and unload, quickly and properly.

The Employer agrees to main adequate card record time clocks for the purpose of recording the working hours of employees.

The foregoing principles shall also be applied to men serving non-commission trade.

Article 5. In case of breakdown, accident or delay beyond his control, the Union agrees that the Employer shall be allowed reasonable tolerances in enforcement of provisions of Article 4.

[fol. 1190] Article 6. Any matter in dispute between the Union and Employer, which cannot be settled, shall be referred by either party to an Industry Labor Committee consisting of three (3) representatives of Employers parties to this Agreement, and three (3) representatives of the Union. It shall be the duty of this Committee to hear and dispose of all complaints raised by either party to

this Agreement concerning violations thereof that cannot be settled amicably between the parties. If this Committee is equally divided on any such complaint, the Chief Justice of the Municipal Court of Chicago or his nominee shall be called in to act as the impartial member of said Committee and his decision shall be final. No action shall be taken by either party to the Agreement pending the decision of this Committee.

Article 7. If the Employer claims an employee is short in his accounts, the employee or the Union representative shall, upon request, be furnished with an itemized account of the shortage.

Article 8. When any dispute arises as to the hours of work, or to commissions and wages, the Employer agrees to furnish in a reasonable time, time records, reports, load sheets, or any records applying to wages or commissions necessary to determine whether or not a man received the wages and commissions he is entitled to receive.

Article 9. It is agreed by the Union that any member of the Union wishing to quit his position must give his Employer one week's notice. It is agreed by the Employer that of he wishes to discharge a member of the Union, he will give him one week's notice. Proven dishonesty or drunkenness shall be considered just cause for discharge without the one week's notice. At the expiration of the week's notice the member of the Union shall, upon request, be issued a statement with reference to his character and services and receive all monies due him.

Article 10. It is further agreed that no member of the Union will be asked to make any verbal or written contracts which will conflict with this Agreement. Any existing contracts or agreements between members of the Union and the Employer conflicting with this Agreement shall be null and void.

Article 11. Members of the Union shall not be required to perform any duties which conflict in any manner with those required of members of other labor organizations, except for emergencies. Controversies with other labor organizations shall not be considered emergencies. Mem-

bers requested to drive trucks to safety lanes for inspection by the Employer must do so within the work week as specified in this Agreement.

All truck drivers and transportation men leaving their trucks at the end of their day's work at a point away from the starting point shall be paid for time required for the driver to return to the starting point.

Article 12. Vacations: It is agreed, that all employees coming under the jurisdiction of this Agreement, shall, at the end of any fifty-two week's service with one firm, be entitled to two weeks' vacation with full pay and commissions excepting as provided in Section H of Article 42. If, at the end of fifty-two weeks, an employee either resigns or is discharged, he shall have two weeks' pay in lieu of his vacation. Summer vacation periods shall be scheduled April 1st of each year to November 1st. Employees to pick their vacation period by order of seniority. Any employee with previous experience going to work on or before January 1st shall at the end of fifty-two weeks of continuous service with one firm, be entitled to two week's vacation, and on April 1st, be entitled to schedule. Men without previous experience do not come under this rule. Such employees starting work after November 1st, shall not be entitled to schedule for vacation until the second vacation period following.

All employees shall receive three (3) weeks' vacation after twelve (12) years of service. Full credit on merger or when with the same employer in accumulating twelve (12) years of service.

Should any employee resign or be discharged before any period of fifty-two (52) weeks has expired, he shall receive one-twelfth (1 12) of his earned vacation pay for each month of service, providing he has had one earned vacation.

Members leaving employer after May 1, 1953, or those out of industry on that date shall not be entitled to any bridging of service toward computing twelve (12) years' service.

Article 13. There shall be steward at each dairy to see that the members of the Union live up to the rules of the Union and dairy. Said steward shall be elected

by members of the Union working at said dairy, or temporarily appointed by Executive Board from said branch or dairy, and shall be allowed one day off during the months of January, April, July and October for the purpose of collecting dues.

Article 14. No employee shall be dismissed, transferred or suspended on account of serving on committees of the Union, or as delegate to Labor Conventions, or because of other Union activities.

Article 15. All employees coming under the jurisdiction of the Union shall be entitled to a 5-day week. Group seniority to prevail in the selection of days off.

All work performed on the sixth and seventh consecutive day of any work week shall be compensated for at the rate of one and one-half times the regular hourly rate. Employer must notify steward when men are required to work sixth or seventh day.

Article 16. In case of a lock-out or strike of any Union, it shall not be considered a violation of this Agreement for the members of this Union to refuse to deliver goods where such controversy is on.

Article 17. All guaranteed salary and overtime due shall be paid on Thursday, for the preceding week ending Saturday.

Article 18. Any firm requesting drivers to wear uniforms or caps, shall furnish same, free of charge to the employees, shall keep them laundered and in repair at the company expense, and all such articles must bear the union label.

Article 19. Should the Employer require the employee to give bond, the same shall be furnished, the employee to pay one-half the total premium. Interest to be paid at the rate of four percent (4%) per annum on all cash deposits when requested by employee annually. Cash deposits to be limited to Two Hundred Dollars ($200.00).

It is further agreed that all cash deposits of the employee shall be segregated from all other funds on the books of the Employer.

Article 20. Should the Union hereafter enter into any

agreement with any milk dealer upon terms and conditions more advantageous to such dealer than the terms and conditions of this Agreement, or should the Union sanction a course of conduct by any milk dealer who has signed this form of agreement enabling him to operate under more advantageous terms and conditions than those provided for in this Agreement, the Employer shall be entitled to adopt such terms and conditions in lieu of those contained in this Agreement.

Article 21. Should any member of the Union be expelled or suspended by the Union, the Employer agrees to discharge such person within fifteen (15) days after receiving written notice from the officials of the Union.

Article 22. It is agreed that all soliciting from the wagon will be done by regular routemen or foremen in their respective territories. When dealers employ solicitors or adjusters they shall be members of Local 753 and receive maximum scale called for in these Articles of Agreement, and hours as specified in Article 4.

Article 23. It is agreed that no employee shall be required to deliver more goods than he can adequately serve within the regular working time specified in this Agreement.

The Employer further agrees not to employ helpers on wagons or trucks to avoid the payment of a routeman's scale of wages.

It is further agreed by both parties hereto that none except authorized employees of the company shall be permitted to ride on any delivery vehicle or serve customers therefrom.

[fol. 1191] Article 24. It is further agreed by the Employer that when a route is split, the driver whose route is so divided shall have first choice of the two routes with full pay for the six months following, or such part thereof as he continues in the employment of the Employer, to be governed by the thirty days' average sales previous to dividing said route.

Article 25. Credits on all stolen, broken, spilled or sour goods are to be allowed for daily upon proper evidence at platform or milk-room. Any man proven dishonest in

securing credits for stolen, broken, spilled or sour goods shall be subject to discharge without further notice.

Article 26. When a route salesman leaves his regular route temporarily, to run vacation routes, he shall receive Two Dollars ($2.00) per week, in addition to his regular salary, and the commission his regular route earns.

A man hired to run vacation routes shall receive at least half-pay for time spent when learning routes.

Article 27. Retail routeman required to fill out order blanks or reports, or to figure or make up the monthly route-book shall do so within the hours prescribed in this article. Billing Morthly Accounts: 6 hours allowed for book work. Men to total units of sales in book. Companies to bill accounts which have been approved for monthly bills. Men to copy figures from bills into own books.

A committee from both sides to work out a program for billing.

Article 28. Records of all bottle and container charges are to be charged on the customer's page as a separate item, such to be carried in outstanding at the end of each month.

The Employer shall be responsible for fixing credit for customers. The routemen shall be held responsible for any credit extended beyond that established by the Employer. However, no deductions shall be made from the pay of any routeman for extension of credit unless the credit limits so established are marked and initialed on the customer's page in the current route book.

Article 29. The employee will be given credit at the unloading point daily for all unsold goods he did not order. No employee shall be required to pay for goods which he has been unable to sell.

Article 30. Any legitimate shortage created by a routeman, routerider or route forman shall be determined at the end of each month, and posted in route books or on on board by the 12th of following month, and such shortage shall be paid on the following commission pay day. The same shall apply to the crediting of overages.

Article 31. Any routeman absent from his route for a period of not more than fourteen (14) days, shall receive the commission from same; after that period commission is to be paid to whoever is on the route, except as provided for in Articles 26 and 42.

Article 32. If route foreman, route riders, or routemen are required to serve two routes alone in one day, they shall receive one extra day's pay as compenstation.

Article 33. Where it is necessary to make special deliveries, such sales shall be credited to the route regularly serving that trade. Full commission shall be paid with no base allowance to special delivery men where such deliveries are made of goods resold when such is not credited to to any route.

Article 34. Any employee who has been receiving a premium over the previous established scales shall not lose his premium by reason of the execution of this Agreement. This clause shall not apply in cases of demotions or change in job classification.

Article 35. An employee working 51% of his time at any of the within classified occupations shall receive the highest scale specified for such work.

Article 36. Hours for wholesale men. Forty (40) hours shall constitute a week's work for routemen, routeriders, special delivery men and extra men serving non-commission wholesale trade. Each man's time to report and time to unload shall be scheduled so that he can finish his day's work in eight and one-half (8½) hours after he commences his day's work. Each man's time shall be recorded on time card by time clock when he reports and finishes his day's work in make-up room, starting time to be governed by schedules. Non-commission routemen to be allowed to pull in when their routes are properly served. One-half hour shall be allowed for lunch.

Article 37. Wholesale men to receive time and one-half for all hours worked in excess of 40 hours in any week. Overtime after 42½ hours. Overtime on basis of 40 into base pay. In case of breakdown, accident or delay beyond his control, the Union agrees that the Employer shall be

allowed reasonable tolerance in the enforcement of these provisions for overtime compensation.

Article 38. Members working forty (40) hours per week; if requested by the Employer to drive trucks to safety lane for inspection must do so within forty (40) hours scheduled work week.

Article 39. Hours of Delivery—Retail Deliveries. On week days, loading to begin as required; deliveries to start at 7:00 A.M., except on Sundays and legal holidays, except Lincoln's or Washington's Birthday and Armistice Day, when vehicles shall start any time in the morning that business may require. Unloading facilities to be ready at 1:30 P.M. week days and 9:00 A.M. on Sundays or holidays. Vehicles to be scheduled off the street 3:30 P.M. week days and 12:00 P.M. on Sundays and holidays.

Wholesale Deliveries: Deliveries by store trucks to be the same as retail on week days. All wholesale and store trucks to be scheduled off the street no later than 1:00 P.M. on Sundays and holidays. Trade in the territory bounded on the north by Chicago Avenue on west by Halsted Street, on south by Roosevelt Road (both sides of these streets are included) shall not be regulated by the rules prescribed above, but shall be supplied from any time in the morning that the business may require until 12:00 o'clock noon. All vehicles must be out of this district by 1:00 P.M.

All questions pertaining to hours of seasonal changes in delivery shall be referred to a committee from the Employers and the Union. The decision to be binding on both parties to this contract, except in case of breakdown or delay beyond their control.

The Employer agrees that he will enforce the provisions of this Article except in case of breakdown, accident or delay beyond his control.

Article 40. The Union agrees at all times, as far as in its power, to further the interests of the Employer. It is mutually agreed between the parties herein named, that the customers and consumers of the Employer belong to and are a part of the assets and good-will of the said milk dealer; that the driver solicits, serves and sells such customers and consumers in a representative capacity only and if for any reason whatsoever any member of the said

Union terminates his employment or is discharged or dismissed or for any reasons said employment ceases and is terminated, it is understood and agreed that any such driver or his agent shall not call upon, solicit, sell or interfere with or divert the customers or consumers formerly served by him on behalf of his former Employer, for a period of two years (2) from the date of his termination of employment. It is further understood that if a driver were to resign as a member of the Union, in no event would this abrogate the agreement until the space of two years (2) from the date of his resignation or discharge has elapsed. The Union shall not be required to pay any costs of any proceedings relative to procuring of any order restraining a driver from stripping his route. The party of the first part shall advance any and all costs necessary relative thereto and party of the second part agrees to abide by Article 40. The provisions of this article shall be suspended in the event of and during a general strike by or lock-out of the members of the Union.

[fol. 1192]

Article 41. Wage Scale. Overtime Rating for 1953	May 1, 1953	May 1, 1954	Stright Time Rate 1953	Overtime Rate 1953
Retail Route Men	$ 92 00	$ 95 00	$2 30	$3 45
Inexperienced Men	91 00	94 00	2 27½	3 41
Route Foremen	104 00	107 00	2 60	3 90
Ass't Route Foremen	99 00	102 00	2 47½	3 71
Solicitors or Adjusters	99 00	102 00	2 47½	3 71
Store Route Men	92 00	95 00	2 30	3 45
Com. Wholesale Route Men	93 50	96 50	2 34	3 51
Special and Extra Route Men	91 00	94 00	2 27½	3 41
Truckers and Van Day Men	97 00	100 00	2 42½	3 64
Truckers and Van Night Men	98 00	101 00	2 45	3 68
Tank Day Men	97 00	100 00	2 42½	3 64
Tank Night Men	98 00	101 00	2 45	3 68
Noncom. Wholesale Men	109 00	112 00	2 72½	4 09
Retail Store Solicitors	104 00	107 00	2 60	3 90
Noncom. Ass't Route Foremen	114 00	117 00	2 85	4 28
Noncom. Route Foremen	119 00	122 00	2 97½	4 46

On May 1, 1954, an additional $3.00 weekly wage increase shall be put into effect.

Article 42 (A). Commissions to be figured at 75¢ per hundred, over 1733 points on seven day routes, over 1486 points on six day routes, and over 1238 points on five day routes, up to 4,000 points per week. Over 4,000 points, 90¢ per hundred.

Commissions on butter and oleomargarine sold at retail

home delivery shall be two (2) points per pound and on eggs, two (2) points per dozen. Commission on cheese, 1¢ per jar of one pound or less; in larger quantities, 1¢ per pound at retail. The commission on cheese must be paid over and above the guaranteed salary.

Commission on butter on store routes shall be one cent (1¢) per pound. Same for oleo. Commission on eggs one cent (1¢) per dozen. Commission on cheese, one cent (1¢) per jar of one pound or less; in large quantities, one cent (1¢) per pound. This must be paid over and above the guaranteed salary.

(B.) A point of goods sold on retail wagons shall consist of one quart of milk, one pint of milk, four one-half pints of milk, three one-third quarts of milk, one quart of skim, one-half pint, or two gills of cream, one quart of buttermilk.

(C.) Full commissions shall be paid on schools served by either retail or wholesale routes. All half pints, or one-third quarts served by retail wagons to either schools or wholesale stops where they are not resold, can be figured,—four, one-half pints, or three, one-third quarts as one point.

(D.) All vending machines classed as retail,—four one-half pints as one point.

(E.) Commission on Commission Wholesale shall be 75¢ per hundred over 2400 points for the first 4000 commission points, then 90¢ per hundred.

(F.) Straight additional commission to be paid on goods not resold over 400 points per week.

(G.) Commission to be figured on goods for re-sale delivered on non-commission routes at 75¢ per hundred over 400 points up to 4000 points. Over 4000 points 90¢ per hundred.

(H.) Whenever a Foreman, Assistant Foreman or Extraman is required to run a wholesale commission route, he shall receive sixty percent (60%) of the commission earned that day, or days he runs the route. Balance of the earned commission to be credited to regular drivers. Commission for this group to be figured on basis of month average.

(I.) All goods sold from retail routes to be classed as retail. Places that resell milk to be classed as retail.

(J.) All commissions to be paid not later than the fourth pay-day of the month.

(K.) Whenever employer employs assistant route fore-

men or foremen on non-commission wholesale routes they shall be paid $5.00 and $10.00 over the wage scale for non-commission wholesale men as set forth in Article 41.

Article 43. Truckers, Van and Tank men. Forty (4) hours shall constitute a week's work, of eight hours per day. Overtime to be paid after eight and one-half (8½) hours per day which includes one-half hour eating period at one and one-half times the basic rate. The Employer shall be allowed reasonable tolerance in cases of break-down or delay beyond the control of the Employer, in the enforcement of this Article. Men shall punch time-card by time-clock when he reports as scheduled and punch card when he finishes his day's work.

Seniority to apply on picking steady runs or starting time.

Article 44. All drivers of auto trucks who begin work at 4:00 P.M. or thereafter shall be considered night truck men. All drivers who begin work at 4:00 A.M. or thereafter shall be considered day truck men.

Truckers, van and tank men who work less than 4 hours on the night shift between 4:00 P.M. and 4:00 A.M. shall receive 50¢ per night. Those who work 4 hours or more during that period shall receive a bonus of (10%) per night.

Article 45. It shall not be a violation of this Agreement for members of Local 753 to refuse to work for an Employer at a plant where any person or persons delivering milk or dairy products to or from such plants are not members of Local 753 or refuse to become members within ten days.

Processor agrees to service only vendors in good standing with Union or those presenting an O.K. card signed by Secretary-Treasurer signifying intention to join.

Whenever a party of the first part claims the business of a vendor as his property, or where the party of the first part furnishes the vehicle for the use of a vendor, such vendor shall be classed as an employee and shall be paid the wages and commissions this contract calls for.

Processor shall pay $3.50 per week to each vendor and to master vendors for each route operated as an allowance for advertising the sale of processors' products. Additional $2.00 for second year.

Article 46. The Employer agrees that when members of the Union leave for Military Service, their seniority rights will be accumulative, crediting their period of service, and on return they will be given their positions if physically qualified to handle same. Application for reinstatement must be made within 90 days of date of honorable discharge.

Article 47—Pension-Severance—$3.50 per week for all members and an additional $5.00 per week for all routes over 12,000 points per week shall be paid by the employer into a separate fund for pension and severance benefits to members. This shall be jointly operated by a committee from the Union and the Employers as set forth in Supplemental Articles of Agreement and Milk Drivers-Milk Dealers Pension Severance Plan. The employer's liability under this article is limited to the payment of contributions as hereinabove set forth.

Article 48. This Agreement shall take effect as of May 1, 1953, and shall continue in effect until May 1, 1955, and from year to year thereafter unless written notice of a desire to cancel or modify the same is given by either party to the other not less than sixty (60) days prior to May 1st of any year. It is further agreed that negotiations continue until an agreement is reached or negotiations are broken off by either party.

Employers: Union:

_____ _____

President

_____ _____

Secretary-Treasurer

[fol. 1193] In United States District Court, Northern District of Illinois, Eastern Division

[Title omitted]

Civil Action No. 51 C 947

Final Pre-trial Order—The Borden Co.—December 16, 1958

The Court, pursuant to Rule 16 of the Federal Rules of Civil Procedure, having directed the attorneys for the parties to appear before it for pre-trial conference concerning the evidence to be offered upon the reopening of this action; the Court having met with counsel for the parties from time to time; the Court having entered the Supplemental Pre-Trial Order of November 8, 1955, the Additional Pre-Trial Order of September 19, 1957, and the Rebuttal Pre-Trial Order of December 16, 1958; and plaintiff and defendant The Borden Company (hereinafter called "Borden") having come to further agreements in the course of said conferences;

[fol. 1194] It is Ordered:

1. This Order is a supplement to the Pre-Trial Order entered on March 4, 1953, the Supplemental Pre-Trial Order entered on November 8, 1955, the Additional Pre-Trial Order entered on September 19, 1957, and the Rebuttal Pre-Trial Order entered on December 16, 1958;

2. This Order pertains only to plaintiff and defendant Borden;

3. The introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff and the defendant Borden that the evidence sought to be introduced is immaterial or irrelevant, and the same reservation and objection shall apply to all stipulations, agreements and admissions of fact contained in this Order;

4. This Order and all matters herein referred to and all admissions of fact and agreements with respect to the further trial of this action shall be used for no other purpose

than the trial of this action and are made solely for the purposes of this trial.

5. All schedules referred to in this Order may be offered in evidence without further proof or authentication.

[fol. 1195] I. Additional Agreements as to Facts, Exhibits and Schedules

1. The routemen and relief drivers described in paragraphs 128 and 129 of the Additional Pre-Trial Order were at all times during 1954 and 1955 under standing instructions to make the regular stop at each store customer location on their route, irrespective of whether or not they anticipated that the store customer would purchase any fluid milk products at that location.

2. A wholesale route arranged as described in paragraphs 135 and 136 of the Additional Pre-Trial Order, is readjusted whenever the addition of new store customers make it difficult to serve the entire route within the time requirements of the union contract and the time needs of the store customers.

3. Thomas B. Gilmore, if called to testify on behalf of Borden, would testify as follows:

(a) That he is an attorney duly licensed to practice law in the State of Illinois and has been so licensed since 1927; that continuously since 1938 he has acted as attorney for the Associated Milk Dealers, Inc., and in such capacity has represented the Milk Dealers in the Chicago marketing area in their negotiations with the Milk Wagon Drivers' Union Local 753, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in negotiations leading up to the Collective Bargaining Agreements which have been entered into from time to time between said Union and said Milk Dealers.

[fol. 1196] (b) That the Commissions payable on store routes were established for the purpose of curtailing the size of store routes and preventing the consolidation and reorganization of mixed routes.

(c) That in every labor negotiation between the Milk Wagon Drivers' Union and the Associated Milk Dealers, Inc., the representatives of the Union have, as part

of their demands, requested increases in the rates of commission payable to drivers on store routes; that during the course of said negotiations, officers of the Union have made frequent public statements to the effect that the purpose of such demands for increases in the rates of commission payable to drivers on store routes was to keep the size of store routes within limits which can be safely served by a route man in a normal working day with due regard to the health, welfare and safety of the route man; that in addition to such public statements, in the course of such negotiations, officers of the Union have repeatedly explained that the purpose of demands for increases in the rates of commission payable to drivers on store routes was to create and preserve a maximum number of jobs for Union members; that said Union officers have repeatedly emphasized that said demands were in furtherance of the objective of obtaining what the Union regards as an equitable pay scale for its entire membership.

(d) That in his opinion, based on his experience in labor negotiations, the commission payments are the economic equivalent in the dairy industry in the City of Chicago of other forms of premium pay, such as time and a half for overtime, which are, in general, designed to spread the available jobs among the maximum number of members of the labor force.

The plaintiff moves that the foregoing testimony of Mr. Gilmore be stricken on the following grounds and for the following reasons: 1. raises collateral issues; 2. not the best evidence; 3. argumentative; 4. incompetent; 5. irrelevant and immaterial.

4. Schedule XXXV, "Summary of General and Administrative Expenses of Borden's Chicago Milk Division Main [fol. 1197] Office for Twelve Month Period Ending June 30, 1955," shows by item of expense the total cost for the year of such general and administrative expenses, and the average weekly cost thereof. The Schedule also shows the average weekly points sold by the Chicago Milk Division for the twelve month period, the average weekly wholesale points of the Irving Park and Englewood Branches, and the percentage of such points of these two branches to the

total sold by the Chicago Milk Division. The Schedule then shows the average weekly general and administrative expenses applicable to the wholesale points sold by the Irving Park and Englewood Branches, less such expenses already covered in paragraphs 249, 254, 257, 258 and 260 of the Additional Pre-Trial Order.

5. During the year 1955, the representation of Borden with the chain stores was the responsibility of O. N. Koenig, W. N. Waterstreet and H. R. Fagerson. The total compensation of these three men and their secretaries for the year 1955 was $74,777.47. During the entire year W. N. Waterstreet was President of Borden's Chicago Milk Division, and his salary and that of his secretary were applicable to the Chicago Milk Division. From January 1 to March 15, 1955, H. R. Fagerson was Vice President of the Chicago Milk Division, and his salary and that of his secretary for that period were applicable to the Chicago Milk Division. From March 15 to December 31, 1955, H. R. Fagerson was [fol. 1198] District Sales Director of Borden's Chicago Central District, and during the entire year O. N. Koenig was District Chairman of the Chicago Central District. The Chicago Milk Division was one of seven divisions comprising the Chicago Central District. The total expense of the Chicago Central District applicable to the Chicago Milk Division in the Chicago area was 18.52 per cent of the total expense of the entire Chicago Central District. When the salaries of O. N. Koenig and H. R. Fagerson and their secretaries for these periods are allocated to the Chicago Milk Division on the basis of this percentage, the total compensation of O. N. Koenig, W. N. Waterstreet, H. R. Fagerson and their secretaries applicable to the Chicago Milk Division for the year 1955 was $37,015.26.

6. Schedule XXXVI, "Summary of Trend of Borden's Independent and Chain Store Business in the Chicago Area," in part includes information found in paragraph 153MD of the Additional Pre-Trial Order and paragraph 18 of the Rebuttal Pre-Trial Order. The Schedule shows the trend from 1947 through 1956.

Enter:

Campbell, Judge.

Dated: December 16, 1958.

[fol. 1199] SCHEDULE XXXV

Summary of General and Administrative Expenses of Borden's Chicago Milk Division Main Office Covering 12 Month Period Ended June 30, 1955

Account No	Description	Total 12 Month Ended June 30, 1955	Average Per Week
1	Salaries and Wages	$259,341 15	$ 4,987 33
101	Office Expense	21,072 03	405 23
102	Telephone and Telegraph	18,276 59	351 47
109	Legal Fees and Expenses	9,586 37	184 35
110	Gifts and Donations	11,450 46	220 20
111	Traveling Expense	8,240 64	158 47
115	Fees and Dues	27,518 65	529 20
138	Tabulating Service	29,857 71	574 19
200-201-204	Repairs	4,027 16	77 45
227-228-229-230	Insurance	10,517 11	202 25
233	Fees—Fidelity Bonds	4,282 61	82 36
236	Taxes—Real and Personal	3,453 34	66 41
240-241	Depreciation	8,745 00	168 17
260	Laundry	1,509 10	29 02
262	Light, Heat and Power	14,637 26	223 79
266	Building Services	33,300 92	640 40
319	Circle Publication	12,484 68	240 09
106-114-137-225 254-295-298-311 312-313-314-315 318	Miscellaneous	22,993 50	442 29
149-265-302	Transfers—Net	25,339 05	487 29
	Total	$523,633 33	$10,069 87

Average Weekly Points of Chicago Milk Division	3,405,196
Average Weekly Wholesale Points of Irving Park and Englewood Branches	1,716,180
Percent of Points of Irving Park and Englewood Branches to Points of Chicago Milk Division	50.39%
Portion of General and Administrative Expense Applicable to Irving Park and Englewood Branches: ($10,069.87 x 50.39% = $5,074.21)	5,074 21
Less the Direct Costs Included in Paragraphs 249, 254, 257, 258 and 260 of the Additional Pre-Trial Order	746 62
Average Weekly Indirect General and Administrative Expenses Applicable to Irving Park and Englewood Branches	$ 4,327 59

[fol. 1201] In United States District Court, for the Northern District of Illinois, Eastern Division

[Title omitted]

Civil Action No. 51 C 947

Supplemental Pre-Trial Order—Bowman Co.—December 16, 1958

The Court, pursuant to Rule 16 of the Federal Rules of Civil Procedure, having held pre-trial conferences from time to time, and the plaintiff and the defendant Bowman Dairy Company (hereinafter referred to as "Bowman") having come to certain agreements in the course of said conferences,

It is Ordered:

1. This order is a supplement to the Supplemental Pre-Trial Order entered in this cause on November 4, 1955, the Supplemental Pre-Trial Order entered on December 23, 1957, and the Plaintiff's Rebuttal Pre-Trial Order as to Bowman Dairy Company, entered contemporaneously herewith.

2. The reference on the first page of the Supplemental Pre-Trial Order entered on December 23, 1957, to a prior pre-trial order "of November 8, 1955" should be and hereby is corrected to refer to the prior pre-trial order of November 4, 1955.

[fol. 1202] 3. The provisions of paragraphs 2, 3 and 4 of the Supplemental Pre-Trial Order entered on November 4, 1955 are applicable to this supplemental pre-trial order.

Agreements of Fact Between Plaintiff and the Bowman Dairy Company

1. Robert F. Elrick, if called to the stand to testify on behalf of the defendant Bowman Dairy Company, would testify as follows with respect to the mail survey described in paragraphs 7 through 9 of plaintiff's rebuttal pre-trial

order as to Bowman Dairy Company, and the rebuttal exhibits contained in Folder A, submitted therewith.

(a) He is the same Robert F. Elrick referred to in paragraphs 21 through 26 of the supplemental pre-trial order entered on December 23, 1957, and is still the president of Elrick & Lavidge, Inc.

(b) Under his personal direction and supervision, the staff of Elrick & Lavidge, Inc. has studied the results of a mail survey conducted by the plaintiff, and has re-examined the personal interview survey originally conducted by Elrick & Lavidge, Inc. in the light of the results of plaintiff's mail survey. The purpose of this study and re-examination was to further measure, if possible, the extent of customer competition, if any, among the six stores originally selected by the plaintiff.

(c) An analysis of the actual responses to plaintiff's mail questionnaire shows that competition among the sample stores is extremely limited. For example, out of the 155 responses to the questionnaires mailed to persons who were interviewed at the A & P store at 2601 West 51st Street, only two persons indicated that they also made purchases from Psomakos at 2416 West 47th Street. None of the responses to questionnaires mailed to persons interviewed in front of Goldenstern's Market at 427 West 69th Street indicated any purchases from the Kroger Store at 7260 South Went-[fol. 1203] worth. As a result of a study of all of the data contained in the mail responses pertaining to the six selected sample stores, it is my considered opinion that the extent of possible customer competition among the sample stores is practically negligible.

(d) In my opinion the results of the plaintiff's mail survey do not in any way affect the conclusions drawn by Elrick & Lavidge, Inc. in the original personal interview survey. The analysis of plaintiff's mail survey conducted by the Elrick & Lavidge, Inc. staff confirms the previously expressed opinion that the extent of possible customer competition among the sample stores is practically negligible.

2. A. J. Bergfeld, if called to the stand to testify on behalf of the defendant Bowman Dairy Company as a rebuttal witness would testify as follows:

(a) He is the same A. J. Bergfeld referred to in paragraphs 27, 33, 34 and 35 of the supplemental pre-trial order entered on December 23, 1957; that he has studied the proposed testimony, and the depositions of Messrs. Woolley, Taggart, Sawyer and Taylor, and has, with the assistance and cooperation of R. G. Havemeyer, a member of his staff with Stevenson, Jordan & Harrison, Inc., analyzed the exhibits submitted on behalf of the plaintiff in connection with the plaintiff's rebuttal pre-trial order as to Bowman Dairy Company.

(b) He has made a further analysis, and has given further serious consideration to the subject of central office overhead discussed in paragraph 35 of the supplemental pre-trial order entered on December 23, 1957, and is still of the opinion that the views expressed in said paragraph are correct, specifically that (1) if central office overhead had been studied in great detail and charged directly to transactions with corporate chain outlets and independent stores, that the effect on costs would have been minor, and (2) the result of such a study would have charged a proportionately greater share of such expenses to independent stores and thereby created an even greater cost difference than was submitted in the original studies.

[fol. 1204] That during his experience of nearly eleven continuous years of consultation service with Bowman Dairy Company, he has observed their market difficulties, the nature and subject of their departmental and corporate meetings, and the problems towards which executives direct their time. He has observed that a greater proportional share of their time and efforts are expended on problems and conditions surrounding dealings with independent stores than with corporate chains.

That in its calculations, Bowman Dairy overcharged chain store transactions by charging a portion of solicitors' cost to them, although in fact these men have no selling or credit contact with those stores. This point

is emphasized here because one of plaintiff's experts (Mr. Sawyer) did not understand it.

(c) That the time to "Collect" and "Delay to Collect", spent by the drivers on the route at independent stores, which plaintiff excluded in its rebuttal calculations (see plaintiff rebuttal table 15, footnote 9), should not have been excluded from the cost calculations because this is truly an additional function which is performed for independent customers. In his opinion, the cost of billing and collection at the distribution division office, Elston Division, for example, and at the company's central office is no greater per point delivered for chains than for independents. Accordingly, the cost of this additional route collection function ("Collect" and "Delay to Collect") should be charged to independent stores.

At the distributing division office a record is maintained of sales to each store; in the case of independents this is done for subsequent discount calculations which are computed for a monthly rebated discount, and in the case of chains this is done for a weekly summary bill. In his opinion, the cost of maintaining such records in the office is no greater for chain store sales than for independent store sales.

At the company's central office, the calculation for each independent store requires total point vaulation and total dollar purchases of deliveries during the month, which is information provided to it by the distributing division. Clerks at the central office determine the discount rate for each store, extend it by the dollar value of purchases, and issue a discount check.

[fol. 1205] The company's central office also prepares a weekly summary bill from sales data prepared by the distributing division for each of the corporate chain groups served by the company.

To illustrate the relative amount of work involved in the central office section, the following data is submitted:

	March, 1955	December, 1955
No. of corporate chain bills issued	15	12
No. of rebate checks issued to independents	3,266	1,860

[fol. 1200]

Schedule XXXVI

Summary of Trend of Borden's Independent and Chain Store Business in Chicago Area

Year	Number of Independent Stores Served	Volume of Milk Delivered to Independent Stores Expressed in Percentage	Number of Chain Store Locations Served	Volume of Milk Delivered to Chains Expressed in Percentage #	Percent of Chain Store Volume to Total Volume of Chicago Milk Division Sales to all Customers
1947	2,209	100 00%	305	100 00%	16 70%
1948	2,338	105 84	298	110 48	17 98
1949	2,267	102 63	290	131 83	20 72
1950	2,258	105 22	283	141 85	21 37
1951	2,113	95 65	281	142 80	21 20
1952	1,925	87 14	277	151 00	22 35
1953	1,728	78 92	274	176 00	26 72
1954	1,529	68 24	256	192 20	29 52
1955	1,357	60 19	110	164 30	26 99
1956	1,224	54 20	112	97 5	16 21

Note: Year is given as of December 31. Actual sales figures on which this table is based have been revealed to counsel for plaintiff but because of the confidential nature of the figures, volume sales figures are expressed in appropriate percentages using 1947 as the base year.

He would also state that company officials have pointed out that there is no delinquency or credit problem with the corporate chains and that there is this problem with independent stores and that it requires time of the division manager, assistant managers, and solicitors to keep it within reasonable limits.

As a result of this consideration of office functions relating to billing and collection, it is his opinion that this functional cost is no greater for chains than for independents, either in total or per point, and that the additional time and cost for collecting cash from independents on the route was properly included in the Bowman studies and should have been included in the plaintiff's calculations.

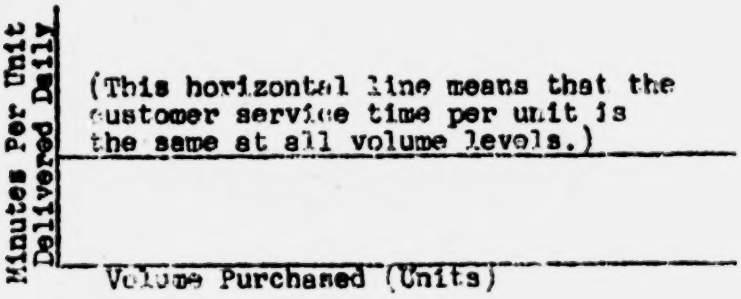
(d) That he does not believe that it is sound to divide the delivery function into a transportation segment and a service segment, and to treat the two segments separately, but that even if the plaintiff's principle of treating the transportation segment separately were acceptable, that nevertheless the plaintiff's method of allocating transportation costs was incorrect. The plaintiff has allocated transportation costs to products and thence to customers on a space basis and has used the "point" to represent a unit of space, although plaintiff's witnesses have stated that a weight basis might be equally valid. In plaintiff's rebuttal table S G, those costs which plaintiff termed transportation costs were divided by the total number of points delivered to determine transportation cost per point, and were then charged to various size stores in plaintiff's rebuttal table 16 A and 16 B at that unit cost. In [fol. 1296] order for such a refined method of allocating transportation costs to be correct, the space occupied per point, or the weight per point, would have to be uniform for all products; otherwise some products would be charged a disproportionate share of those costs and the customers buying overcharged products would suffer accordingly. The space and weight per point vary widely for different fluid milk products, as is shown by the attached Table 161.

(e) That he and his staff engineer, R. G. Havemeyer, have reviewed the plaintiff's method of deriving the

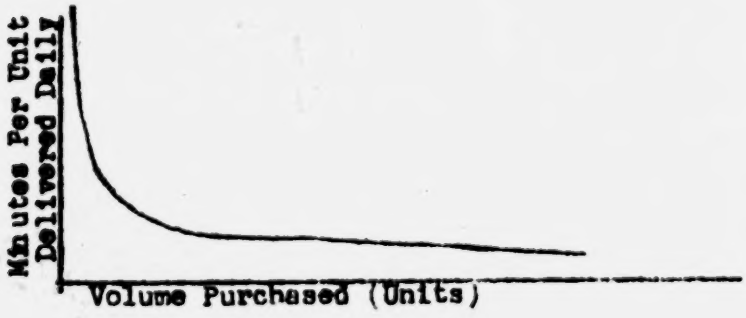
"customer service time per unit delivered" for independent stores as shown in plaintiff's rebuttal chart I A, with supporting data tabulated in plaintiff's rebuttal table 10 A.

Plaintiff has used a data calculation method which is the most favorable method that could have been used for the plaintiff's purposes, but which is an incorrect representation of "customer service time".

The defendant used a customer service time which was the same per unit delivered for all size stores. A graphic presentation would be a straight horizontal line on the following type of chart:



The plaintiff said in effect that the "customer service time per unit" varies by size of store and that it is less per unit for a large volume purchaser than for a smaller one. Graphically, it would appear as follows:



[fol. 1207] The plaintiff's method of arriving at this conclusion is described in the following paragraphs.

During the 1949 time studies, which are the basis for the source of this data, not all stores asked for

and received customer service on all days that the study was made. This fact is demonstrated by plaintiff's rebuttal chart II A and Table 10 A.

In view of the inconsistent requests for customer service, plaintiff factored the data plotted from the time studies (plotted on plaintiff's chart I A) by the ratio 3.30/5.48, in order to derive its "correct customer service time" for any size store. The 3.30 is the average customer service time per unit as computed by the defendant. The 5.48 represents the average customer service time per unit only for those stores actually receiving customer services, as computed by the plaintiff (see plaintiff's table 10 A).

The significant point is that the plaintiff factored every point of his plotted graph by this same ratio to derive the Customer Service curve which he used in subsequent calculations. The approach is not valid unless all customers, regardless of size, receive Customer Service with equal frequency. Plaintiff's rebutal chart II and table 11, however, demonstrate that this is not true. In other words, during the several days of time studies, a greater proportion of large size stores received Customer Service. The proportion of stores receiving Customer Service was not the same for all size categories, although the plaintiff's calculations assume that it was the same. This difference in proportion was very large. For example, plaintiff's table 11 shows the following:

[fol. 1208] 1. Proportion of stores receiving Customer Service on *all* sample days.

0- 5 points per day— 25% of stores
50- 60 points per day— 62% of stores
200-300 points per day— 93% of stores
300-400 points per day— 100% of stores

2. Proportion of stores receiving Customer Service on *no* sample days—reverse trend of above.

0- 5 points per day— 63% of stores
50- 60 points per day— 30% of stores
200-300 points per day— 6% of stores
300-400 points per day— 0% of stores

By using the same factoring ratio (3.30 ÷ 5.48) for all customers, plaintiff did not take into account the actual experience which its own data tabulations disclose. As large independent stores receive customer service a high proportion of time, the observed time data should not have been factored by the ratio 3.30 ÷ 5.48, which is 60.2%, but by the ratio actually experienced; as shown previously this was 93% for 200-300 point stores and 100% for 300-400 point stores. By factoring time data by the correct ratio, the customer service time per unit for large stores would have been a greater value than the plaintiff calculated. Conversely, small volume stores, because they receive customer service a small proportion of time (Example: 0-5 points, 25% proportion) would have had a lower value than the plaintiff calculated.

That he has made this type of calculation, using the data as plaintiff tabulated it. The attached table 101 is a recalculation of the data appearing in plaintiff's rebuttal table 10 A. The effect of this recalculation is shown graphically in attached chart 103. The points designated X are the result of this calculation. The drawn curve is the result of plaintiff's calculations and is the curve used in subsequent plaintiff tables to compute customer service time.

The effect of this calculation is very significant. At volumes higher than 70 units, the calculated value is higher than the plaintiff's curve in every instance except one; at volumes lower than 45 units, the properly [fol. 1209] calculated curve is lower than the plaintiff's curve in every instance. The plaintiff's curve does not fit the properly calculated points. In fact, by inspection, it is apparent that a straight, almost horizontal, line would fit the X points.

Using the same detailed mathematical technique as employed by Mr. Woolley, the line which fits these points best is:

$$\overline{M}=5.691 \cdot U(-.11842)$$

Mathematical tests show that this relationship is real and significant ($r=-.485$, $t=2.482$).

The equation computed by Mr. Woolley with his method is

$$\overline{M}=13.04 \cdot U'(-.34164)$$

In comparing the two equations, the significance of the constant (Mr. Woolley=13.04, Mr. Bergfeld=5.691) is that Mr. Bergfeld's line crosses the vertical axis at a much lower value, namely, at 5.691. The significance of the exponent (Mr. Woolley=—.34164, Mr. Bergfeld —.11842) is that Mr. Bergfeld's line descends at a much slower rate, or has a smaller slope. In non-mathematical language, the line computed by Mr. Bergfeld, using the data arranged by Mr. Woolley, is much closer to a straight horizontal line.

Although the proper handling of data even as presented by Mr. Wolley would be close to a straight horizontal line, in Mr. Bergfeld's opinion the most realistic measure of customer service would not be to make a separate calculation at each volume level as done by Mr. Woolley and in the preceding description, because there is inconsistency in the acceptance of customer service between different size stores, as indicated by plaintiff's chart II, and there is also inconsistency at particular stores and groups of stores as to the acceptance of customer services. Instead, a more realistic approach, which is the method used by Mr. Bergfeld, would be to use a general average (Note: in graphic terms this would be a straight horizontal line); that is, divide the total number of customer service minutes recorded, by [fol. 1210] the total number of units delivered to all stores, whether or not the stores actually receive customer service on the days they were studied. In Mr. Bergfeld's opinion, an attempt to achieve a higher degree of mathematical exactitude on this point is futile because the conditions are not static.

(f) That he has reviewed the plaintiff's data pertaining to (1) the number of fibre and glass containers delivered daily, and (2) the percentage of glass containers to total containers delivered daily; this is described in paragraph 24 of plaintiff's rebuttal pre-trial

order. The data is compiled in plaintiff's rebuttal tables 12A, 12B, 13A, and 13B, and is used to plot plaintiff's rebuttal charts III A, III B, IV A, and IV B.

He has tabulated plaintiff's data from the above tables, without making any revisions or rearrangements, as shown in the attached table (Table 104). This table shows that in the volume range of 0-200 points, that there was 98.1% (823 stores) of the independent stores and 7.6% (5 stores) of the chain stores, and that in the volume range over 200 points that there was 1.9% (16 stores) of the independent stores and 92.4% (61 stores) of the chain stores.

Although 92.4% of the chain stores recorded in plaintiff's study purchased more than 200 points and 98.1% of the independent stores purchased less than 200 points, and therefore practically no overlap of store size, plaintiff has projected the data for independent stores upward through the entire chain store volume range, and conversely projected chain store data downward through the entire independent store range.

(g) That he and his associate, Mr. R. G. Havemeyer, have reviewed Mr. Woolley's data, calculations and charts pertaining to the relationship between the number of containers delivered and the number of points delivered to chains and independents (plaintiff's rebuttal table 13 A and 13 B and charts III A and III B). These charts state that in the higher volume ranges, chain store sales require more containers than independent store sales at the same point volume. As this is [fol. 1211] not easily apparent from plaintiff's charts, the data and lines from plaintiff's charts III A and III B have been plotted on to one graph (see attached chart 105).

The record does not suggest any reason why an independent store doing a given volume of business should use a different number of containers than a chain store doing the same volume of business. Such a difference could not exist unless the customers patronizing one of them purchased a larger share of their fluid milk products in larger containers than the customers of the other.

Based on his knowledge of market conditions in the

Chicago Area, he does not believe there is any reason why customers of independent stores should buy any greater share of their dairy products in gallon or half-gallon containers than customers of chain stores. However, he does consider it likely that small stores of the delicatessen type may sell relatively more single-point containers (quart of milk, pint of cream, etc.) and relatively fewer multiple point containers (gallons, half-gallons, etc.) than the large "super-mart" type stores.

The data which Mr. Woolley has summarized on charts III A and III B indicates that small stores use relatively more containers than larger stores.

Thus plaintiff's tables 12 A and 13 A show that 492 stores (54.4% of total) averaging 50 points per day or less, handled a total of 11,749 points and a total of 9,045 containers, or an average of 77.0 containers for every 100 points. Plaintiff's tables 12 A, 12 B, 13 A and 13 B show that 413 stores (including both chains and independents), averaging more than 50 points per day, handled a total of 68,566 points in 45,607 containers, or an average of 66.5 containers for every 100 points.

This common method of computing an average can be expressed in graphic and mathematical terms by the same type of charts and exponential formulae[1] as Mr. Woolley used in Charts III A and III B. The formula [fol. 1212] for stores in the 0-50 range would be N=0.770 • V(1.000), and the formula for stores in the volume range over 50 points per day would be N=0.665 • V(1.000). A chart containing two lines, one for small volume stores and the other for large volume stores, drawn from these two formulae, is attached as Exhibit 106.

He would point out that the lines on Exhibit 106 do not extend beyond the dots summarizing the basic data, which is in contrast to Chart 108 (which combines plaintiff's charts III A and III B). He would note on Chart

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[1] Explanation: In the general equation N=constant • V(b) where the variable V is raised to the power b, b is called the exponent. If the exponent b=1.000, the equation can be more simply written N=constant • V.

105 that the difference in the slope of the two lines is used to indicate a difference between chains and independents, and that it is only at the high volume ranges that the lines, as extended, indicate that the number of containers purchased by chains is significantly greater than the number purchased by independents. Plaintiff's data shows no experience for independent stores in the high volume ranges, yet plaintiff extends the line for independent stores to double the volume actually experienced and recorded for them in plaintiff's test data (see plaintiff's chart III A and attached chart 105), and it is in this volume range that plaintiff claims that chain stores have a disadvantage on this particular point.

In chart 106, using the plaintiff's sampling data, Mr. Bergfeld has assumed a simple average of 77.0 containers for every 100 points sold by stores at volume levels of 50 points or less, and a similar simple average of 66.5 for larger stores. The exponential equation for each of these two lines uses the exponent "1.000", and it will be noted that the two lines on Chart 106 are parallel.

The difference in the slope of the lines on the plaintiff's charts III A and III B (our chart 105) would be eliminated if the exponents in plaintiff's two exponential equations were "1.000" instead of ".92" and "1.046". Mr. Woolley has acknowledged (Deposition Tr. 104, 106) that either exponent could change as much as 5% by chance variation alone, which could raise the former to .965 and reduce the latter to 1.000 or even below. Mr. Bergfeld would farther point out that an error or poor judgment in (1) selecting the sample route books, (2) recognizing whether a customer is a chain store, independent store or restaurant, (3) re-[fol. 1213] cording data, or (4) calculating with the data, could affect the exponent significantly. These factors could bring both exponents to 1.000 and cause the two lines to be parallel. He would point out that the changes which Mr. Woolley himself made between the first calculation of the exponential equation, and his final, corrected submission, were both in the direction of an exponent of 1.000, and were almost as significant

as the difference in the slope of the two lines which Mr. Woolley still finds, and that the change was caused by incorrectly recognizing less than half a dozen stores in the original computation.

If in fact the relationship between the number of points and the number of containers for all stores is a simple average, and the precise exponent in the exponential equations describing the relationship is 1.000, it is his judgment that the chance that any computation of the mathematical formula to the sixth decimal place, using a sample of route book sales data, would produce the exact exponent of 1.000 is infinitesimal. Mr. Woolley has estimated that chance variation could produce an exponent with as much as a 5% variation in either direction—i.e., from .950 to 1.050. One of Mr. Woolley's formulae, for the particular sample he selected, is already within that tolerance—i.e., the exponent for the chain store equation as calculated by Mr. Woolley is 1.046. The exponent of the independent store equation for his sample, and per his calculations, is 0.92, which is close to the 5% tolerance limit of 0.95. Mr. Bergfeld believes that this chance factor, together with variations caused by other factors mentioned above, could account for the difference in the slope of the two lines on Chart 105.

It is his judgment that the slope of the line on plaintiff's chart III A, which is substantially affected by the data from delicatessen-type stores doing less than an average daily volume of 50 points, is not a realistic measure of the number of containers which large supermart type independent stores may be expected to use in volume ranges over 250 points per day (the volume where plaintiff's two lines cross). In his opinion, plaintiff's data on independent stores at high volume levels is not sufficient to support the conclusion that there is any material difference between chain stores and large independent stores with respect to the number of containers used per point. There does appear to be a dif [fol. 1214] ference between chain and small independent stores, but that difference indicates a higher cost of serving independents.

Considering the data as a whole, Mr. Bergfeld is of

the opinion that the complex mathematics employed by Mr. Woolley does not warrant the conclusion that high volume chain stores use any more containers than independent stores at comparable volume levels, but merely indicates that the small stores (which happen to be independent) use relatively more containers than larger stores.

(b) He would also testify that he and his associate, Mr. R. G. Havemeyer, have reviewed the plaintiff's method of preparing charts relating to the ratio of glass containers to number of points delivered (plaintiff's rebuttal charts IV A and IV B). In his opinion the data on those charts is inconclusive and the curves drawn, particularly that on chart IV B, are not good representations of the plotted data.

He would also point out that there is little overlap of plaintiff's data as explained in paragraph 25(f) above, and that uniform class intervals for the data have not been maintained, although it is preferred procedure to do so.[1] The inconclusive nature of the data allows considerable latitude in plotting it and fitting curves to it.

He would demonstrate, for example, that the data for both chain stores and independent stores could be regrouped into the same class intervals, for both types of stores and plotted on one chart (see Table 107). A curve could also be fitted to these points (see Chart 108), which is different than those which the plaintiff drew, but which probably is no worse an approximation of the data than is shown in plaintiff's chart IV B. [fol. 1215] His general opinion is that the plaintiff's data is too inconclusive to warrant the statistical con-

[1] For example, refer to plaintiff's table 12 A:

a. Between 0 and 50 points, a class of stores has been established for every 5 points;

b. Between 50 and 100 points, a class of stores has been established for every 10 points; and

c. Between 100 and 200 points, a class of stores has been established for every 20 points.

clusions drawn by Mr. Woolley on differences in the

glass container ratios between chains and independents for different size stores.

(i) That paragraph 35(e) of plaintiff's rebuttal pretrial order is incorrect in indicating that plaintiff could not make the same type of cost analysis for each of the restaurant-type customers as plaintiff made in the store delivery analysis.

Information and data for such calculations was available and could have been provided upon request.

(j) That the attached table (Table 109) lists the usual quantity of merchandise in various size containers, as carried by a Bowman Dairy Company bulk wholesale driver in one "swing", when delivering to the restaurant, hotel, etc., type of customer.

A "swing" is one movement made by the driver when unloading merchandise from the delivery truck to the sidewalk or wheeled dolly, and from the wheeled dolly to a final destination spot on the customer's premises.

The information shown in this table was determined by observation and then reviewed and confirmed by the bulk wholesale division's (Central Wholesale Division) route foremen and managers.

As the table shows, the volume of merchandise carried in one movement ("swing") varies, depending upon the size of container involved. The cost of moving merchandise from the delivery truck to the final destination spot therefore is in part dependent upon the size of containers.

He would also point out that the defendant has recognized this variation and other significant delivery characteristics at each customer location in calculating the cost to deliver there.

The plaintiff's calculations, which are based on the incorrect asumption that the delivery cost per gallon of fluid milk products is the same for all products and for all container sizes, neglect this reason for cost differences; the results of those calculations are therefore incorrect. Indented sentence No. 4 on page 10 of Bowman Exhibit No. 42 (A Cost and Price Study of Certain Bulk Wholesale Customers Transactions) specifically explains this point.

[fol. 1216] (k) That with respect to the subject of commissions, that on the basis of information provided him by the executives of Bowman Dairy Company, he concluded that the commission payments to wholesale route drivers were comparable to other forms of premium pay employed in other industries for such matters as time and a half for over-time, or other types of premium pay sought by Union representatives for the purpose of maximizing the number of jobs available, rather than for the purpose of giving individual employees extra incentive to earn additional compensation, and that his treatment of the commissions in the same manner as the balance of the driver's wages is consistent with the treatment of other forms of premium pay in other industries, which is customarily employed as sound cost accounting technique. He is satisfied, after considering the comments of the witnesses submitted by the plaintiff, and further reviewing his own reasoning, that commissions are merely one element of an overall wage scale intended by collective bargaining agreement to be equitable to all Union members, and that commission payments should accordingly be treated for cost accounting purposes a part of the basic wage itself.

3. The attached record of routes #129 and #1471 (Tables 110 and 111) represent a three year history of the two routes which served C. Goldenstern at 427 West 69th Street and G. Psomakos at 2416 West 47th Street. This is a record of customers added to or dropped from these routes, provided by Bowman Dairy Company's South Division as it operated them.

The attached table (Table 112) is a record of the miles traveled by the trucks which served routes #129 and #1471 during each month of 1955.

The attached table (Table 113) is a record of the volume sold by routes #129 and #1471 on the first seven days of each month in 1955. This information was provided by Bowman Dairy Company's South Division; Route Books were the source of data.

Plaintiff used the data in table 13 A which represented the average percentage of glass containers delivered daily

for all divisions. This is the data in Column 2 below. It was [fol. 1217] used by plaintiff for the purpose of refuting some of defendant's statistics.

Each of the three store divisions had a different percentage than the average percentage. Columns 3 and 4 below show which division differed the most from that average, and the amount of difference. Source of all data is plaintiff's rebuttal table 13 A.

Store Size Category	Average % of Glass Containers, 3 Store Divisions	Division Which Differed Most From Average	Amount of Difference
Column 1	Column 2	Column 3	Column 4
0 under 5	18 46%	South	40 7%
5 under 10	8 26	South	38 6
10 under 15	4 17	Forest	59 0
15 under 20	6 64	Forest	5 3
20 under 25	4 99	Forest	37 7
25 under 30	7 11	South	43 6
30 under 35	9 38	South	26 0
35 under 40	6 25	Forest	50 1
40 under 45	7 64	Forest	42 5
45 under 50	9 57	South	11 3
50 under 60	11 68	Forest	7 3
60 under 70	12 80	South	23 4
70 under 80	9 52	Forest	69 9
80 under 90	12 87	South	14 4
90 under 100	10 94	South	34 9
100 under 120	13 10	South	7 5
120 under 140	13 99	Elston	30 9
140 under 160	14 00	Elston	22 0
160 under 180	12 37	Forest	80 4
180 under 200	13 75	Forest	56 7
200 under 400	13 14	South	16 8
400 and over	20 34	Elston	14 9

[fol. 1218] 4. Ray Baer, if called to the stand to testify on behalf of the defendant Bowman Dairy Company, would testify as follows:

(a) That he is the Director of Industrial Relations for the Bowman Dairy Company, that he has been employed by Bowman Dairy Company continuously for over 29 years; and that on the basis of his experience with the Bowman Dairy Company he is thoroughly familiar with its delivery operations.

(b) That the commission payment provisions of the

Collective Bargaining Agreement with Local 753 of the Milk Wagon Drivers' Union were adopted at the request of the Union, and not by the Company; that in his opinion, and in the opinion of other executives of the Bowman Dairy Company, that the purpose of such provisions is not to provide an incentive for store route drivers to sell larger quantities of fluid milk products, but on the contrary, that such provisions are regarded by the dairy, by the drivers, and by the Union as being a method of defining an equitable wage scale, or more specifically, of providing a type of premium pay which is regarded in this industry as roughly the equivalent of time and a half for overtime, or other forms of premium pay which are ultimately desired by the Union for the purpose of providing the maximum number of jobs for members of the Union.

(c) That the Bowman Dairy Company store route drivers are not trained in salesmanship techniques to secure new customers; that a group of solicitors is maintained for this purpose, while store route drivers are expected only to maintain friendly customer relationships through adequate and satisfactory delivery services. In the opinion of the Bowman Dairy Company management, this specialization of labor provides the most efficient use of the route driver's time. The diversion of route driver's time from the performance of delivery services which they are employed to perform, to solicitation or salesmanship would be an inefficient and uneconomical use of time, and therefore contrary to management policy.

[fol. 1219] (d) Although it is conceivable that some drivers may exert some influence on the owners of independent stores as to the volume of fluid milk products which may be delivered to them at specific times, they have no opportunity to exert any influence whatsoever on managers of corporate chain outlets because they have little or no contact with the chain store managers, and have been instructed to drop their merchandise at the delivery entrance to the store, and not to enter the retail sections of those stores.

(e) That the reasons why a driver may have little or no influence on the volume delivered to an independent

store include the following: (1) the company does not want the drivers to spend undue time in sales activities because this kind of activity is not the most efficient use of their particular abilities; (2) the volume delivered to any store is dependent upon the wants of the ultimate consumers who come to patronize that particular store, and any unsold milk must be returned to the dairy; unsold merchandise is an expense to the company because the independent store owner is given credit for it. The route driver has no influence whatsoever upon the ultimate consumers who buy at the store, and therefore who, in the last analysis, determine the amount of milk which shall be sold to that store customer.

(f) That from time to time the Bowman Dairy Company has experimented with extra incentives to induce route drivers to maximize their sales, but has found that these programs are of negligible significance with respect to the activities of wholesale route drivers. Such programs have been effective with retail drivers who deal directly with ultimate consumers, and have also been effective with solicitors who are responsible for developing new accounts, but it has been the experience of the Bowman Dairy Company management that such programs are of negligible value for wholesale route drivers. Retail route drivers and store solicitors are periodically given training in salesmanship in order to improve their ability to develop new business, but store wholesale route drivers are not given such sales training because the Bowman Dairy Company management has determined that such training programs are of no value for wholesale route drivers.

[fol. 1220] 5. Thomas B. Gilmore, if called to testify on behalf of the defendant Bowman Dairy Company, would testify as follows:

(a) That he is an attorney duly licensed to practice law in the State of Illinois and has been so licensed since 1927; that continuously since 1938 he has acted as attorney for the Associated Milk Dealers, Inc., and in such capacity has represented the Milk Dealers in

the Chicago marketing area in their negotiations with the Milk Wagon Drivers' Union Local 753, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in negotiations leading up to the Collective Bargaining Agreements which have been entered into from time to time between said Union and said Milk Dealers.

(b) That the commissions payable on store routes were established for the purpose of curtailing the size of store routes and preventing the consolidation and reorganization of mixed routes.

(c) That in every labor negotiation between the Milk Wagon Drivers' Union and the Associated Milk Dealers, Inc., the representatives of the Union have, as part of their demands, requested increases in the rates of commission payable to drivers on store routes; that during the course of said negotiations, officers of the Union have made frequent public statements to the effect that the purpose for such demands for increases in the rates of commission payable to drivers on store routes was to keep the size of store routes within limits which can be safely served by a route man in a normal working day with due regard to the health, welfare and safety of the route man; that in addition to such public statements, in the course of such negotiations, officers of the Union have repeatedly explained that the purpose of demands for increases in the rates of commission payable to drivers on store routes was to create and preserve a maximum number of jobs for Union members; that said Union officers have repeatedly emphasized that said demands were in furtherance of the objective of obtaining what the Union regards as an equitable pay scale for its entire membership.

(d) That in his opinion, based on his experience in labor negotiations, the commission payments are the economic equivalent in the dairy industry in the City of Chicago of other forms of premium pay, such as [fol. 1221] time and a half for overtime, which are, in general, designed to spread the available jobs among the maximum number of members of the labor force.

6. Bowman Dairy Company has not sold any fluid milk products to the Goldblatt Bros. store at 47th and Ashland since May 11, 1957, or to any other Goldblatt store in the City of Chicago since January 4, 1958. Since that date said stores have been supplied with fluid milk products by Mottle Bros., an independent distributor of Meadowmoor Dairy Products.

7. On September 9, 1958, Bowman Dairy Company was advised by the Great Atlantic & Pacific Tea Company that said company would discontinue its purchases of fluid milk products from Bowman Dairy Company as of November 1, 1958, and that thereafter the A & P stores in the Chicago Area would be served exclusively by The Borden Company.

8. The Government moves that the proffered testimony of Messrs. Elrick, Bergfeld, Baer, and Gilmore be stricken on the following grounds and for the following reasons:

1. Raise collateral issues:
2. Argumentative:
3. Not the best evidence;
4. Incompetent;
5. Irrelevant and immaterial.

For the foregoing reasons, the Government cannot consent to this Order.

Enter:

Campbell, Judge.

December 16, 1958.

[fol. 1222]

TABLE No. 101

Rebuttal to Government's Use of the Point as the Volume Bases for Allocating Transportation Costs

(Fluid Milk Items Commonly Sold to Stores)

Product and Container			Points per Container	Volume Occupied per Unit (Cubic Inches)[1]	Cubic Inches per Point	Pounds per Unit (Product and Container)[2]	Pounds per Point
Product	Size	F or G					
Milk	Gallon	G	4	611	152.8	15.50	3.88
	½ Gallon	G	2	349	174.5	8.50	4.25
	½ Gallon	F	2	230	115.0	5.74	2.87
	Quart	G	1	157	157.0	4.25	4.25
	Quart	F	1	115	115.0	2.88	2.88
	⅓ Quart	G	⅓	94	282.0	1.83	5.49
	⅓ Quart	F	⅓	58	174.0	1.09	3.27
	Pint	G	1	94	94.0	2.50	2.50
	Pint	F	1	79	79.0	1.52	1.52
	½ Pint	G	¼	54	216.0	1.45	5.80
	½ Pint	F	¼	39	156.0	0.78	3.12
Half and Half	Pint	G	1	94	94.0	2.50	2.50
	Pint	F	1	79	79.0	1.52	1.52
Carry-Pak	4½ Pints	F	1	230	230.0		
Dari-Rich							
Egg Nog	Quart	G	4	157	39.3	4.25	1.06
	Quart	F	4	115	28.8	2.88	0.72
Rich Cream	Quart	G	4	157	39.3	4.25	1.06
	Quart	F	4	115	28.8	2.88	0.72
	Pint	G	2	94	47.0	2.50	1.25
	Pint	F	2	79	39.5	1.52	0.76
	½ Pint	G	1	54	54.0	1.45	1.45
	½ Pint	F	1	58	58.0	0.84	0.84
Sour Cream	Pint	F	2	230	115.0	2.38	1.19
	½ Pint	F	1	69	69.0	0.95	0.95

[1] This is based on a study made early in 1955. A check of current conditions disclosed no significant difference. It is the effective space occupied on the truck. In other words, a case of gallon containers contains 4 gallon bottles and occupies 2,444 cubic inches, or 611 cubic inches per bottle.

[2] This is based on a study made October 1956; there has been no change since then. It includes the fluid product, the container, and a proportionate share of the case weight itself. For example, a case of gallon containers contains 4 gallon bottles and weighs 62.0 pounds, or 15.5 pounds per bottle.

[fol. 1223]

TABLE No. 102

Recalculation of Plaintiff's Rebuttal Pre-trial data Relating to Customer Service Time

Reference: Table 10A of Plaintiff's Rebuttal Pre-trial Order

Size Class Of Store	Total Number Stores[1]	Total Units Delivered[1]	Total Customer Service Time (Min.)[1]	Average Units Per Store[2]	Average Min. Per Unit (1/100 Min.)[3]
Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
1 - 5	20	55	3 03	2 75	5 51
5 - 10	43	306	10 73	7 12	3 51
10 - 15	51	602	30 41	11 80	5 05
15 - 20	51	854	40 09	16 75	4 69
20 - 25	56	1,240	50 05	22 14	4 04
25 - 30	38	1,035	41 44	27 24	4 00
30 - 35	40	1,290	40 67	32 25	3 15
35 - 40	40	1,473	39 12	36 83	2 66
40 - 45	38	1,597	55 74	42 03	3 49
45 - 50	44	2,079	88 25	47 25	4 24
50 - 60	55	3,006	98 48	54 65	3 28
60 - 70	40	2,568	91 15	64 20	3 55
70 - 80	53	3,956	123 12	74 64	3 11
80 - 90	32	2,735	90 21	85 47	3 30
90 - 100	28	2,651	86 04	94 68	3 25
100 - 120	42	4,566	135 50	108 71	2 97
120 - 140	20	2,578	122 33	128 90	4 75
140 - 160	15	2,205	87 86	147 00	3 98
160 - 180	10	1,698	42 48	169 80	2 50
180 - 200	6	1,125	67 02	187 50	5 96
200 - 250	12	2,634	74 45	219 50	2 83
250 +	3	899	15 05	299 67	1 67
Totals	737	41,152	1,433 22		

[1] Source: Columns 1, 2, 5, Table 10A, Plaintiff's Rebuttal Pre-Trial Order

[2] Calculation: Column 3 ÷ Column 2

[3] Calculation: 100 x (Column 4 ÷ Column 3)

[fol. 1224]

TABLE No. 103

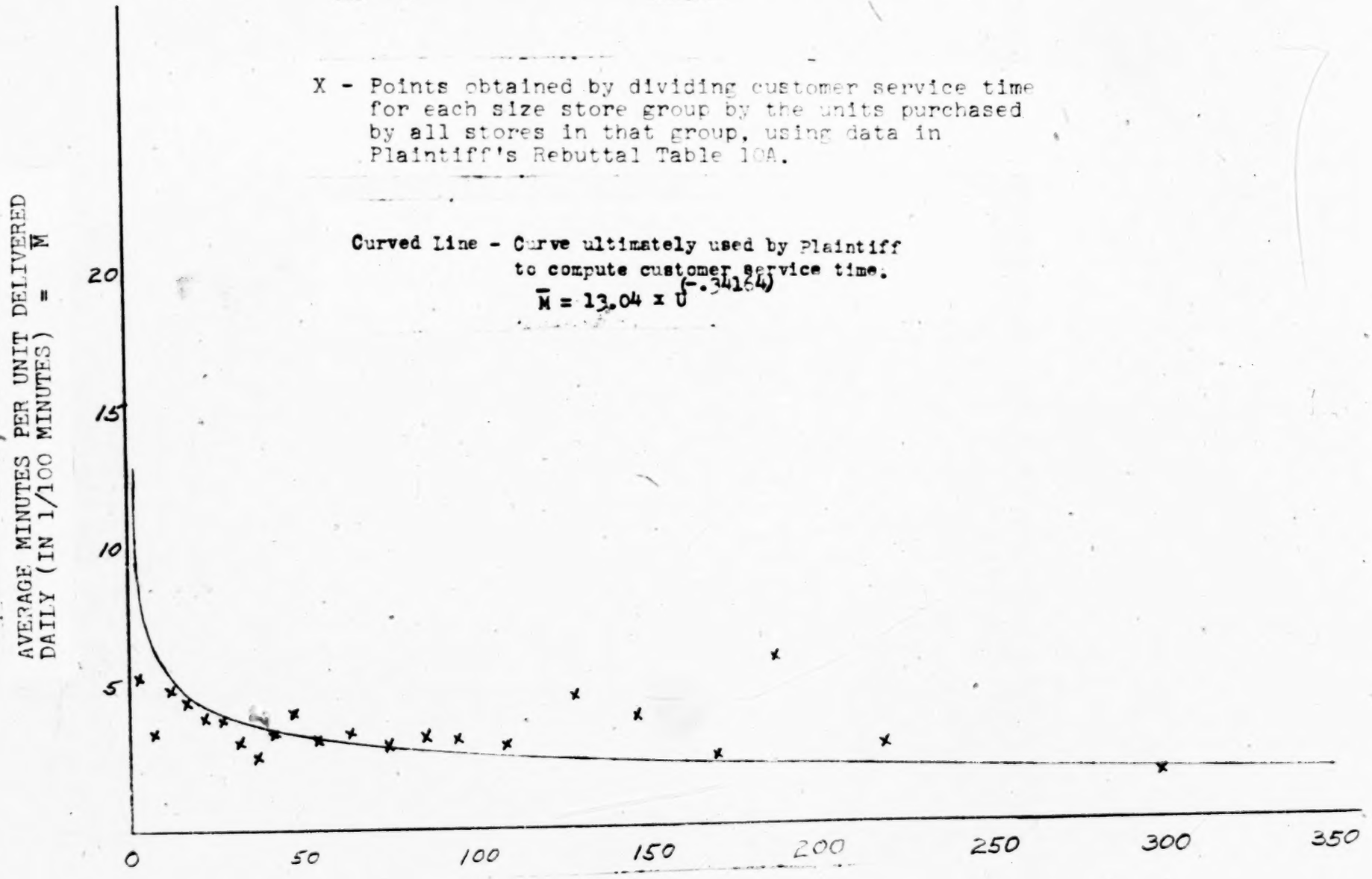
543

RECALCULATION OF PLAINTIFF'S REBUTTAL PRE-TRIAL DATA RELATING TO CUSTOMER SERVICE TIME

X - Points obtained by dividing customer service time for each size store group by the units purchased by all stores in that group, using data in Plaintiff's Rebuttal Table 10A.

Curved Line - Curve ultimately used by Plaintiff to compute customer service time.

$$\bar{M} = 13.04 \times U^{(-.3416)}$$



[fol. 12
Recalc
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160
180
200
25

[fol. 1225]

Table No. 104

Review of Plaintiff's Rebuttal Pre-Trial Data[1]

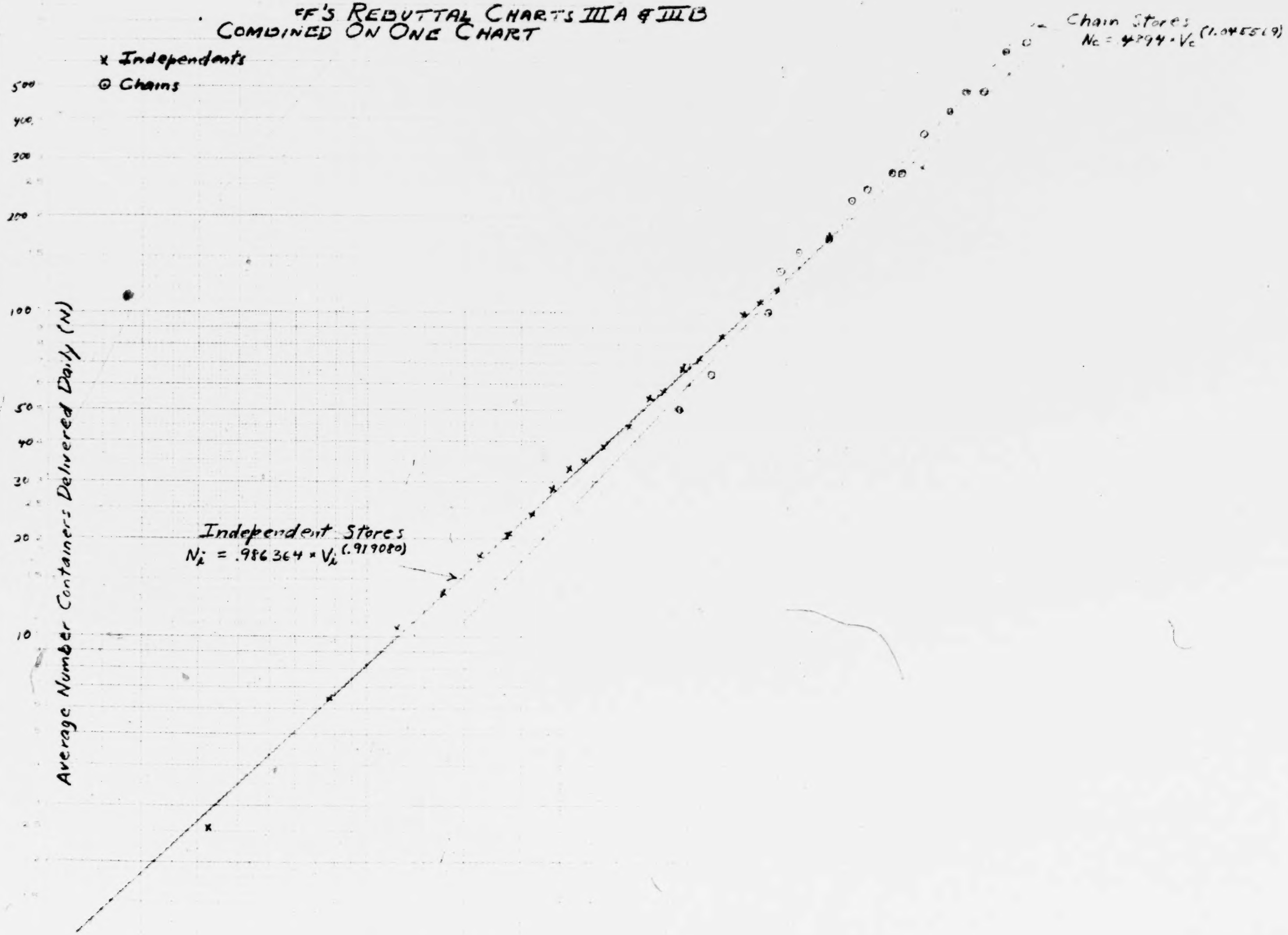
Number of Independent and Chain Stores in the various Volume Groups, as grouped by Plaintiff in Plaintiff Rebuttal Tables 12A and 12B and used for calculations in Plaintiff Rebuttal Charts IIIA, IIIB, IVA, and IVB.

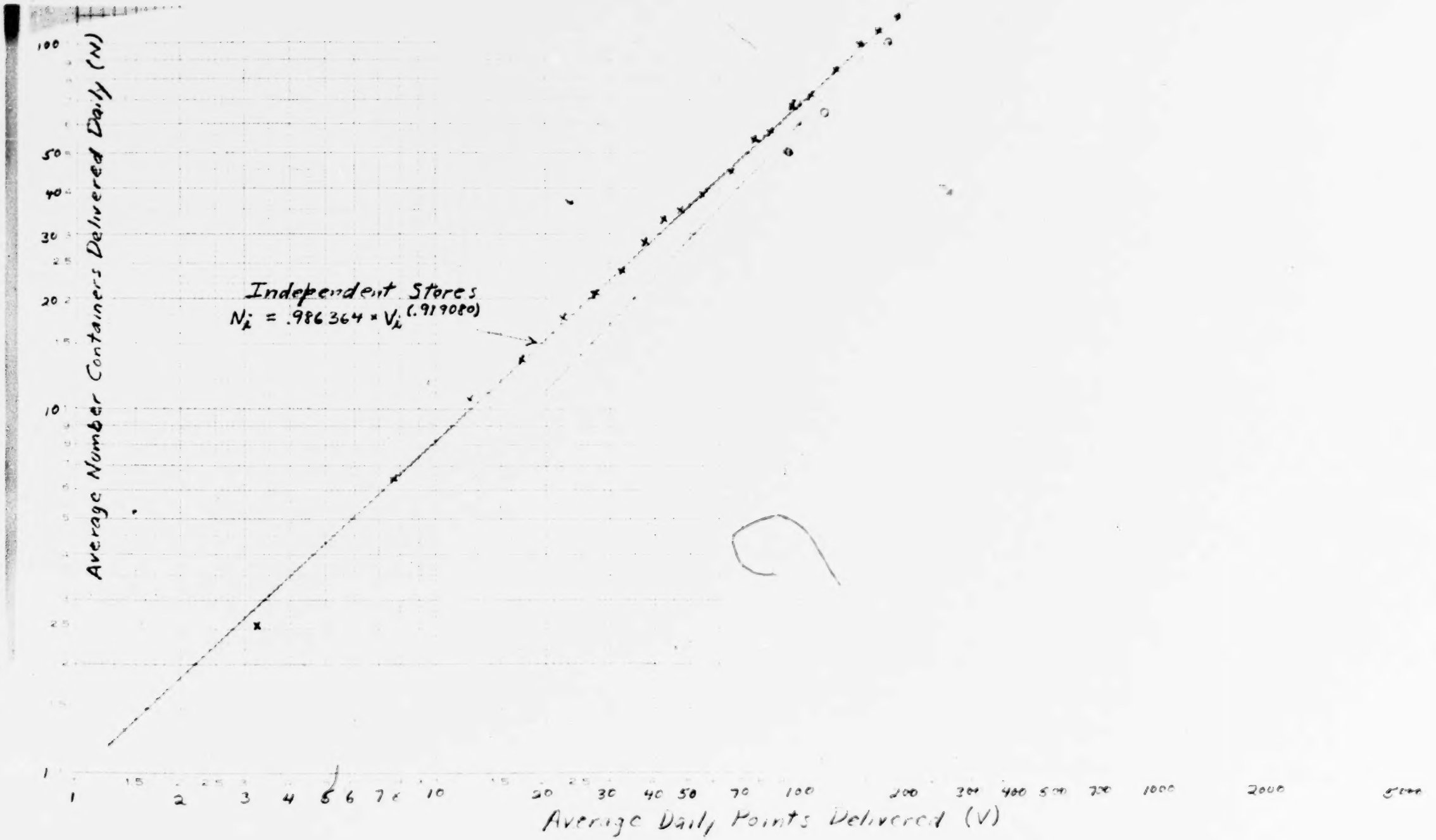
Volume Group	Independent		Chain	
	No. of Stores	Per Cent of Total	No. of Stores	Per Cent of Total
<5	27			
5– 10	61			
10– 15	60			
15– 20	72			
20– 25	55			
25– 30	49			
30– 35	38			
35– 40	41		0	
40– 45	38			
45– 50	41			
50– 60	60			
60– 70	56	98.1%		7.6%
70– 80	46			
80– 90	26			
90– 100	33		1	
100– 120	46		1	
120– 140	31		0	
140– 160	15		0	
160– 180	12		1	
180– 200	7		2	
200– 250			3	
250– 300	12		9	
300– 350			4	
350– 400			8	
400– 450		1.9%	5	92.4%
450– 500			1	
500– 600			8	
600– 700	4		8	
700– 800			7	
800– 900			3	
900–1,000			3	
1,000+			2	
	839		66	

[1] Source: Plaintiff's Rebuttal Tables 12A and 12B.

TABLE No. 105

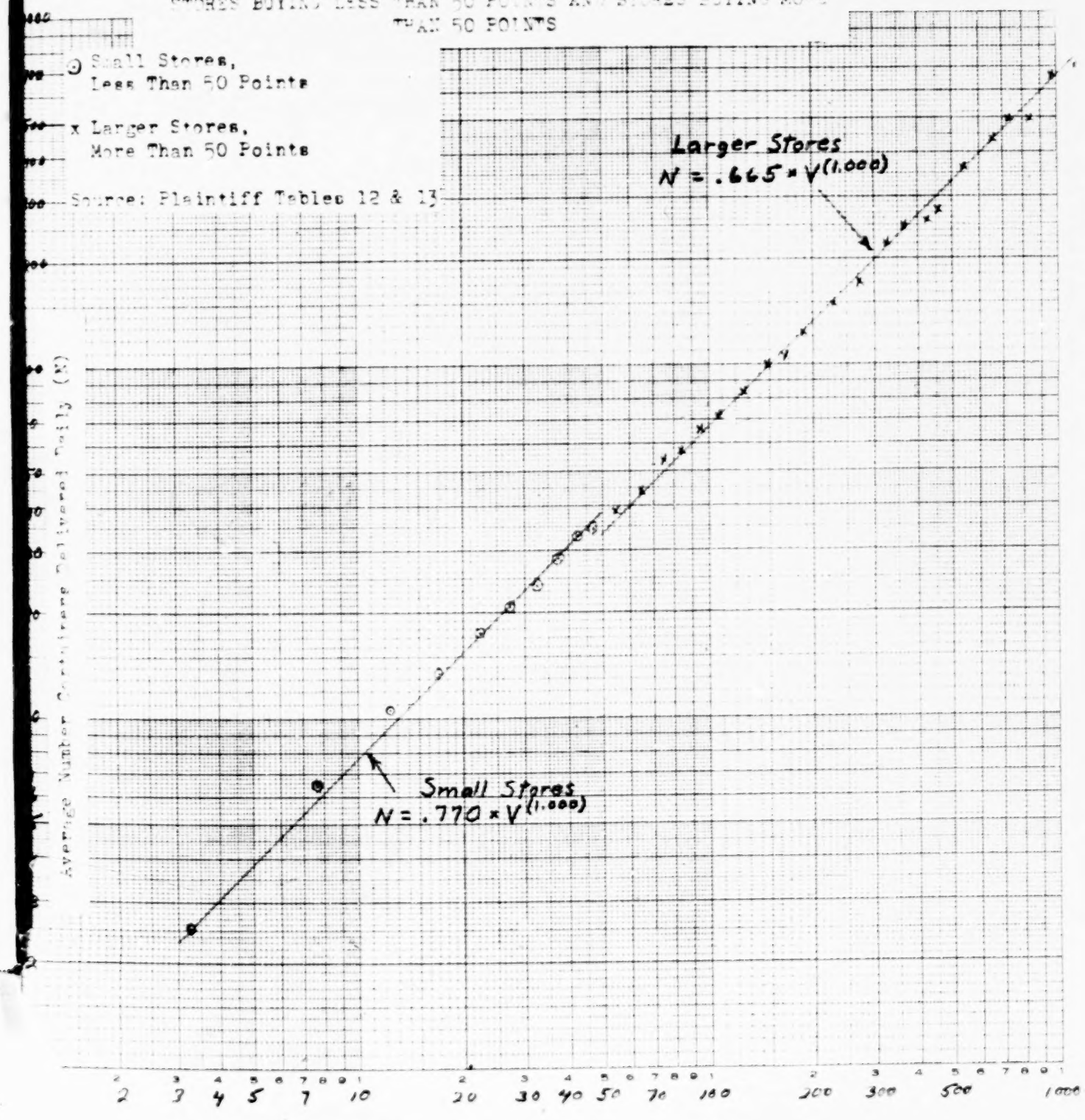
FF'S REBUTTAL CHARTS III A & III B COMBINED ON ONE CHART



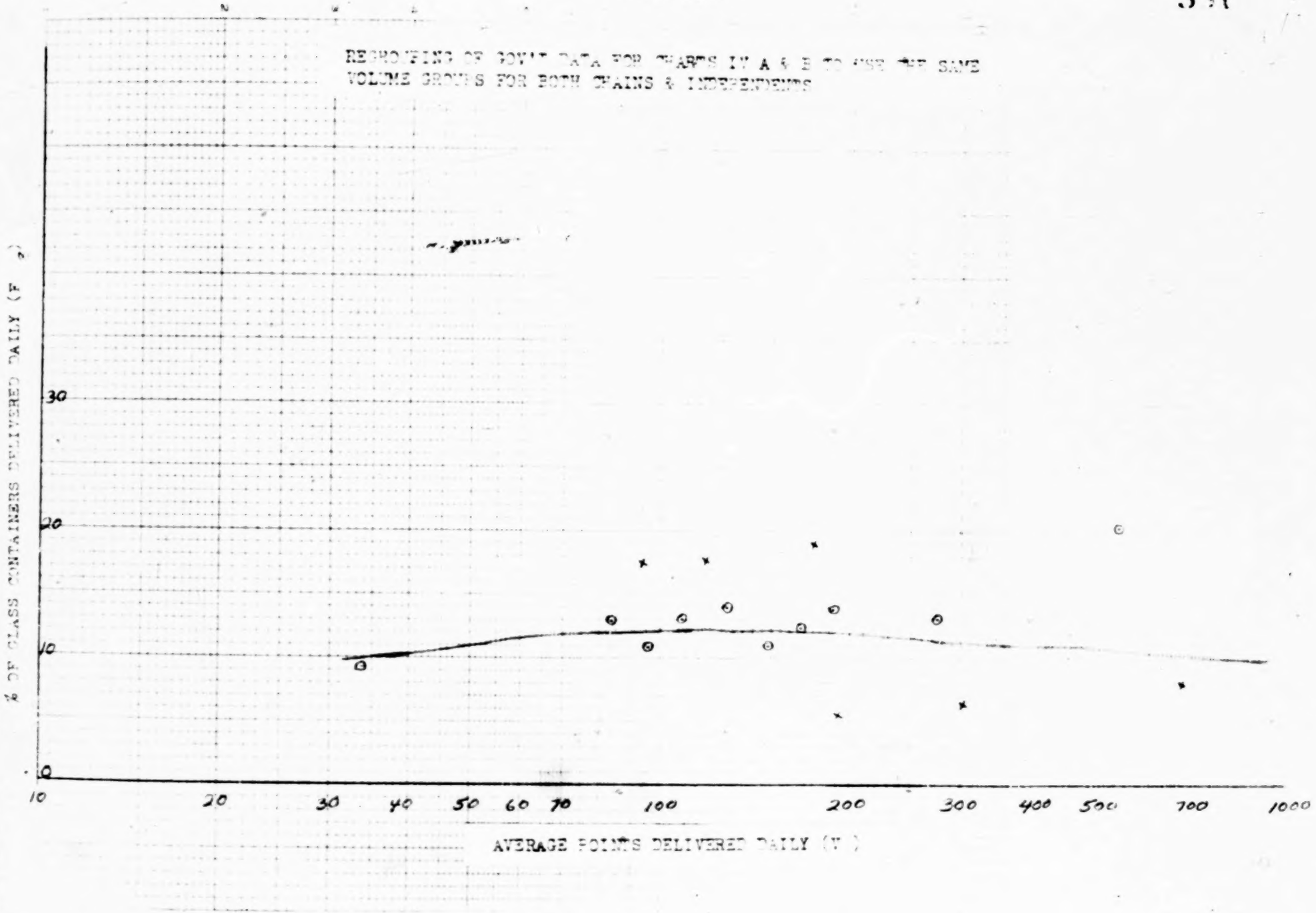

Average Number Containers Delivered Daily (N)
Independent Stores
$N_i = .986364 \times V_i^{(.919080)}$
Average Daily Points Delivered (V)

CONTAINER - POINT RELATIONSHIP

STORES BUYING LESS THAN 50 POINTS AND STORES BUYING MORE THAN 50 POINTS



RECIPROCALS OF BOYT DATA FOR CHARTS IV A & B TO USE THE SAME VOLUME GROWTH FOR BOTH CHAINS & INDEPENDENTS



[Fol. 1230]

TABLE No. 109

Quantity of Merchandise Carried in one "Swing" by a Bulk Wholesale Driver

Container Size	No. of Containers Carried in One "Swing"	Volume Carried In One "Swing"
1. Can Merchandise—driver swings one can at a time.		
10 gallon	1	10 gallons
8 gallon	1	8 gallons
5 gallon	1	5 gallons
2. Cased Merchandise—driver swings one case at a time.		
½ gallon—fiber	12	6 gallons
quart—glass	12	3 gallons
—fiber	24	6 gallons
⅓ quart—glass	24	2 gallons
—fiber	48	4 gallons
pint—glass	24	3 gallons
—fiber	35	4 3/8 gallons
½ pint—glass	24	1 ½ gallons
—fiber	72	4–½ gallons

[fol. 1231]

TABLE No. 110

History of Route Which Served C. Goldenstern

427 West 69th Street

1. On January 1, 1955 on # 129 route—8th stop.

2. Goldenstern

1- 1-55—2 deliveries—9:15 A.M. and 11:45 A.M.
3- 1-55—Charles Oswald—added to route
—B. Nicklas—added to route
4- 1-55—J. Price restaurant quit
7- 1-55—New account added—342 W. 69th Street
11-28-55—Added 4 accounts from # 59 route—service time to Goldenstern changed to 10 A.M.
12-27-55—New account—332 W. 71st Street added
1- 1-56—New account—439 W. 75th Street added
Lost account—7349 Halsted, quit

Sequence changed—Goldenstern served again 9:15 A.M.

3- 8-56—New account—7252 Wentworth
4-27-56—Closed account—224 W. 69th Street
6- 1-56—Closed account—439 W. 75th Street
6-20-56—New account—348 W. 75th Street
7-22-56—Transferred 2 accounts to Englewood Division, 7256 Wentworth and 348 W. 75th Street
7-12-56—Lost account—342 W. 69th Street, quit
11- 3-56—Closed—Kroger—7260 Wentworth
1-12-57—Santee Food—Quit—340 W. 77th Street
2- 1-57—Snack Shop—7204 Wentworth—Closed
4- 3-57—Nichols Food—6757 Wentworth—Closed

Goldenstern—now 7th stop

6-20-57—Jo-Jo-Book—401 W. 69th—Closed for vacation

Goldenstern—now 6th stop

7- 6-57—Fanny—7701 Fielding—Closed for vacation
7-20-57—Goldenstern—Closed for vacation
7-22-57—Fanny—7701 Fielding—re-open
8- 2-57—Goldenstern—427 W. 69th re-open
9- 4-57—Jo-Jo-Book—401 W. 69th re-open
9- 6-57—Reuther Mkt.—524 W. 71st Street—closed
10-22-57—Jim's restaurant—6659 Cottage
—Head Store—6545 Cottage
—Payne—510 E. 67th Street
} added to route
12-31-57—Goldenstern still on # 129 route

[fol. 1252]

TABLE No. 111

History of Route Which Served G. Psomakas

2416 W. 47th Street

1. On January 1, 1955—on #1471 Route—15th stop

2. G. Psomakas

6-1-55—M. Wauzek—4801 Winchester—new account
9-26-55—Seward School—4600 Hermitage—new account
10-2-55—Varlo—5000 California—quit
10-4-55—J. Schuch—2851 W. 59th St.—transferred to Englewood Div.
10-21-55—A. Alberg—3415 W. 51st St.—transferred to Englewood Div.
10-21-55—Psomakas—now 14th stop
10-28-55—J. Kurcharzyk—5254 Washtenaw—new account
1-10-56—E. Nykrin—2702 W. 47th St.—quit
1-10-56—Psomakos—now 13th stop
3-1-56—Kosne—2457 W. 51st St.—New account
3-7-56—S. Grzywna—4337 Woods—transferred to #527 route
G. Raulik—5440 Hoyne
R. Hoffman—4958 Artesian
M. Worezuk—4801 Winchester
G. Fonecki—5218 Campbell
} transferred to Englewood Division
3-7-56—Goldblatt—47th & Ashland—transferred to #527 route
3-8-56—7 accounts added
Raulnick—3109 W. 59th St.
B. Rodgurez—3803 W. 56th St.
Peck School—3826 W. 58th St.
Gauchos—3756 W. 64th St.
B. Rhodes—6601 Pulaski
Hi-Low—3409 W. 63rd St.
J. Hauser—5609 Kedzie
} Transferred from #800 route
4-2-56—McAvy—5947 Damen—new account
6-13-56—St. Michael School—48th & Damen—closed for vacation
6-20-56—Peck School—3826 W. 58th St.—closed for vacation
7-6-56—L. Novak—3759 W. 64th Pl.—quit
Psomakas—now 10th stop
9-5-56—Peck School—3826 W. 58th St.—re-opened
9-6-56—B. Rhodes—6601 Pulaski—quit
9-10-56—St. Michael School—48th & Damen—re-opened
10-24-56—J. Kuchazyk—5254 Washtenaw—quit
11-20-56—Gerts Rest.—3754 W. 63rd St.—new
12-22-56—Kosner—2457 W. 51st St.—closed
2-1-57—Peck School—quit
Psomakas—10th stop
3-1-57—J. Kasner—re-opened
3-30-57—Hi-Low—3409 W. 63rd St.—closed
4-1-57—Hi-Low—3244 W. 63rd St.—opened
6-11-57—St. Michael School—48th & Damen—closed for vacation
Psomakas—now 9th stop
9-9-57—St. Michael School—re-opened
Psomakas—now 10th stop
9-19-57—Frank Mkt.—5605 Crawford—new account
11-1-57—Frank Mkt.—5605 Crawford to early service
Psomakos to 11th stop
12-31-57—#1471 route still serving Psomakas

[fol. 1228]

TABLE No. 107

Regrouping of Governmental Data in Tables 12 & 13 to Use Same Groupings for Both Chains and Independents

Volume Group (Daily Points)	Total Points Del'd		No. of Stores		Average Daily Points		% of Glass Cont. Del'd-Ind.			% of Glass Cont. Del'd-Chain		
	Ind. (Table 12)	Chain	Ind. (Table 12)	Chain	Ind. (Table 12 or Computed)	Chain	Total Cont.	Glass Cont.	Ratio	Total Cont.	Glass Cont.	Ratio
0- 80	22053 5		653	—	33 8	—	16308 7	1495 5	9 2%			—
80- 90			26	—	83 6	—			12 9%			—
90-100			33	1	95 5	93 5			10 9%			17 5%
100-120			46	1	108 0	117 7			13 1%			17 7%
120-140			31	—	127 1	—			14 0%			—
140-160			15	—	148 3	—			11 0%			—
160-180			12	1	167 6	175 6			12 4%			18 9%
180-200			7	2	188 4	191 7			13 8%			5 5%
200-400		7293 6	12	24	274 6	303 9			13 1%	4897 8	310 4	6 3%
400 & Over		24967 7	4	37	536 4	674 8			20 3%	16423 3	1310 3	8 0%
			839	66								

[fol. 1233]

TABLE No. 112

Record of 1955 Mileage, Routes #129 and #1471, South Division

Month	Miles Traveled To, On, and From Routes	
	Route #129	Route #1471
January 1955	523	[1]
February	732	113
March	720	680
April	701	711
May	581	798
June	744	725
July	718	658
August	612	631
September	818	631
October	866	671
November	698	559
December	701	623

[1] Record incomplete for January.

[fol. 1234]

TABLE No. 113

Record of Sales for the First Seven Days of Each Month of 1955, Routes #129 and #1471, South Division Volume (Points)

Month	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Route #129							
Jan.	1360	1301	1228	1154	1622	235	
Feb.	1280	1235	1280	1095	1152	1771	
Mar.	1282	1349	1189	1181	1215	1771	
Apr.	1321	1270	1223	1142	1250	1701	
May	1150	1204	1165	1342	1470	2031	
June	Route Book Missing						
July		1350	1338	1686	1128	1871	
Aug.	1160	1278	1198	1241	1256	1797	
Sept.		1745	1528	1285	1110	1648	
Oct.	1290	1348	1265	1190	1208	1755	
Nov.	1426	1305	1263	1242	1212	1918	
Dec.	1786	1568	1382	1483	1508	2185	
Route #1471							
Jan.	1260	1297	1342	1245	1456	695	
Feb.	1494	1346	1345	1298	1430	1901	
Mar.	1452	1304	1427	1245	1542	1912	
Apr.	1352	1344	1325	1385	1209	1984	
May	1426	1377	1344	1417	1588	2031	
June	Route Book Missing						
July	758	1457	1556	1420	1343	2277	
Aug.	1514	1526	1544	1407	1448	2060	
Sept.	1750	1390	1424	1382	1397	2237	
Oct.	1360	1447	1378	1409	1430	2279	
Nov.	1459	1374	1470	1272	1650	2245	
Dec.	1661	1553	1556	1517	1612	2501	

[fol. 1235] In United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America, Plaintiff,

v.

Borden Company, et al., Defendants

Memorandum, Findings of Fact, Conclusions of Law and Decree—February 27, 1961

Campbell, Chief Judge.

This suit began in June, 1951 by the filing of a complaint charging eight Chicago dairies with various violations of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act (Title 15 U.S.C., Sections 1, 2, 13(a)). Before the taking of any evidence, four of the eight defendants entered into a consent decree prohibiting the various practices which the Government sought to enjoin. The remaining defendants are the Borden Company and a wholly-owned subsidiary (hereinafter collectively referred to as Borden); and Bowman Dairy Company and a wholly-owned subsidiary (hereinafter collectively referred to as Bowman).

[fol. 1236] Since my conclusions rest in some measure upon differences between those practices alleged in the complaint and those practices alleged by plaintiff to exist in the milk industry in Chicago today, it is important to review those portions of the complaint which deal with alleged violations of the Clayton Act. The complaint is twenty-three pages long, and, apart from its prayer for relief, consists of forty-eight paragraphs, only two of which are devoted to the Clayton Act charges, and read as follows:

> "B. *Violations of Section 2(a) of the Clayton Act as Amended.*
>
> "46. Beginning on or about January, 1941, and continuing up to the date of the filing of this complaint, each of the defendants has sold and is continuing to sell for resale fluid milk in interstate trade and com-

merce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality, and the effect of such discrimination may have been and may continue to be to substantially lessen competition or tend to create a monopoly in the sale of fluid milk to wholesale purchasers in the Chicago area or to injure, [fol. 1237] destroy or prevent competition between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended (38 Stat. 730, 49 Stat. 1526, 15 U.S.C. Sec. 13(a). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.

"47. The aforesaid discriminations in price have been granted, often secretly, in the form of preferential prices, discounts, rebates, lump sum cash payments, installment cash sums, and interest-free loans."

The length of the allegations respecting Clayton Act violations fairly indicates the importance which the plaintiff attached to those violations at the 1953 trial, and the amount of time devoted to proof of those allegations, as compared to the magnitude and complexity of the plaintiff's alleged Sherman Act case.

At the close of plaintiff's case in 1953, I dismissed the entire complaint *U. S.* v. *Borden Co.*, 111 F. Supp. 562, [fol. 1238] holding, first with respect to the Sherman Act, that plaintiff had failed to show either monopoly or a conspiracy to monopolize and, second, with respect to the Clayton Act that (even though plaintiff had established a prima facie case) the defendants were effectively prohibited from committing further violations by the terms of a decree entered by another judge of this Court. *Dean Milk Company* v. *American Processing and Sales Company*, No. 49 C 1159. I then stated, at 111 F. Supp. pages 581, 582:

> "A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government; and a consent decree, entered by any judge of this court

without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned. "As a court of equity, I will not perform [fol. 1239] a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations."

On appeal, the Supreme Court affirmed the Sherman Act phase of the case, but reversed and remanded as to the Clayton Act phase on the sole ground that the existence of a private decree does not *itself* deprive the Government of its right to a decree when *the need for injunctive relief is shown*. *U. S. v. Borden Company*, 347 U. S. 514. However, the Court further indicated that the *Dean* Decree is properly one of the many considerations involved in this determination:

"The Government contends that it has 'an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit.' But we cannot say that the existence of the private decree warrants no consideration by the chancellor in assessing the likelihood of recurring illegal ac- [fol. 1240] tivity. We hold only that, in view of the difference in the respective interests sought to be vindicated by the Government and the private litigant, the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree.

"The judgment of dismissal as to the Sherman Act allegations is affirmed; as to the Clayton Act allegations the case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with this opinion." (347 U. S. 514, 520.)

After remand, on the motion of plaintiff, on April 18, 1955, I opened the record for the introduction of further evidence by plaintiff for the purpose of showing the existence of current Clayton Act violations, and by the defendants for asserting affirmative defenses. All of the evidence was taken in the form of stipulations which were then embodied in pre-trial orders, and in the form of depositions of expert witnesses. Afterward, all parties argued their respective positions through able and comprehensive briefs.

I am grateful to counsel for all parties for their coopera-
[fol. 1241] tion and assistance in preparing the lengthy pre-trial orders and the able briefs. Without such cooperation this case might have consumed many weeks of the Court's time.

The sole question now before me is the appropriateness of the requested injunctive relief—whether, in the light of *present* conditions in the milk industry in Chicago, as shown by the evidence presented to the Court after remand, the public interest would be served by the issuance of an injunction in the form prayed by plaintiff's complaint.

Those paragraphs of the complaint, quoted above, relating to the Clayton Act fairly describe the type of evidence which was introduced at the 1953 trial. Plaintiff then showed that defendants had engaged in "stop-buying," that is, the "purchasing" of wholesale outlets. Plaintiff also showed that defendants had made interest-free loans to wholesale customers and granted discriminatory discounts to various customers either outright, or through gifts of fixtures or merchandise.

These practices, described in the complaint and shown at the 1953 trial, were not referred to after remand of the case. Indeed, there is no evidence of any kind to support a finding that any such practices exist today in the milk
[fol. 1242] industry in Chicago. The practice to which the evidence before me relates, as shown by the stipulations of fact prepared after remand, consist of price discriminations which may be summarized as follows:

1. Bowman published and followed, during the years following the remand, discount quotations which on their face discriminated between chain customers and independent stores. For example, from June, 1954

to August, 1955, the published Bowman discount quotations were as follows:

To chain customers (A & P and Kroger): 11 per cent off of the fluid milk list prices regardless of quantities purchased.

To independent stores: A sliding scale quantity discount with a maximum of 8 per cent off of the fluid milk list prices computed on the basis of the average daily "points" purchased each month.

Plaintiff has demonstrated by its Schedule I, comparing five grocery stores, chain and independent, within a radius of one mile and served by the same milk route, and by its Schedule II, comparing four stores, chain and independent, within another radius of one [fol. 1243] mile and served by the same milk route, that a price discrimination exists as against the independent stores under applicable discount quotations.

2. With respect to Borden, plaintiff's evidence as embodied in the stipulations also shows price discrimination between chain and independents by means of published discount schedules. For example, from June, 1954 until August, 1955, the following discount quotations were in effect:

To chain stores (A & P and Jewel): 8½ per cent off of the fluid milk list prices regardless of quantities purchased.

To independents: A graduated quantity discount with a maximum of 4 per cent off of fluid milk list prices computed on the basis of average daily "points" purchased each month. Again, by schedules relating to chain and independent stores within a radius of one mile and served by the same milk route, plaintiff has demonstrated a price discrimination as against independents under applicable discount quotations.

[fol. 1244] Plaintiff has made similar charges of price discrimination respecting the "bulk wholesale customers" of defendants. This class of customers includes, principally, restaurants and hotels. By tables comparing the flat, net prices on customer purchases in the downtown area of Chicago, Illinois, plaintiff has demonstrated with regard

to both defendants price differences among their bulk wholesale customers.

With regard to both classes of customers, plaintiff, in order to show prima facie violations of Section 2(a) of the Clayton Act, must prove that:

1. Defendants were engaged in commerce, and that discriminatory practices occurred "in the course of such commerce";
2. Defendants either directly or indirectly discriminated in price between purchasers of commodities of like grade and quality;
3. That the effect of such discrimination "may be" to substantially lessen competition or to create a monopoly in this line of commerce, or to injure, destroy, or prevent competition with any person who grants such discrimination, or with customers of such person.

It is not open to question that the price differences described above are not price discriminations under Section [fol. 1245] 2(a) in light of *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536. However, defendants argue that these discriminations are not prima facie violations of Section 2(a) on the basis of these reasons:

1. Defendants contend that plaintiff failed to prove that the alleged violations were committed in the course of interstate commerce. A similar contention was before me prior to the 1953 trial upon the motion of defendants. After extensive argument and due deliberation, I rejected the contention and denied defendants' motion. On appeal, this contention was neither pressed by defendants nor considered by the Supreme Court. I have, however, again fully considered the evidence before me and find that defendants' alleged violations with regard to wholesale and bulk wholesale customers did occur in interstate commerce.
2. Defendants contend that the Government has failed to show that there has been any injury to competition. This argument is wholly without merit in view of the well-settled principle that the Clayton Act frowns [fol. 1246] upon any discrimination which "may" injure competition. *Federal Trade Commission* v. *Mor-*

ton Salt Company, 334 U. S. 37; *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152, 154. I note here the interesting analysis of the requirement of injury to competition by the Seventh Circuit Court of Appeals in the recent decision of *Anheuser-Busch Inc.*, v. *F.T.C.*, ——— F. 2d ———, decided upon remand from the Supreme Court. Since that case differs factually from the cause now before me, I do not here find it relevant.

In short, the evidence shows: That the sales made by defendants were in commerce; that the defendants discriminated in price; that the customers of defendants were in competition with each other, and that there may be an injury to competition. I find that the published discount quotations of defendants, which on their face show discriminations between the defendants' wholesale customers, constitute prima facie violations of Section 2(a) of the Clayton Act. I further find that the discriminations between defendants' bulk wholesale customers constitute prima facie violations of Section 2(a) of the Clayton Act.

As I indicated previously, there are many factors which [fol. 1247] affect a determination of this case. Most important is the defense of cost justification raised by the defendants in accordance with the cost proviso of Section 2(a) which reads as follows:

> "Provided, That nothing * * * (herein) contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

Though there has been some disagreement as to whether this provision should be strictly construed so as to require full cost justification of every price differential with mathematical certainty, or whether the provision should be liberally construed so as to allow a reasonable latitude in cost studies, I find that a liberal approach to cost justification studies is today supported by expert, as well as judicial, opinion.

The Supreme Court in *Automatic Canteen Co.* v. *F.T.C.*, 346 U. S. 61 commented specifically at Page 68 upon the "intricacies inherent in the attempt to show costs in a Robinson-Patman proceeding" and the "elusiveness of cost data." The Federal Trade Commission in *In the Matter of Minneapolis-Honeywell Regulator*, 44 F.T.C. 351, stated [fol. 1248] at Page 394:

> "Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error."
>
> • • •
>
> "Where they (cost studies) are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. • • • Respondent's burden under the Act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error."

In *American Can Co.*, v. *Russellville Canning Co.*, 191 F. 2d 38, the Court, finding that the district court "applied too rigid a standard," stated at Page 59:

> "If a manufacturer granting quantity discounts is required to establish and to continuously maintain a [fol. 1249] cost accounting system which will record the expenses incurred in selling every individual customer and all of the data which the plaintiff deems essential, the burden, expense and assumption of risk involved would seem to preclude the granting of quantity discounts, at least until the approval of the plan by the Federal Trade Commission had been secured.
>
> "We cannot say that the District Court was compelled to accept the defendant's justification of the quantity discounts which were granted. If, however,

the system was adopted in good faith and the cost study during the test period of more than four years was honestly maintained, and reflected with substantial accuracy the differences in selling costs as between the customers in Class C and those in Classes A and B, we think the court's conclusion that the justification was inadequate because it was not continued beyond the test period, did not reflect cost differences as between individual customers, and failed to take into consideration conjectural geographical differences in [fol. 1250] selling cost and other matters which might be thought to have some speculative bearing on such cost differences, was not justified."

In Reid v. Harper and Brothers, 235 F. 2d 420, the Court made the following statements at Page 422:

"Both the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data derived from litigation-inspired accounting methods."

"To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyers, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such a requirement might be to discourage all price differentials, even those actually justified by cost distinctions."

In addition, the Report to the Federal Trade Commission by the Advisory Committee on Cost Justification under the Robinson-Patman Price Discrimination Act, filed February, 1956, and the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws concur in supporting a liberal approach to cost justification studies. The Report of the Attorney General's Committee contains [fol. 1251] the following statements at Pages 174, 175:

"As a legal framework, we recommend recognition that a Robinson-Patman cost defense is not susceptible to testing by precise or mechanical rules. We advise a liberal interpretation of the statute's 'due allowance' criterion as enacting a reasonable de minimis concept

to exonerate a challenged price even if an attempted cost defense falls short of 'justifying' it by a fractional amount. Similarly, realistic adaptation of this concept should validate only partially 'justified' price concessions whenever the 'unjustified' portion of the differential alone could not reasonably cause 'injury sufficient to bring the Act into play * * *."

"Because any accounting apportionment of costs essentially involves subjective business judgment, not objective fact, we recommend that a reasonable approximation of production or distribution cost variances to prior differentials—when demonstrated in good faith through any authoritative and sound accounting princi- [fol. 1252] ples—suffice as a matter of law to meet the requirement for justification under the Section 2(a) cost proviso. Applied in this way, the Act should impede no price variation reasonably related to economies in any of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions."

The Cost Justification Report at Page 6 expressly recognizes the "necessity for a broad approach in the administration of the cost proviso" and in discussing the meaning of the words "due allowance" as contained in the cost proviso, comments at Page 9 as follows:

"Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.

"In view of the plus-or-minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), 'due allowance' should not be construed in every case to require full and complete cost justifica- [fol. 1253] tion of a price differential. It should be construed flexibly, so as to require only 'reasonable allowance' for cost differences based on sound accounting and pricing principles."

At Page 11, the Report states:

> "Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. 'Great weight' should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound. A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent."

And at Page 22, the Report concludes:

> "The Committee recognized that the cost proviso of the Robinson-Patman Act operates in a complex area and that many of the problems to which it gives rise are [fol. 1254] not given to ready solution. Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role."

Plaintiff contends that the case of *F.T.C.* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55, dictates that the cost proviso of Section 2(a) must be narrowly construed. However, I find that that opinion, resting solely upon the court's interpretation of Section 2(e) of the Act, is not pertinent here.

I might add here that it is my opinion that the Federal Trade Commission, in matters of accounting detail, is the tribunal possessing *expertise*. I am completely in accord with the suggestion made by the *Supreme Court in Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 at Page 745:

> "It (The Robinson-Patman Act) indicates, too, that the Federal Trade Commission is the appropriate tribunal to hear in the first instance the complicated issues growing out of grievances against a quantity discount practice of a seller."

The above statements of the Courts, the Federal Trade [fol. 1255] Commission Report and the Report of the Attorney General's Committee, set forth the principles which

guide my decision as to the cost justification phase of this case.

I now consider the cost studies submitted by defendants to sustain their cost justification defenses:

1. *Bowman Studies:*

Bowman first maintains, and has attempted to show by studies, that plaintiff has engaged in a careful process of culling and grading of some 2,300 stores available for consideration by plaintiff in the Chicago area in order to show a discrimination among wholesale customers. Bowman contends this "culling and grading" process results in isolated examples of discrimination which are not representative of the situation throughout the Chicago area. Bowman has also submitted several cost studies conducted and analyzed primarily by Albert J. Bergfeld, an expert in the field, which purport to justify the different discounts granted to chains and independents. These studies, which are lengthy and detailed, conclude that the discount [fol. 1256] quotations are justified because of the difference in the cost of delivery between chain and independent stores.

With regard to the alleged price discriminations against bulk wholesale customers, Bowman contends that the price variations complained of were bona fide attempts to meet competition and were also justified by differences in delivery costs and has submitted a detailed cost study to this effect.

2. *Borden Study:*

The Borden Study conducted by J. F. Malone, an expert in the field, assisted by the accounting firm of Haskins and Sells, is a detailed analysis of route activities, branch office clerical activities and district central office activities and concludes in substance that the price discrimination against independent wholesale customers is justified by a consideration of direct and indirect costs.

With regard to the alleged price discriminations against bulk wholesale customers, Borden contends that the price variations complained of were justified

[fol. 1257] by differences in manufacturing costs due to differences in quantities of various products purchased and has submitted summary schedules to this effect.

The defendants have as well submitted by their briefs, a mass of material, much of which is argumentative, explaining and elaborating upon specific parts of the studies. For purpose of this memorandum it is sufficient to find, as I do, that the studies of both Bowman and Borden are products of extensive investigations of many customers within given areas and reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers.

Plaintiff has made detailed criticisms of defendants' wholesale customer cost studies. Among other contentions, plaintiff argues: That defendants have given too broad an interpretation to the phrase "methods or quantities" as used in the cost proviso in preparing their cost studies; that defendants' own cost charts show that the discount differences between their store customers were not justified by cost differences; that Bowman cannot justify its discriminatory prices on the basis of any alleged cost differences resulting from the collection of C.O.D. payments or the rendering of "customer services" in connection with its [fol. 1258] milk deliveries; that Bowman and Borden "customer services" are prohibited by Sections 2(d) and 2(e) of the Clayton Act and outside the scope of Section 2(a); that the Bowman and Borden systems of cost allocations are unsound and improper on several grounds including the use of erroneous premises, statistically unsound standard time formulae and wrongful classification of various functions. Plaintiff has, as well, by Tables, submitted corrections of these alleged deficiencies in defendants' cost allocations.

Another principal criticism of the cost studies relates to their seemingly arbitrary nature. A customer who qualifies as a chain, for example, gets a flat discount regardless of volume purchased, while a customer who qualifies as an independent must reach a prescribed dollar volume in order to qualify for his discount.

Plaintiff has selected some isolated cases where this

seemingly arbitrary classification results in percentage discounts which do not bear a direct ratio to differences in volume of sales. However, this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores. Some measure of business (or accounting) judgment must be used in determining the premises of a cost [fol. 1259] study, and I cannot now find that these defendants have determined premises for these studies which are improper. Certainly, the studies are imperfect in some respects, but any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect.

Plaintiff contends with regard to defendants' bulk wholesale customers that Bowman failed to prove a bona fide meeting of competition as to its customers and also failed to prove a cost justification defense. Plaintiff contends that Borden failed to prove its cost justification defense.

Having fully considered all the evidence before me, as well as the schedules, summaries and tables and arguments relating thereto of the parties, I find that defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification for the difference in prices described above in defendants' published discount quotations.

I further find that defendants' bulk cost studies provide an adequate justification for the difference in price described above with regard to the flat, net prices charged defendants' [fol. 1260] bulk wholesale customers.

I now consider whether a decree should be granted in accordance with the Government's prayer for relief. In reaching a decision on this question I have been guided, among other considerations, by the following:

1. As stated at the outset of this memorandum the practices described in the plaintiff's complaint apparently no longer are followed by the defendants. In any event, such practices would be relevant only to show the present state of the industry and to determine the likelihood of future violations occurring. As Mr. Justice Jackson stated in *U. S. v. Oregon Medical Society*, 343 U. S. 326, at Page 333:

"All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form it is to undo existing conditions, because otherwise they are likely to continue. In a forward-looking action [fol. 1261] such as this, an examination of 'a great amount of archeology' is justified only when it illuminates or explains the present and predicts the shape of things to come." The types of violations now alleged to exist are completely different from those described in the original complaint. No evidence was presented and no argument made that there is a *present* need for injunctive relief to cure such old practices.

Further, these old practices which were the subject of the 1953 trial have already been condemned by the terms of the *Dean* Decree. As I have already indicated, and as the Supreme Court has commented in this case, I am justified in considering *all* factors, as well as the *Dean* Decree, in arriving at this determination.

2. The various practices of which plaintiff *now* complains, consisting of alleged outright discrimination between classes of customers, are shown to have been adequately justified by the defendants' cost studies.

[fol. 1262] 3. The single question for determination in this phase of these proceedings is whether or not I should issue an injunction regulating *all* wholesale sales made by defendants. Such an injunction would, by its nature, be general and all inclusive. And, as the parties well know, in all probability, subsequent proceedings for enforcement, amendment and modification of the injunction would follow.

In short, I would regulate this particular phase of the industry and, in so doing, would continually be called upon to pass judgment on the pricing practices of these defendants. On the basis of the evidence presented, I feel that such a course is impractical and unwarranted.

I wish to make clear, however, that I have not given my stamp of approval to all pricing policies and practices revealed by the evidence. As I have indicated in other parts of this memorandum, these policies and practices have in many instances been imperfect.

Plaintiff is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted.

Accordingly, keeping in mind the admonition of the United States Supreme Court in this very case that:

> "(T)he moving party must satisfy the Court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive;"

I find that plaintiff has shown no need for the exercise of the Court's equitable powers and accordingly, the case must be, and is, hereby dismissed.

I adopt my Findings of Fact the Stipulations of Fact embodied in the pre-trial orders heretofore entered by me.

Further, in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, the facts and conclusions stated in this memorandum shall stand as additional findings of fact and conclusions of law.

Campbell, Chief Judge.

Dated: February 27, 1961.

[fol. 1264] [File endorsement omitted]

In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 51 C 947

United States of America, Plaintiff,

v.

The Borden Company et al., Defendants

Notice of Appeal to the Supreme Court of the United States—Filed April 28, 1961

I

Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final decree dismissing the complaint, entered in this action on February 27, 1961.

This appeal is taken pursuant to Title 15 U.S.C. § 29.

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. All docket entries subsequent to October 27, 1953.
2. Complaint filed June 18, 1951.

[fol. 1265] 3. Opinion and Mandate of United States Supreme Court, filed June 23, 1954.

4. Plaintiff's Motion to Open the Record for the Taking of Further Evidence and Plaintiff's Motion for Leave to Engage in Discovery, both filed January 11, 1955.
5. Motion of the State of Wisconsin for Leave to File Brief *Amicus Curiae*, filed January 11, 1955.
6. Plaintiff's Memorandum in Support of its Motion to Open the Record for the Taking of Further Evi-

dence and in Support of its Motion for Leave to Engage in Discovery, filed January 17, 1955.

7. Response of The Borden Company, Bowman Dairy Company, Ridgeview Farms Dairy, Inc. and Belmont Dairy Company to Plaintiff's Motion to Open the Record for the Taking of Further Evidence, filed January 10, 1955.

8. Memorandum of the State of Wisconsin in Support of its Motion for Leave to File a Brief *Amicus Curiae*, filed January 17, 1955.

9. Brief of Defendants in Response to the Action of the State of Wisconsin for Leave to File Brief *Amicus Curiae*, filed January 27, 1955.

10. Defendants' Memorandum in Opposition to the Government's Motion to Open the Record, and for Leave to Engage in Discovery, filed January 27, 1955.

[fol. 1266] 11. Plaintiff's Reply Memorandum in Support of its Motions to Open the Record and for Leave to Engage in Discovery, filed February 2, 1955.

12. Supplement to Plaintiff's Motion to Open the Record for the Taking of Further Evidence, filed February 2, 1955.

13. Memorandum of the State of Wisconsin in Reply to Defendants' Brief in Opposition to the State's Motion for Leave to File Brief *Amicus Curiae* and Brief of the State of Wisconsin, *Amicus Curiae*, filed February 2, 1955.

14. Response to Supplement to Plaintiff's Motion to Open the Record, filed February 10, 1955.

15. Plaintiff's Rebuttal Memorandum in Support of Plaintiff's Motion to Open the Record, filed February 15, 1955.

16. Memorandum and Order that Government's Motion to Open the Record for Taking of Further Evidence is Granted; Government's Motion for Leave to Engage in Discovery Denied; Motion of the State of Wisconsin for Leave to File a Brief *Amicus Curiae* Denied; entered April 18, 1955.

17. Supplemental Pre-Trial Order [as to Bowman Dairy Company], entered November 4, 1955.

18. Supplemental Pre-Trial Order [as to defendant The Borden Company], entered November 8, 1955.

[fol. 1267] 19. Plaintiff's Exhibit 5 and Schedule IV [Copy of "Gorand's 1951 Edition Street Map of Chicago and Suburbs" showing location of Bowman's and Borden's store customers].

20. Additional Pre-Trial Order Relating to Plaintiff and Defendant The Borden Company, entered September 19, 1957.

21. Copy of Letter dated September 24, 1957 to Judge Campbell relating Plaintiff's Objections to Borden's Pre-Trial Order.

22. A Cost and Price Study of Certain Bulk Wholesale Customer Transactions, Bowman Dairy Company, dated March 1956 [Bowman Exhibit 42].

23. Manual for Establishing and Testing a Store Discount [Bowman Exhibit 4].

24. Discount Schedule Tests (March 1955) [Bowman Exhibit 14].

25. Test of Bracket Discount Plan Effective September 26, 1955 [Bowman Exhibit 15].

26. Test of Store Discount Plan, Effective January 2, 1956 [Bowman Exhibit 16].

27. Statistical Data Relative to Milk and Cream Purchases for Bowman Dairy Company Downtown Chicago Accounts March 1955 [Bowman Exhibits 41, 41 A, and 41 B].

28. Bowman Exhibits 5 through 13 entitled "Discount Schedules 1 through 9."

[fol. 1268] 29. Bowman Exhibit 3 entitled "Survey of Food Store Competition."

30. Bowman Exhibits 1, 2, 3 AAA, 3 BBB, 17, and 17 A, filed December 23, 1957.

31. Supplemental Pre-Trial Order [as to Defendant Bowman Dairy Company], entered December 23, 1957.

32. Plaintiff's Rebuttal Pre-Trial Order as to The Borden Company, entered December 16, 1958 with Rebuttal Exhibits as to The Borden Company, Folders A, B, C, filed December 16, 1958.

33. Plaintiff's Rebuttal Pre-Trial Order as to Bowman Dairy Company, entered December 16, 1958 with

Rebuttal Exhibits as to Bowman Dairy Company, Folders A, B, and C, filed December 16, 1958.

34. Final Pre-Trial Order [as to Borden], entered December 16, 1958.
35. Supplemental Pre-Trial Order [Bowman], entered December 16, 1958.
36. Depositions of: Herbert F. Taggart, April 14 and 15, 1958; Albert E. Sawyer, April 16, 1958; Otto F. Taylor, April 28 and 29, 1958; Elliott B. Woolley, June 23, 1958 and September 11, 1958, filed February 13, 1959. Joseph F. Malone, February 15, 1957, filed February 11, 1957. Albert Joseph Bergfeld, Septem-
[fol. 1269] ber 6 and 7, 1956, filed October 30, 1956.
37. Government Trial Exhibits Nos. 1538, 1539, 1540.
38. Transcript of proceedings before Judge Campbell: July 1, 1954, May 16, 1955, and September 12, 1955;

Transcript of pre-trial proceedings:

September 26, 1955	March 7, 1957
October 6, 1955	May 17, 1957
October 14, 1955	September 19, 1957
November 4, 1955	November 6, 1957
January 6, 1956	December 3, 1957
January 27, 1956	March 14, 1958
April 20, 1956	May 16, 1958
May 18, 1956	September 12, 1958
June 15, 1956	October 31, 1958
November 28, 1956	

39. Post Trial Brief for the United States, filed February 3, 1959.
40. Brief of The Borden Company in Opposition to Post Trial Brief of the United States and Appendix, filed April 13, 1959.
41. Post Trial Brief for the Bowman Dairy Company, filed April 13, 1959.

[fol. 1270] 42. Government's Reply Brief to Post Trial Briefs of the Defendants Bowman Dairy Company and The Borden Company, filed June 2, 1959.

43. Brief of The Borden Company in Opposition to Post Trial Reply Brief of the United States, filed July 2, 1959.

44. Reply Brief of Bowman Dairy Company, filed July 14, 1959.
45. Letter dated July 31, 1959 to Judge William J. Campbell with copy of stipulation of March 17, 1953, attached, filed August 3, 1959.
46. Memorandum, Findings of Fact, Conclusions of Law and Decree, entered February 27, 1961.
47. This Notice of Appeal.

III

The following questions are presented by this appeal:

The District Court found that defendants' pricing systems for the sale of their fluid milk products by which each of the individual grocery stores of a chain received a high, fixed discount regardless of the quantity of its purchases, but independent grocery stores received discounts dependent upon the volume of purchases and in no event as high as that provided to each of the chain stores, constituted a prima facie price discrimination in violation of the Robinson-Patman amendment of Section 2(a) of the Clayton Act. It found, however, that these discriminations were cost justified on the basis of defendants' studies purporting to [fol. 1271] show the "differing methods or quantities" in which defendants' products were sold and delivered to the chain and independent stores respectively.

The District Court further found that defendants had discriminated in price in sales of fluid milk products to their respective restaurant customers and although such price discriminations constituted a prima facie violation of Section 2(a) of the Act, the defendants had met the burden of affirmatively justifying such discriminations under the "cost" proviso of Section 2(a).

The questions here presented are:

1. Whether defendants' pricing systems to chain and independent grocery stores can be cost justified under Section 2(a) of the Act and, if so, whether defendants met their statutory burden of affirmatively showing that their discriminatory pricing practices were based solely upon differences in cost resulting from the differing methods or quantities in which their products were sold or delivered.
2. Whether defendants met their statutory burden of

affirmatively showing that their discriminatory prices to restaurants were based solely upon differences in cost resulting from the differing methods or quantities in which their products were sold or delivered.

s/ Earl A. Jinkinson, s/ Dorothy M. Hunt, Attorneys, Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, HArrison 7-4700.

[fol. 1272] Acknowledgements of Servige. (omitted in printing).

[fol. 1273] Affidavit of Proof of Service (omitted in printing).

[fol. 1274] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

THE BORDEN COMPANY AND BOWMAN DAIRY COMPANY, Defendants-Appellees

DESIGNATION BY BOWMAN DAIRY COMPANY, DEFENDANT APPELLEE, OF ADDITIONAL PORTIONS OF THE RECORD TO BE INCLUDED IN THE TRANSCRIPT TO BE TRANSMITTED TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES—Filed May 8, 1961

Pursuant to Rule 75(a) of the Rules of Civil Procedure for the United States District Court, Bowman Dairy Company, defendant-appellee, by its attorneys, hereby designates the following additional portions of the record in this

case, and requests the Clerk of this Court to include said additional items in the transcript to be transmitted to the Clerk of the Supreme Court of the United States:

1. Answers of Bowman Dairy Company and Ridgeview Farms Dairy, Inc. filed on September 19, 1952.
2. Order entered on February 9, 1959, dismissing Ridgeview Farms Dairy, Inc., as a party defendant.
3. Bowman Exhibit 18.
4. Bowman Exhibit 18-A.
5. Bowman Exhibit 19.
6. Bowman Exhibit 20.
7. Bowman Exhibit 21.
8. Bowman Exhibit 21-A.
9. Bowman Exhibit 21-B.

[fol. 1275] 10. Bowman Exhibit 22.

11. Bowman Exhibit 23.
12. Bowman Exhibit 24.
13. Bowman Exhibit 24-A.
14. Bowman Exhibit 25.
15. Bowman Exhibit 26.
16. Bowman Exhibit 27.
17. Bowman Exhibit 28.
18. Bowman Exhibit 29.
19. Bowman Exhibit 30.
20. Bowman Exhibit 31.
21. Bowman Exhibit 31-A.
22. Bowman Exhibit 31-B.
23. Bowman Exhibit 32.
24. Bowman Exhibit 33.
25. Bowman Exhibit 33-A.
26. Bowman Exhibit 34.
27. Bowman Exhibit 35.
28. Bowman Exhibit 35-A.
29. Bowman Exhibit 35-B.
30. Bowman Exhibit 36.
31. Bowman Exhibit 37.
32. Bowman Exhibit 40-A.
33. Bowman Exhibit 40-B.
34. Bowman Exhibit 40-C.
35. Bowman Exhibit 40-D.
36. Bowman Exhibit 40-E.
37. Bowman Exhibit 37-A.

38. Bowman Exhibit 38.
39. Bowman Exhibit 39.
40. Bowman Exhibit 39-A.
41. Bowman Exhibit 39-B.
42. Bowman Exhibit 40.
43. This designation by Bowman Dairy Company, defendant-appellee, of additional portions of the record to be included in the transcript to be transmitted to the Clerk of the Supreme Court of the United States.
44. Motion of Bowman Dairy Company pursuant to Rule 75(e) of the Rules of Civil Procedure of the United States District Court for an order directing that certain non-essential matter be omitted from the record to be transmitted to the Clerk of the Supreme Court of the United States, filed on May 8, 1951.
45. Any order that may be entered pursuant to the said motion number 44 above.

/s/ L. Edward Hart, /s/ John Paul Stevens, Attorneys for Bowman Dairy Company, Defendant-Appellee.

[fol. 1276] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 947

Honorable William J. Campbell, Judge Presiding

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, ET AL., Defendants

Brief of Defendant the Borden Company in Opposition to the Post Trial Brief of The United States—Filed April 13, 1959

* * * * * * *

[fol. 1277] 2. SUMMARY SCHEDULE NO. I SHOWS THAT BORDEN'S DISCOUNTS TO STORE CUSTOMERS ARE FULLY JUSTIFIED ON THE BASIS OF DIRECT CHARGES ALONE

The simplest of all cost accounting problems is the distribution of direct costs.

The various time studies of routemen's time, and of billing and accounting time, included in the Bordon cost study permit the direct assignment of large segments of the costs of sale and distribution between chain stores and independ-[fol. 1278] ent stores. When a driver spends time at a particular store location giving service to that store, it is obvious that the cost of his time is directly chargeable to that store for cost study purposes. Professor Taggart agreed that activities which drivers perform at customers' premises are "direct costs to be allocated directly to the customers." (T.D. 70-71, App. 14.)

The actual cost of such time, of course, involves more than the mere compensation paid to the driver. Mr. Taylor pointed out, for example, that "vacation and all fringe benefits can also be allocated on a time basis." (O.T.D. 87-89, App. 46-47.)

The fact is that *every one of Borden's discounts can be justified on the basis of direct costs alone.* Rarely has a

discount schedule been so clearly and completely cost justified.

Summary Schedule No. I—"*Cost Justification Based Solely on Direct Costs*"—shows the assignment of direct costs. It is limited to costs which relate directly and exclusively to specific customers or classes of customers. This summary schedule appears on the next page.[14]

Explanation of Summary Schedule No. I

Line One

Line one of this schedule distributes the portion of the labor costs of operating the route which on a time basis can be charged directly against specific locations, and hence directly against classes of customers.

This includes the cost of the time spent on the route activities performed at specific stores as described as items 6 through 23 (APTO pp. 115-119), such as the time spent [fol. 1279] in carrying products into the various stores. It also includes the cost of the time spent at the end of the day in the activities described as items 38, 39, and 40. (APTO pp. 121-122.) The first two of these three items relate solely to chain store customers, and the last item relates solely to independent store customers.

The total direct labor cost of these activities (minutes times cost per minute) was $17,065.24. This total is derived from Schedules XXVI and XXIX (APTO pp. 129, 135) as follows:

Schedule XXVI,	column (e), total	$ 6,285 45	
	column (g), total	9,253 82	
	column (h), total	168 07	(items 38 & 39)
	column (i), total	13 04	(item 40)
Schedule XXIX,	column (e), total	1,344 86	
	Total	$17,065 24	

In line one, the total amount of $17,065.24 appears in the appropriate column, and the amounts of $6,432.52 and $9,266.86 directly chargeable to chain stores and to independents, appear in the next two columns.

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[14] Summary Schedules Nos. I through IV appearing in this brief are the same as those separately furnished to the Court for the Court's convenience.

The total charges to independents ($9,266.86) is then broken down in the next four columns between the four classes of independent stores.

In the last column appears the total ($1,344.86) chargeable directly against non-store customers as shown by Schedule XXIX. (APTO p. 135.)

Line Two

Line two sets forth the labor costs of special deliveries which are directly chargeable to classes of customers on a time basis. The total amount of such direct charges is $72.59, which appears on Schedule XXXI. (APTO p. 142.) The amounts of such expense directly chargeable to each class of customer also appear in Schedule XXXI.

[fol. 1280]

Summary Schedule No. 1

Cost Justification Based Solely on Direct Costs

	Total Cost	Chain Stores	Independent Stores					Non-Store Customers
			Total	Discount Schedule				
				0%	2%	3%	4%	
Direct Costs:								
1. Routemen's direct labor costs	$17,065.24	$ 6,453.52	$ 9,266.86	$ 1,143.26	$3,543.24	$ 2,932.15	$ 1,648.21	$ 1,344.86
2. Special delivery direct labor costs	72.59	36.66	18.20	1.29	3.28	4.53	9.10	17.73
3. Branch office clerical salaries	2,355.51	649.79	1,274.55	325.66	546.14	295.64	107.11	431.17
4. Billing department	466.15	356.38	42.29	12.54	18.33	8.86	2.56	67.48
5. Credit department	60.72	1.30	9.37	2.78	4.06	1.96	.57	50.05
6. Accounting department	21.72	8.25	13.47	3.99	5.84	2.82	.82	
7. Robert F. White & Company	140.83		140.83	41.76	61.04	29.51	8.52	
8. Tabulating department	57.20	12.12	45.08		27.77	13.43	3.88	
9. Bad debt losses	31.58		31.42	9.32	13.62	6.58	1.90	.16
10. Loss on returned products	2,213.82	1,139.20	972.87	109.65	391.19	304.31	167.72	101.75
11. Salesmen's and solicitors salaries	2,065.83		2,065.83	135.10	691.64	752.17	486.92	
12. Total direct costs	$24,551.19	$ 8,657.22	$13,880.77	$ 1,785.35	$ 5,306.15	$ 4,351.96	$ 2,437.31	$ 2,013.20
13. Sales Volume		$195,262.07	$98,672.52	$ 6,554.77	$33,051.13	$35,899.27	$23,167.35	
14. Cost Per $100.00 of Sales		$4.43	$14.07	$27.24	$16.05	$12.12	$10.52	

[fol. 1281] *Line Three*

Line three sets forth certain branch office clerical costs. These costs relate to the activities listed in Schedule XXXIII. (APTO p. 151.) The total of these costs was $2,355.51. (APTO pp. 148-149.) The total figure is given in paragraph 237. (APTO p. 149.)

The costs of certain of these activities, totaling $448.76, were directly chargeable either to chain stores or to independent stores and *non-store* customers on a time basis. (APTO, pars. 239-241, pp. 149-150.)

The costs of the rest of these activities ($1,906.75) were spread on a stop basis—that is, divided between classes of customers on the basis of the number of deliveries made to stores in each classification. (See definition of a "stop" basis, APTO p. 113.) Most of these were clerical activities dealing with sales accounting, such as posting sales to office ledger, balancing routemen's orders against sales, and recapping daily sales by product. (APTO p. 151.)

The units of activity were too small to justify the cost of a time study to measure the fractional amounts of time spent directly related to specific customers or classes of customers. Here the principle of finding a measure which is equivalent to actual time comes into play. As the Cost Justification Report states:

> "However, for cost justification purposes, time does not always have to be actually measured. Instead, logical inferences concerning time may often be accepted in measuring cost. For example, under typical circumstances, it may be assumed that it takes a uniform amount of time to prepare each invoice line, regardless of the article sold or the quantity of articles represented. Under such conditions, the invoice line becomes a valid unit of measure of human effort." (C.J.R. 13.)

[fol. 1282] With respect to these clerical activities, the number of "stops" was used as the "unit of measure of human effort." This was on the assumption that each delivery to a store—or "stop"—constituted a single *order* covering a similar list of products, or constituted a single

total *sale* to a single customer. Thus the "stop" constituted a valid unit measure of the work performed.

Such a measure is customary for distributing sales accounting expense. The Cost Justification Report lists as the units to be used in distributing the costs of a "sales accounting" function the following: number of orders or invoices, or invoice lines, number of transactions, number of accounts. The "stops" used by Borden are equivalent in effect to the "number of orders"; they are also equivalent to the number of "invoices", or sales tickets created; they are also equivalent to the "invoice lines", since the merchandise delivered at each stop ordinarily included the same assortment of products; and they were also equivalent to "number of transactions", since each stop completed a separate sales transaction.

Line Four

Line four sets forth the costs of the billing department in the division main office. The activities of this department were directly identifiable on a time basis as between chain stores, independent stores, and non-store customers, as the report form (Exhibit VII, APTO p. 153) and the analysis (APTO p. 154) make clear.

The amount of this expense chargeable to the three main customer classifications is set forth in paragraph 249 (APTO p. 154), and these amounts are carried forward into line four of Summary Schedule No. I. Only a small amount of this expense was chargeable to independent stores ($42.29). Because of the small amount, this expense [fol. 1283] has been allocated between classes of independent stores on a location basis.[15] (APTO p. 126.)

Line Five

Line five sets forth expenses incurred in the division main office credit department. The weekly costs of this de-

[15] Direct costs of a minor nature are often so allocated because "Establishment and maintenance of the necessary bookkeeping routines for isolating all direct costs is burdensome and is justified only when amounts involved are appreciable and satisfactory results cannot be obtained by other and less expensive methods." (C.J.R. 27-28.)

partment for time spent on exclusively wholesale functions averaged only $64.82, of which $60.72 was allocable to the wholesale customers on the 134 routes covered by the cost study. (APTO p. 155.) This amount was directly chargeable on a time basis to the three main customer classifications—chain stores, independent stores, and non-store customers. (APTO pp. 155-156.) The small amount chargeable to independent stores ($9.37) was in turn allocated between discount classes on a location basis.

Line Six

Line six covers a small item of $21.72 representing the weekly cost of supervising the preparation of discount checks. This was allocated between chain stores and independent stores on a direct time basis. (APTO p. 156.)

Line Seven

Line seven covers a charge for outside computing services in compiling data used in computing discounts to *independent stores*. (APTO p. 156.) This entire charge was directly applicable to independent stores. It was allocated between the discount classes on a location basis. (APTO pp. 156-157.)

[fol. 1284] *Line Eight*

Line eight covers expenses of the tabulating department directly chargeable on a time basis to chain stores and independent stores. Again, the small amount chargeable against the independent stores ($45.08) was allocated between the classes of independent stores receiving discounts on a location basis. (APTO pp. 157-159.)

Line Nine

Line nine sets forth the weekly average of bad debt losses ascribed to wholesale customers. All of these losses for the six years studied were ascribable to independent store and non-store customers; hence, these losses were directly chargeable to those two customer classes. The small amount of costs directly chargeable to independent stores ($31.42) was in turn allocated between classes of independent stores on a location basis. (APTO pp. 159-160.)

Line Ten

Line ten covers the cost on returned products. The report forms used in the cost study were designed to record the returned goods for each location. (Exhibit III, APTO pp. 93-94.) However, it proved to be physically impossible for the time study men to record this information. (APTO p. 95.) Since practical considerations required that a substitute measure be found, the measure used was the time spent by drivers in gathering returned merchandise at each store, because the time so spent was proportional to the quantities returned. (APTO pp. 160-161.) The figures set forth in line ten are listed at the top of page 161 of APTO.

[fol. 1285] *Line Eleven*

Line eleven sets forth the costs of "salesmen's and solicitors' salaries" charged to accounts 721 and 723 23 2-6. (APTO p. 68.) The activities of the "solicitors" are described in paragraphs 112 MD and 113 MD of the cost study. (APTO pp. 70-71.) Since these solicitors solicit the business of independent store accounts, both new and old, but do *not* solicit the business of chain stores (APTO p. 71), the cost of their salaries is directly chargeable to the independent stores.

This cost on a monthly basis was $2,065.83. (Schedule XXIII, APTO p. 75.) The measure selected for distribution of this cost between classes of independent stores was the sales volume of each class.[16] This was done because the time spent by solicitors was proportionate to the volume of business of the customer or prospective customer. This results in a proportionally equal allocation of this cost to each class of independent store customers.

Line Twelve

Line twelve sets forth the totals of the above weekly direct costs by class of customer.

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[16] This distribution does not appear in the pre-trial orders, but is a simple, mathematical computation based on the amount of dollar sales by classes of independent customers shown in Schedule XXXIV. (APTO p. 163.)

Line Thirteen

Line thirteen sets forth the weekly dollar sales to each class of customer. This information appears in Schedule XXXIV. (APTO p. 163.)

[fol. 1286] *Line Fourteen*

Line fourteen sets forth the direct costs assigned to each class of customer expressed in dollars of costs per hundred dollars of sales. This is a simple mathematical computation, made by dividing the dollars of costs shown in line twelve by the dollars of sales shown in line thirteen, and moving the decimal point two places.

How Summary Schedule No. I Proves that the Discounts Given by Borden Were Fully Cost Justified

Summary Schedule No. I demonstrates that all of the discounts given to store customers by Borden were more than justified by differences in the direct costs of sale and delivery to the various classes of customers.

Concentration of attention on direct costs alone is a proper and sound method:

> "It is well to note that in some circumstances a very simple cost analysis is the best one. If the price differential is based entirely on some characteristic of the transaction whose cost can be directly measured, attention may be directed at that item of cost and at no other." (C.J.R. 15.)

Here the price differential was obviously granted in recognition of the marked differences in the direct costs of sale and delivery; hence, if the Borden cost study had been limited entirely to a study of direct costs of sale and delivery, it would have been sufficient.

The following table, constructed from the data set forth in Summary Schedule No. I, graphically illustrates the comparisons:

[fol. 1287]

Table 1

	Differences in costs per $100 of sales	Amount necessary to justify discount	Amount of over-justification
1. Between chain stores and independents getting no discount ($27.24 less $4.43)	$22.81	$8.50[17]	$14.31
2. Between chain stores and independents getting 2% discount ($16.05 less $4.43)	$11.62	$6.50	$5.12
3. Between chain stores and independents getting 3% discount ($12.12 less $4.43)	$7.69	$5.50	$2.19
4. Between chain stores and independents getting 4% discount ($10.52 less $4.43)	$6.09	$4.50	$1.59

This table demonstrates that the discounts attacked by plaintiff were fully cost justified on the basis of direct costs alone.

No account need be taken of any joint and indirect costs whatsoever in order to establish the defense of cost justification. Thus there is no need to debate the relative virtues of one or another of the possible yardsticks used to allocate such joint or indirect costs.

3. Summary Schedule No. II Shows that the Margin of Cost Justification when Indirect Route Labor Costs and Overhead Costs are Distributed to Follow Direct Costs is so Great as to Eliminate All Doubts as to the Sufficiency of the Cost Differentials to Justify the Discounts

Summary Schedules Nos. II and III have been prepared in order to demonstrate that, on any of several bases, an allocation of indirect costs will increase rather than decrease the cost differentials established by the distribution of direct costs.

Summary Schedule No. II is based on the use of the common and approved method of permitting indirect costs which are related to the direct costs to be allocated to follow the application of direct costs.

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[17] A discount of 8½% equals $8.50 on each $100 of sales.

[fol. 1288] a. *Use of the Distribution of Direct Costs as a Measure of Allocating Related Indirect Costs Is a Rational and Accepted Method.*

One of the most common methods of cost allocation is to ascertain the costs directly chargeable to different purchasers, commodities, or transactions, and then let indirect costs closely related to the direct costs be allocated in the same proportion. Here the "service unit" or measure used in allocating such indirect costs is the distribution of the costs which are directly chargeable.

Textbooks and plaintiff's witnesses unite in their approval of this method of allocation. Thus Professor Taggart testified:

> "Certain indirect costs are permitted to follow the direct. This means that the way in which direct costs are applied may reasonably be used as a service unit for allocating such indirect costs." (App. 11 summarizing T.D. 50-51.)

Plaintiff's witness Taylor also agreed that:

> "Sometimes indirect costs can be permitted to follow direct costs." (App. 43 summarizing O.T.D. 207.)

The list of suggested service unit for allocating the costs of various distribution function given by the Cost Justification Report (C.J.R. 28) contains numerous examples of the use of direct costs as a measure for allocating indirect costs. Thus, speaking of the function of "Operating Service", the Cost Justification Report suggests that it be "treated as overhead of selling and technical service function and allocated on same basis." As Professor Taggart admitted,

> "The method just described is certainly a common method of allocating operating service costs." (App. 11 summarizing T.D. 61-64.)

[fol. 1289] Similarly, speaking of the function of "Sales Management", the Cost Justification Report suggests that it be,

> "treated as overhead of the functions managed, and allocated either on basis of all costs previously charged or on basis of payroll of persons supervised." (C.J.R. 28.)

Professor Taggart also pointed to examples given in the section of the Accountants' Handbook on "Distribution Costs" (of which he was the author), which suggest that overhead or indirect costs be allocated on the basis of letting them "follow direct costs or previously allocated expenses". (T.D. 60-61; App. 11.)

Mr. Malone, who was intimately familiar with the operations of the dairy business, testified that the indirect routemen and truck expenses may be allocated to specific customers "in proportion to the costs directly chargeable to such customers on a time basis". (APTO p. 122.) These costs included the cost of routemen's activities in preparing their trucks for the day's work, in driving to and from the route area, and the like—matters which will be spoken of hereafter as "routemen's indirect labor costs". The costs referred to also include the expenses of maintaining and operating the delivery trucks, which will be referred to hereafter as "wholesale truck costs". Mr. Malone also stated that

> "it would be entirely proper to allocate all of these cost elements listed in paragraph 110 of this Order in proportion to the ascertainable direct costs to individual customers and classifications of customers, and that such method of allocation would be entirely consistent with, and fully justified by, standard cost accounting practices." (APTO p. 72.)

These costs include overhead expenses incurred in the Irving Park and Englewood branches, such as "Salaries-Supervision" and the like, charged to the accounts tabu-[fol. 1290] lated in paragraph 110. (APTO pp. 68-70.) The average weekly charges to these accounts are set forth in Schedule XXIII. (APTO pp. 75-76.)

Another type of costs which may properly be allocated on the basis of direct costs is the general overhead and administrative costs of the Chicago Milk Division main office, so far as those costs are allocable to the wholesale

routes operated out of the Englewood and Irving Park branches. These expenses are listed and analyzed in Schedule XXXV. (APTO p. 7.)

Summary Schedule No. II, appearing on the next page, shows the results where this well recognized accounting principle is followed.

Explanation of Summary Schedule No. II

Lines One Through Twelve

Lines one through twelve are identical with the same lines appearing on Summary Schedule No. I.

Line Thirteen

Line thirteen first sets forth the total route indirect labor costs ($12,177.26), which amount is composed of the total costs of the activities described as items 1 through 5, and 24 through 37. (APTO pp. 114-115, 119-121.) The cost of the time devoted to these activities is set forth in Schedules XXVI and XXIX (APTO pp. 129, 135), as follows:

[fol. 1291]

Summary Schedule No. II

Cost Justification Based on Allocation of Major Indirect and Overhead Costs on Basis of Direct Cost

		Grand Total	Chain Stores	Sub-total Independent Stores	Independent Stores by Discount Schedule Class 0%	2%	3%	4%	Non-store Customers
Direct Costs:									
1.	Routemen's direct labor	$17,065 24	$ 6,453 52	$ 9,266 86	$ 1,143 26	$ 3,543 24	$ 2,932 15	$ 1,648 21	$ 1,344 86
2.	Special delivery direct labor	72 59	36 66	18 20	1 29	3 28	4 53	9 10	17 73
3.	Branch office clerical	2,355 51	649 79	1,274 55	325 66	546 14	295 64	107 11	431 17
4.	Billing department	466 15	356 38	42 29	12 54	18 33	8 86	2 56	67 48
5.	Credit department	60 72	1 30	9 37	2 78	4 06	1 96	57	50 05
6.	Accounting department	21 72	8 25	13 47	3 99	5 84	2 82	82	
7.	Robert F. White & Company	140 83		140 83	41 76	61 04	29 51	8 52	
8.	Tabulating department	57 20	12 12	45 08		27 77	13 43	3 88	
9.	Bad debt losses	31 58		31 42	9 32	13 62	6 58	1 90	16
10.	Loss on returned products	2,213 82	1,139 20	972 87	109 65	391 19	304 31	167 72	101 75
11.	Salesmen and solicitors	2,065 83		2,065 83	135 10	691 64	752 17	486 92	
12.	Total direct costs	$24,551 19	$ 8,657 22	$13,880 77	$ 1,785 35	$ 5,306 15	$ 4,351 96	$ 2,437 31	$ 2,013 20
Indirect Costs:									
13.	Routemen's indirect labor	$12,177 26	$ 4,293 70	$ 6,885 02	$ 885 41	$ 2,632 14	$ 2,158 45	$ 1,209 02	$ 998 54
14.	Special delivery indirect labor	271 69	95 80	153 61	19 75	58 73	48 16	26 97	22 28
15.	Wholesale truck costs	7,508 89	2,647 63	4,245 53	545 98	1,623 07	1,330 97	745 51	615 73
16.	Total indirect delivery costs	$19,957 84	$ 7,037 13	$11,284 16	$ 1,451 14	$ 4,313 94	$ 3,537 58	$ 1,981 50	$ 1,636 55
17.	Total direct and indirect sales and delivery costs	$44,509 03	$15,694 35	$25,164 93	$ 3,236 49	$ 9,620 09	$ 7,889 54	$ 4,418 81	$ 3,649 75
Overhead Expense:									
18.	Advertising allowance	$ 2,098 34	$ 1,303 74	$ 671 42	$ 43 91	$ 224 72	$ 244 53	$ 158 26	$ 123 18
19.	Branch overhead expense	20,753 42	7,317 66	11,733 98	1,508 99	4,485 90	3,678 60	2,060 49	1,701 78
20.	Soda straws, etc.	57 34							57 34
21.	General and administrative expenses	4,327 59	1,525 91	2,446 82	314 66	935 42	767 08	429 66	354 86
22.	Total overhead expense	$27,236 69	$10,147 31	$14,852 22	$ 1,867 56	$ 5,646 04	$ 4,690 21	$ 2,648 41	$ 2,237 16
23.	Grand Total Costs	$71,745 72	$25,841 66	$40,017 15	$ 5,104 05	$15,266 13	$12,579 75	$ 7,067 22	$ 5,886 91
24.	Costs Per $100.00 of Sales		$13 23	$40 56	$77 87	$46 19	$35 04	$30 51	

[fol. 1292]

Schedule XXVI, column (h)	$ 845.14 [18]
Schedule XXVI, column (i)	4,398.76 [19]
Schedule XXVI, column (j)	1,071.24
Schedule XXVI, column (k)	3,728.50
Schedule XXIX, column (d)	2,133.62
	$12,177.26

These activities were those not clearly chargeable directly to specific customers, such as driving to and from the route area (item 25), icing the truck before starting to the route (item 3) and parking it at the end of the day (item 32).

In line thirteen, this amount of $12,177.26 is allocated between classes of customers in the same proportion as the total direct expenses were charged, as shown by line twelve.

Line Fourteen

Line fourteen takes the total indirect expense of special deliveries, shown as the total of column (c) on Schedule XXXI (APTO p. 142), amounting to $271.69, and allocates this expense between classes of customers in the same proportion as the total direct costs shown in line twelve were charged.

Line Fifteen

Line fifteen starts with the average weekly costs of operating the wholesale route trucks, amounting to $7,508.89, shown on Schedule XXXII. (APTO p. 145.) This joint cost is then allocated among classes of store customers in proportion to the direct costs of route operation as shown in line twelve.

[fol. 1293]

Line Sixteen

Line sixteen sets fort hthe total of the indirect delivery costs recorded in lines thirteen, fourteen, and fifteen.

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[18] This is the total of column (h) ($1,013.21) less $168.07 covering items 38 and 39.

[19] This is the total of column (i) ($4,411.80) less $13.04 covering item 40.

Line Seventeen

Line seventeen sets forth the total direct and indirect sales and delivery costs computed by adding the figures in line twelve to those in line sixteen.

Line Eighteen

Line eighteen sets forth the charges to accounts 721 and 723-23-2-299, "Advertising allowance to stores". (APTO p. 70.) This allowance was "available on the same terms to all store customers." (APTO p. 70.) The weekly average of this expense was $2,098.34, as shown by Schedule XXIII. (APTO p. 76.) Since these allowances were based directly on the volume of products sold, this expense is allocated to classes of store customers in proportion to the volume of sales as shown by Schedule XXXIV. (APTO p. 163.)

Line Nineteen

Line nineteen covers the balance of the overhead expenses charged to the branch accounts listed in paragraph 110. (APTO pp. 68-70.) The total weekly average of the charges for these expenses listed in Schedule XXIII is $24,974.93. (APTO p. 76.) However, this amount includes three types of expenses which have to be deducted from the total given above before the allocation of the resulting balance in line nineteen. These deductions are as follows:

(1) The charges to accounts 721 and 723-23-2-97 and 171 are described in paragraph 109 (APTO p. [fol. 1294] 68) and were for soda straws and automatic vending machine maintenance. These charges do not apply to store customers, and hence were deducted from the total figure of $24,974.93 mentioned above. The total weekly average of these two items of expense was $57.34 ($46.58 plus $10.76), which figures appear in Schedule XXIII. (APTO p. 75.) This amount appears in line 20.

(2) The weekly average charges for "advertising allowances" of $2,098.34, set forth in line eighteen, were included in the total of $24,974.93 in Sched-

ule XXIII and hence had to be deducted to avoid duplication.

(3) The total figure of $24,974.93 also included the $2,065.83 weekly average salaries and wages of solicitors charged to accounts 721 and 723-23-2-6 which have already been set forth at line eleven. This amount again had to be deducted to avoid duplication.

The balance after these three deductions is $20,753.42, which is the amount set forth in line nineteen and allocated on the basis of the direct expenses shown in line twelve.

Line Twenty

Line twenty accounts for the $57.34 explained above, and is the amount of charges for soda straws and automatic vending machine maintenance. This figure is set forth solely for the sake of completeness.

Line Twenty-One

Line twenty-one sets forth the general and administrative expenses of the Chicago Milk Division which are listed and described in Schedule XXXV. (FPTO p. 7.) The [fol. 1295] total weekly average amount of these expenses applicable to the surveyed routes was $5,074.21, as is shown by that Schedule. From this amount the sum of $746.62 of direct costs of this Chicago Milk Division, already set forth in lines four, five, six, seven and eight, was deducted. The balance of $4,327.59 was allocated on the basis of the direct expense shown in line twelve.

Line Twenty-two

Line twenty-two sets forth the total of the overhead expenses listed in lines eighteen, nineteen, twenty, and twenty-one.

Line Twenty-three

Line twenty-three gives the grand total of all costs, and is computed by adding the amounts appearing in lines twelve, seventeen, and twenty-two.

Line Twenty-four

Line twenty-four computes the totals of all expenses appearing in line twenty-three in terms of dollars of costs per $100 of sales. This is computed in the same manner as line fourteen of Summary Schedule No. I.

How Summary Schedule No. II Proves That the Discounts Given by Borden Were Fully Cost Justified

Summary Schedule No. II shows that an analysis of indirect and overhead costs, and an allocation of those costs on the basis of direct costs, strengthens and confirms the conclusion to be drawn from Summary Schedule No. I. This is true even though care was taken to segregate costs, such as advertising allowances, which could not properly be allocated on these bases; and care was taken to eliminate costs, such as those for soda straws, which were not applicable to store customers.

[fol. 1296] The following table, constructed from the data set forth in Summary Schedule No. II, shows the wide margins by which the discounts are justified by this method of distributing costs:

Table 2

	Differences in costs per $100 of sales	Amount necessary to justify discount	Amount of over-justification
1. Between chain stores and independents getting no discounts ($77.87 less $13.23)	$64.64	$8.50	$56.14
2. Between chain stores and independents getting 2% discount ($46.19 less $13.23)	$32.96	$6.50	$26.46
3. Between chain stores and independents getting 3% discount ($35.04 less $13.23)	$21.81	$5.50	$16.31
4. Between chain stores and independents getting 4% discount ($30.51 less $13.23)	$17.28	$4.50	$12.78

Professor Taggart, in writing in the Accountants' Handbook about the cost justification accepted by the Federal Trade Commission in the *Matter of Bird and Son*, 25 F. T. C. 548 (1937), where, as here, large differentials in direct costs were shown, commented that

> "the justification presented was very sweeping. No amount of quibbling over precise methods of allocation would have substantially affected the conclusion."

In the present case, the cost justification shown in Summary Schedules Nos. I and II is "very sweeping" and "quibbling over precise methods of allocation" will not change the result.

[fol. 1297] 4. Summary Schedule No. III Shows that, Even When Branch Overhead and General Administrative Expenses are Disregarded, and Indirect Delivery Costs are Allocated on a "Stop" Basis, the Discounts Granted by Borden Were Cost Justified by so Wide a Margin as to Preclude Any Challenge.

Summary Schedule No. II demonstrated that the use of direct costs as the yardstick for the measurement and allocation of closely related indirect and overhead costs confirms and emphasizes the wide margin by which Borden's discounts were cost justified.

The question next arises whether the use of other reasonable and common service units would corroborate or rebut the inferences to be drawn from the analyses already presented.

One basis of allocating indirect delivery costs suggested in the cost study was the "stop" basis, which consists of dividing the costs of a particular activity by the total number of deliveries made to customer locations during the weeks in which the routes were surveyed. (APTO p. 113.) The number of "stops" by customer location is set forth in paragraph 202. (APTO p. 126.)

"Stops" are equivalent to "deliveries," or "orders," since each "stop" resulted in a single "delivery," and thus in the filling of a customers "order." As will be demonstrated later (*post*, pp. 91-93), the use of "stops," "deliveries," or "orders" as the service or measuring unit is a common and well-recognized method of allocating delivery costs.

Summary Schedule No. III is based on the use of the "stop" basis to allocate all indirect route labor and truck costs and is found on the next page.

[fol. 1298]

Summary Schedule No. III

Cost Justification on the Basis of Direct Costs Plus Indirect Delivery Costs Allocated on the Basis of Number of Deliveries

		Total	Stores	Sub-total Independent Stores	Independent Stores by Discount Schedule Class 0%	2%	3%	4%	Non-store Customers
Direct Costs:									
1.	Routemen's direct labor	$17,065 24	$ 6,453 52	$ 9,266 86	$ 1,143 26	$ 3,543 24	$ 2,932 15	$ 1,648 21	$ 1,344 86
2.	Special delivery direct labor	72 59	36 86	18 20	1 29	3 28	4 53	9 10	17 73
3.	Branch office clerical	2,355 51	649 79	1,274 55	325 66	546 14	295 64	107 11	431 17
4.	Billing department	466 15	356 38	42 29	12 54	18 33	8 86	2 56	67 48
5.	Credit department	60 72	1 30	9 37	2 78	4 06	1 96	57	50 05
6.	Accounting department	21 72	8 25	13 47	3 99	5 84	2 82	82	
7.	Robert F. White & Company	140 83		140 83	41 76	61 04	29 51	8 52	
8.	Tabulating department	57 20	12 12	45 08		27 77	13 43	3 88	
9.	Bad debt losses	31 58		31 42	9 32	13 62	6 58	1 90	16
10.	Loss on returned products	2,213 82	1,139 20	972 87	109 65	391 19	304 31	167 72	101 75
11.	Salesmen and solicitors	2,065 83		2,065 83	135 10	691 64	752 17	486 92	
12.	Total direct costs	$24,551 19	$ 8,657 22	$13,880 77	$ 1,785 35	$ 5,306 15	$ 4,351 96	$ 2,437 31	$ 2,013 20
Indirect Costs:									
13.	Routemen's indirect labor	$12,177 26	$ 2,292 98	$ 7,980 98	$ 2,032 76	$ 3,419 05	$ 1,854 78	$ 674 39	$ 1,963 30
14.	Special delivery indirect labor	271 69	137 94	94 74	6 97	19 51	30 65	37 61	39 01
15.	Wholesale truck costs	7,508 89	1,449 93	4,886 78	1,237 43	2,084 52	1,139 27	425 56	1,172 18
16.	Total indirect delivery costs	$19,957 84	$ 3,880 85	$12,962 50	$ 3,277 16	$ 5,523 08	$ 3,024 70	$ 1,137 56	$ 3,114 49
17.	Total direct and indirect sales and delivery cost	$44,509 03	$12,538 07	$26,843 27	$ 5,062 51	$10,829 23	$ 7,376 66	$ 3,574 87	$ 5,127 69
18.	Cost Per $100.00 of Sales		$6 42	$27 20	$77 23	$32 77	$20 55	$15 43	

[fol. 1299] Explanation of Summary Schedule No. III

Lines One Through Twelve

Lines one through twelve are identical with those appearing on Summary Schedules Nos. I and II.

Line Thirteen

Line thirteen sets forth the total cost of indirect route labor, $12,177.26. This amount is ascertained in the manner described in the explanation of line thirteen in Summary Schedule No. II, *ante*, pp. 62-63. This total amount has then been allocated between classes of customers in proportion to the number of stops. (APTO p. 126.)

Line Fourteen

Line fourteen sets forth the indirect labor costs of special deliveries, allocated on a "stop" basis, as appears in Schedule XXXI.

The rational basis for the use of the number of deliveries or stops as the divisor for this item of expense is that it is the number of requests for special deliveries which determines the need for special delivery trucks and drivers. Obviously, it takes approximately as much time and expense to deliver a special order to one store as to another, irrespective of the volume involved.

Line Fifteen

Line fifteen sets forth the wholesale truck costs, computed and allocated on a stop basis, as described in paragraphs 228 through 230 and Schedule XXXII. (APTO pp. 143-145.)

The following is the rational basis for the use of a stop basis in allocating this expense:

> [fol. 1300] "In Mr. Malone's opinion, the costs involved in starting and stopping vehicles and in parking them are directly related to the number of stops, because these costs include wear and tear and gasoline

consumption, all of which are much greater in connection with such activities than in the continued running of the truck after it has started." (APTO p. 122.)

Line Sixteen

Line sixteen sets forth the totals of the indirect delivery expense as allocated in lines thirteen, fourteen, and fifteen.

Line Seventeen

Line seventeen gives the total of the direct and indirect costs of sale and delivery, computed by adding the amounts set forth in lines twelve and sixteen.

Line Eighteen

Line eighteen sets forth the costs per $100 of sales.

How Summary Schedule No. III Proves that the Discounts Given by Borden Were Fully Cost Justified

The following table, constructed from the data set forth in Summary Schedule No. III, shows that, even when (1) no indirect costs are allocated on the basis of direct costs; (2) no overhead costs are considered at all; and (3) the various items of indirect delivery costs are allocated on the stop basis, the discounts granted by Borden are cost justified by a wide margin.

fol. 1301]

Table 3

	Differences in costs per $100 of sales	Amount necessary to justify discount	Amount of over-justification
1. Between chain stores and independents getting no discount ($77.23 less $6.42)	$70 81	$8 50	$62 31
2. Between chain stores and independents getting 2% discount ($32.77 less $6.42)	$26 35	$6 50	$19 85
3. Between chain stores and independents getting 3% discount ($20.55 less $6.42)	$14 13	$5 50	$ 8 63
4. Between chain stores and independents getting 4% discount ($15.43 less $6.42)	$ 9 01	$4 50	$ 4 51

Again, the margin of justification is so great that it obviates the need of quibbling over details of allocation.

5. The Fact that Alternative Methods of Assigning and Allocating Costs Concur to Justify the Granting of Price Differentials Demonstrates the Reasonableness and Soundness of the Cost Justification.

Borden's cost study was so designed and presented as to supply data from which several different computations could be made employing differing methods of allocating the joint or indirect costs. This was done in order that the results of such different computations could be compared for the purpose of testing the reasonableness of the results attained.

The pre-trial orders do *not* set forth any of the final computations shown in the Summary Schedules presented in this brief and hence do *not* show what the results of the cost study were. What the pre-trial orders supply is the basic data and the facts necessary for the intelligent employment of such data.

Whenever joint or indirect costs are to be allocated, the possibility arises that one or more service units or measures [fol. 1302] are available as the basis for making the allocation. "In many cases more than one service unit might be chosen." (C.J.R. 28.) Here the proponent of a cost justification may make a choice; and, where the choice is reasonable, it suffices.

> "A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by respondent." (C.J.R. 11).

And again:

> "Different service units will yield different dollar-and-cents results, and a particular service unit should not be chosen merely because it maximizes cost differences. Where the choice is otherwise a matter of indifference, however, there can be no objection to the choice of the method which produces the most desirable result." (C.J.R. 28.)

Professor Taggart's testimony on cross-examination emphasizes his agreement with these propositions. (T.D. 57, 227-229, App. 11-12.)

Where a choice is available, the fact that a particular price differential is justified, whichever choice is made, clearly demonstrates the existence of a sufficient differential in cost. As plaintiff's witness Sawyer admitted on cross-examination:

> "If there are alternative methods of allocating a joint or indirect functional cost, exploration of alternative methods using different service units would strengthen the validity of the over-all judgment to be derived from any one of them." (S.D. 79, App. 29.)

A study of the three alternative summations made from the basic data furnished by Borden's cost study and of the fourth summation appearing later (*post*, p. 99) demonstrates that the store customer discounts were more than justified by differences in costs of sale and delivery.

* * * * * * *

[fol. 1303] 1. THE CRITICISMS OF BORDEN'S COST STUDY WERE INCOMPETENT OR VALUELESS BECAUSE THEY WERE NOT BASED ON A REVIEW OF ALL THE PERTINENT FACTS, BECAUSE THEY WERE BASED ON ASSUMPTIONS OF FACT NOT SHOWN BY THE RECORD, AND BECAUSE THEY WERE BASED ON DOCUMENTARY AND OTHER MATERIAL WHICH WAS NOT DISCLOSED TO DEFENDANT'S COUNSEL FOR PURPOSES OF CROSS-EXAMINATION.

None of the four witnesses had any background acquaintance or practical knowledge of the dairy industry; none of them had done any advisory or consulting work for members of that industry. (T.D. 100, App. 20; S.D. 34, 173-174, App. 21-22; O.T.D. 45, App. 38; W.D. 3-5, App. 51.) None of them had read any of the literature dealing with distribution costs in that industry (T.D. 204-206, App. 2; S.D. 35-36, App. 21; O.T.D. 45, App. 38.)

Unfortunately, the three independent witnesses (Taggart, Sawyer, and Taylor) were not supplied with all the record facts; they were given erroneous impressions as to the facts; and they made assumptions of fact which were completely unfounded.

The three outside witnesses relied for their knowledge of the facts on Mr. Woolley. He supplied them at one time

or another with certain documentary matter, listed in Taggart Deposition Exhibit 2. (App. 64.) This list of documents is significant for its omission of a final draft of the Additional Pre-Trial Order as to Borden. (O.T.D. 50, 141, App. 40; S.D. 96, App. 25.) All that the witnesses [fol. 1304] were given with respect to Borden's cost study was a preliminary statement, Malone's subsequent deposition, and an abstract of that deposition prepared as a basis for discussing the inclusion of additional matter in that pre-trial order. The witnesses were not given any of the time study reports or the basic documents. Apparently, the witnesses were not even shown the Borden discount schedule. (O.T.D. 142-144, 173-176, App. 41-42.)

Repeatedly, the witnesses admitted that they were not informed as to important facts. Professor Taggart had not been aware of the functions of the solicitors in obtaining independent store business, although this was relevant to his expression of opinion as to the handling of extra compensation. (T.D. 80-85, 92-93, App. 17-18.) He had not read the provisions of the union contract relating to extra compensation, and had not taken them into account in formulating his views. (T.D. 86-91, App. 18.) Mr. Sawyer admitted that, not having read the final Additional Pre-Trial Order, he did not know whether "the explanation for the omission of central office overhead" was adequate. (S.D. 128, App. 34-35.) Mr. Taylor admitted that "he saw no testimony with regard to the method by which routes were determined" (O.T.D. 142-144, 173-176, App. 42), although facts were given in the Additional Pre-Trial Order. (APTO pp. 79-80, 122-123.) Mr. Taylor did not know whether the total costs of drivers were set forth in the Borden cost study or whether time allocations were also set forth (O.T.D. 56-57, App. 45), although Schedules XXV and XXVI make these facts clear. (APTO pp. 112, 129.)

Opinions not based on the relevant record facts are obviously of little value.

Furthermore, the three outside witnesses were supplied memoranda prepared by Mr. Woolley, including, particularly as to Borden, "Government's Memo: Cost defense [fol. 1305] analysis, September 25, 1956." (Taggart Dep. Ex. 2, App. 64.) This memorandum contained "material

descriptive of the operations of Bowman and Borden" (S.D. 15, App. 24; *cf.* O.T.D. 8-9 App. 39); and it contained about 55 pages. (W.D. 10, 31, App. 52.) The witnesses all relied on fact statements made in the memorandum in formulating their opinions. (T.D. 9-10, 106-109, 180-182, App. 4; S. D. 21, App. 24-25; O.T.D. 189-190, App. 38.)

Despite the fact that plaintiff's witnesses could not remember what was in Mr. Woolley's memorandum (*cf.* T.D. 108, 182-183, App. 3; O.T.D. 7, 78-79, App. 38-39; W.D. 35-36, App. 52), plaintiff refused on request to produce this memorandum in order to permit cross-examination of the witnesses as to the effect the supposed statements of fact made in this memorandum may have had on their opinions, or to permit verification of the accuracy of the assumptions of fact on which the opinions were based.

In addition, Mr. Woolley made oral statements of fact about Borden's operations which entered into the formation of the opinions expressed. (T.D. 118-119, 183-185, App. 4; O.T.D. 78-79, 58-59, App. 39, 47; W. D. 9-11, App. 52.) But the witnesses could not recall what Mr. Woolley told them (*cf.* T.D. 183-185, App. 3-4); and Mr. Woolley could not recall what he said. (W.D. 12, 15, 38-39, App. 53-54.) However, the record is replete with instances where the witnesses made assumptions of fact about Borden's operations and cost study which simply were untrue but were based in part at least upon these conversations.

For example, Professor Taggart's assumption, contrary to the record facts, that drivers might have something to do with determining the customers served by their routes, was based "partly on what Mr. Woolley told him." (T.D. 92, 96-97, App. 18.)

[fol. 1306] For another example, Mr. Taylor testified on cross-examination that "He was told that in the Borden cost study salaries and wages were not allocated between service functions and transportation functions," and that the total time spent by drivers "was not reduced to the money cost of gettig the goods to the customers." (O.T.D. 53-56, App. 45.) Similarly, Mr. Taylor stated that "He was informed by Mr. Woolley that Borden did not allocate drivers' service costs on any basis" (O.T.D. 57-58, App. 46), despite the fact that Schedule XXVI (APTO p. 129) provides a complete breakdown of these service costs.

Since these false assumptions entered into the formulation of the direct testimony of these witnesses, but were completely contrary to the facts, the opinions of these witnesses must carry little or no weight.

Still another consideration reflects on the competence and weight of these opinions. Professor Taggart was candid enough to admit that "It was a little hard to keep Borden and Bowman completely straight in his mind." (T.D. 115-116, App. 4.) Mr. Woolley admitted that he based at least one of his opinions in his direct testimony on facts he had learned about *Bowman*, and that the assertion he made in his direct testimoy as to Borden was "not based on any information presently in his possession so far as *Borden* is concerned." (W.D. 81-83, App. 63.)

The most glaring of the instances in which opinions as to *Borden's* cost study were predicated on evidence relating solely as to Bowman is Mr. Taylor's reliance on the Eggleston testimony as telling, among other things, "about the general operation of the distribution of Borden's products": Assertions ascribed to Eggleston (the ex-*Bowman* employee) were among "the facts which he took into consideration in the opinions which he expressed with respect to the *Borden* cost study." (O.T.D. 178-179, App. 39.) Profesor Taggart also regarded the Eggleston testimony [fol. 1307] as evidence on which he could base opinions as to *Borden's* cost study. (T.D. 104-105, 117-118, App. 4.)

None of the three outside witnesses saw or asked to see the basic data developed by the Borden cost study, despite its availability (O.T.D. 7-8, App. 38-39; T.D. 235, App. 5; S.D. 7, 13, 15-16, 19, App. 23-24); and none of them asked for any information other than that edited by Mr. Woolley for their consideration. (T.D. 13, 235, App. 5) Time after time, these witnesses were forced to admit ignorance as to important facts appearing in the record (*e.g.*, T.D. 139, 86-91, App. 15, 18; S.D. 145, 97, App. 32, 35-36; O.T.D. 142-144, 173-176, 60-61, App. 42, 47-48), and on relevant subjects they several times admitted that they had not studied the data sufficiently to express an opinion. (*E.g.*, S.D. 98-99, 128, App. 33, 35; O.T.D. 52-53, 57, App. 45-46.)

Large segments of the direct testimony of the three outside witnesses proved, on cross-examination, to amount to nothing more than broad generalizations having no rele-

vance whatsoever to the Borden cost study. (*E.g.*, T.D. 70-72, App. 12-14; S.D. 73-74, 154-157, 80-82, 89, 90-99, 101, App. 25-33; O.T.D. 46-48, App. 40, 42.) In discussing the particular criticisms of the Borden cost study which these witnesses voiced in their direct testimony, it will be pointed out repeatedly that these opinions were based on assumptions of fact which are contrary to the record.

Opinions based on half knowledge, inaccurate facts, and unverified hearsay, are no basis for setting aside a cost justification based on such a complete, frank, and logical analysis as is provided by Borden's cost study.

• • • • • • •

[fol. 1308] f. *Plaintiff's Criticisms as to the Allocation of Extra Compensation and Transportation Expense Are at Best Mere Quibbles, Since Summary Schedule No. IV Shows That the Discounts Would be Fully Cost Justified Even If Plaintiff's Methods of Allocation Were Followed.*

Apparently, plaintiff's witnesses had not fully analyzed the cost study nor understood its purport, since their two major criticisms would, even if well taken, not affect the result.

The astounding fact is that, *even if* extra compensation be taken out of direct and indirect route labor costs and allocated on the basis of sales volume, and *even if* all "transportation expense" be allocated on the basis of sales volume the discounts are still fully justified by differences in the remaining costs.

[fol. 1309] Summary Schedule No. IV, appearing on the next page, sets forth an allocation of costs on plaintiff's own theory.

Explanation of Summary Schedule No. IV

Line One

Line one sets forth the cost of direct route labor *excluding* drivers' extra compensation.

This figure was computed on the basis of the information summarized in Schedule XXV. (APTO p. 112.) The total

weekly direct labor costs there shown amount to $29,242.50, which included $10,148.31 of weekly extra compensation. Subtracting the latter amount left $19,094.19.

Dividing $19,094.19 by the number of minutes (376,864) produced a cost per minute of route activities, exclusive of extra compensation, of $.05066316 per minute. This new cost per minute was then applied to the minutes of time spent in activities directly chargeable to different classes of customers as shown in Schedules XXVI, XXVII and XXIX (APTO pp. 129, 131, 135) to produce the figures set forth in line one.

Lines Two Through Eleven

Lines two through eleven are identical with the same lines in Summary Schedules Nos. I, II and III.

Line Twelve

Line twelve sets forth the totals of lines one through eleven.

[fol. 1310] *Line Thirteen*

Line thirteen allocates the $10,148.31 of extra compensation shown on Schedule XXV (APTO p. 116) to the various classes of customers in proportion to the sales volume shown in Schedule XXXIV. This is equivalent to an allocation on the basis of either weight, bulk, or points, since the assortments of products delivered to the various classes of store customers did not vary store by store. (APTO pp. 72-73.)

Line Fourteen

Line fourteen starts with the costs of routemen's indirect labor exclusive of extra compensation ($7,951.27). These costs were computed by taking the minutes spent in indirect activities as shown on Schedules XXVI and XXIX and multiplying the total by the cost per minute ($.05066316). The resulting total was then allocated to various classes of customers on the basis of the sales volume.

The allocations here made go farther than the most extreme position taken by plaintiff's witnesses, since they

include a number of items of indirect routemen's costs which do not by any stretch of the imagination constitute "transportation expense". Items 27, 29, 33, 34, and 35, totaling 22,569 minutes, represent sales accounting duties imposed on the route drivers which under none of the arguments advanced by plaintiff's witnesses should have been allocated on a volume of sales basis.

Line Fifteen

Line fifteen takes the $271.69 of indirect special delivery costs shown in column (c) of Schedule XXXI (APTO p. 142) and allocates this expense on the basis of sales volume.

[fol. 1311]

Summary Schedule No. IV

Cost Justification Based on Allocating Both Extra Compensation and Transportation Expenses on the Basis of Volume

	Grand Total	Chain Stores	Sub-total Independent Stores	Independent Stores by Discount Schedule Class 0%	2%	3%	4%	Non-store Customers
Direct Costs:								
1. Routemen's direct labor (excluding extra compensation)	$11,142.92	$ 4,213.86	$ 6,050.88	$ 746.51	$ 2,313.59	$ 1,914.57	$ 1,076.21	$ 878.18
2. Special delivery direct labor	72.59	36.66	18.20	1.29	3.28	4.53	9.10	17.73
3. Branch office clerical	2,355.51	649.79	1,274.55	325.66	546.14	295.64	107.11	431.17
4. Billing department	466.15	356.38	42.29	12.54	18.33	8.86	2.56	67.48
5. Credit department	60.72	1.30	9.37	2.78	4.06	1.96	.57	50.05
6. Accounting department	21.72	8.25	13.47	3.99	5.84	2.82	.82	
7. Robert F. White & Company	140.83		140.83	41.76	61.04	29.51	8.52	
8. Tabulating department	57.20	12.12	45.08		27.77	13.43	3.88	
9. Bad debt losses	31.58		31.42	9.32	13.62	6.58	1.90	.16
10. Loss on returned products	2,213.82	1,139.20	972.87	109.65	391.19	304.31	167.72	101.75
11. Salesmen and solicitors	2,065.83		2,065.83	135.10	691.64	752.17	486.92	
12. Total direct costs	$18,628.87	$ 6,417.56	$10,664.79	$ 1,388.60	$ 4,076.50	$ 3,334.38	$ 1,865.31	$ 1,546.52
Indirect Costs								
13. Routemen's extra compensation	$10,148.31	$ 6,305.35	$ 3,247.26	$ 212.40	$ 1,087.08	$ 1,182.40	$ 765.38	$ 595.70
14. Routemen's indirect labor	7,951.27	4,940.28	2,544.25	166.39	851.56	926.62	599.68	466.74
15. Special delivery indirect labor	271.69	168.80	86.94	5.69	29.11	31.65	20.49	15.95
16. Wholesale truck costs	7,508.89	4,665.27	2,402.85	157.15	804.47	874.88	566.35	440.77
17. Total indirect delivery cost	$25,880.16	$ 16,079.70	$ 8,281.30	$ 541.63	$ 2,772.22	$ 3,015.55	$ 1,951.90	$ 1,519.16
18. Total direct and indirect sales and delivery costs	$44,509.03	$ 22,497.26	$18,946.09	$ 1,930.23	$ 6,848.72	$ 6,349.93	$ 3,817.21	$ 3,065.68
19. Sales Value		$195,262.07	$98,672.52	$ 6,554.77	$33,051.13	$35,899.27	$23,167.35	
20. Cost Per $100.00 of Sales		$11.52	$19.20	$29.45	$20.72	$17.69	$16.48	

[fol. 1312] *Line Sixteen*

Line sixteen takes the $7,508.89 of wholesale truck costs shown in Schedule XXXII (APTO p. 145) and allocates this amount on the basis of sales volume.

Line Seventeen

Line seventeen gives the total of the expenses allocated in lines thirteen, fourteen, fifteen, and sixteen.

Line Eighteen

Line eighteen sets forth the totals of sales and delivery expenses computed by adding the sales and delivery expenses charged directly (line twelve) to the transportation and extra compensation expenses allocated on a dollar sales basis (line seventeen).

This total represents the aggregate sales and delivery expense, exclusive of purely overhead expenses, allocated on the basis most favorable to plaintiff's arguments.

Lines Nineteen and Twenty

Line nineteen repeats the sales information appearing at line thirteen of Summary Schedule No. 1. Line twenty sets forth the costs per $100 of sales computed by dividing the costs in line eighteen by the dollar sales given in line nineteen.

[fol. 1313] How Summary Schedule No. IV Shows that, Even if the Most Extreme Views of Plaintiff's Witness as to the Allocation of Extra Compensation and "Transportation Expense" Were Adopted, the Discounts Were Still Cost Justified by a Substantial Margin.

This fact is shown by Table 4, computed from data appearing in Summary Schedule No. IV.

* * * * * * *

Table 4

	Differences in costs per $100 of sales	Amount necessary to justify discounts	Amount of over-justification
1. Between chain stores and independents getting no discounts ($29.45 less $11.52)...	$17.93	$8.50	$9.43
2. Between chain stores and independents getting 2% discounts ($20.72 less $11.52)...	$ 9.20	$6.50	$2.70
3. Between chain stores and independents getting 3% discounts ($17.69 less $11.52)...	$ 6.17	$5.50	$ .67
4. Between chain stores and independents getting 4% discounts ($16.48 less $11.52)...	$ 4.96	$4.50	$ .46

Again, the wide margin by which the cost differentials exceed the discounts is proof that no amount of quibbling over details of allocations will disturb the basic results.

[fol. 1314] c. *In Any Event, If All of the Executive Time Allocable to Store Wholesale Business Had Been Charged Against the Chain Stores, Summary Schedule No. IV Shows That Even This Handling Would Not Affect the Result.*

As shown above, the weekly cost of all possible relevant executive time chargeable to store wholesale operations was $358.69.

Summary Schedule No. IV shows that, even if the extra compensation and "transportation expenses" were all allocated on a volume basis, the discount schedule was fully cost justified.

The very most plaintiff could possible claim is that *all* the applicable executive time be charged to chain stores, and *none* to independents—a claim which is palpably absurd on its face. But even if it were allowed, the $358.69 weekly [fol. 1315] charge would increase the costs of chain stores only $0.19 over $100 of sales.

Table 5 illustrates the effect of allocating to the chain store customers the entire cost of executive time applicable to store wholesale operations.

Table 5

	Differences in costs per $100 of sales[18]	Amount necessary to justify discounts	Amount of over-justification
1. Between chain stores and independents getting no discounts	$17.74	$8.50	$9.24
2. Between chain stores and independents getting 2% discount	$ 9.01	$6.50	$2.51
3. Between chain stores and independents getting 3% discount	$ 5.98	$5.50	$ .48
4. Between chain stores and independents getting 4% discount	$ 4.77	$4.50	$ .27

As Table 5 shows, an allocation of *all* of the cost of executive time to chain store customers, together with the allocation of all extra compensation and transportation expense on a volume basis, still discloses a cost justification in excess of the difference in discounts granted as between the chain store customers and each of the classes of independent store customers. Again, plaintiff is here pursuing a completely irrelevant and insignificant subject.

[fol. 1316] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendants

POST-TRIAL BRIEF FOR THE BOWMAN DAIRY COMPANY
Filed April 13, 1959

* * * * * * *

[fol. 1317] *Appendix*

EXCERPT

In a speech to the Milk Industry Foundation Convention at the Sheraton Plaza Hotel in Boston, Massachusetts on October 27, 1953, A. J. Bergfeld stated, in part:

"In the distribution of milk as in most other service functions, the cost of the service bears a direct relationship to the time required. Management spends money for trucks, gas, oil, tires and maintenance; base wages for routemen; operating costs for branch offices, including salaries, rent, and supplies; and for the other costs of maintaining a distribution system.

"This money is recovered when the routemen distributes his products and brings back sales revenue. The entire operation comes to a focus in this distribution function. What the money buys, actually, is a certain number of hours in which products are distributed and sales revenue returned."

EXCERPT A

National Association of Cost Accountants Bulletin. Section 1—June 1951.

The Burden Problem in Government Contract Costs By: Louis E. Zraik, Chief, Cost Accounting Section, Finance Division, New York Directed Operations, Atomic Energy Commission.

"*Direct Labor Dollar Burden Rates Most Frequent*

"The selection of a method of applying overhead may be determined by such factors as (1) the estimated cost of the contract, (2) the type of cost accounting system used by the contractor, (3) the nature of operations being carried on and how they differ from those normally conducted, and (4) the ease and convenience of obtaining overhead data from the books of the contractor.

"The most popular method of overhead rate determination relates expense to *direct labor*. Percentage of burden to direct labor dollars receives most frequent use. This

method of overhead apportionment is often availed of in connection with government cost-type procurement contracts when labor is the main productive element of cost. [fol. 1318] It is employed, for the most part, because of the ease with which it can be applied. Not many industrial companies accumulate the number of direct labor hours worked in each department. Payroll analysis along these lines is not always feasible. This method of applying overhead is seldom referred to in government contracts, even though it may be true that *overhead rates based on time (labor or machine hours) are generally preferred by cost accountants.*[a]

"The unit method of apportioning overhead, is seldom provided for in government contracts, for the reason that few procurement contracts are entered into with industrial companies which make only one product or a limited number of products of a uniform nature.

"*Manufacturing or Shop Burden*

"This category or burden may include various types of expenses. *Those generally found are indirect labor, shop salaries, operating supplies, expense tools, utility expense, depreciation, maintenance and repairs, normal plant rearrangement costs, employee insurance and payroll taxes, fixed charges of various types, and sundry manufacturing or shop costs.* The factors which determine what is included in shop overhead have been succinctly set forth in a National Association of Cost Accountants publication (Accounting for Overhead Outline for Use in Program of Discussion Forums, 1947-1948) which states that this determination depends on (a) the limits of the manufacturing processes, (b) the classification of direct and indirect costs, (c) accounting policy, and (d) the type of accounting.

"Most medium-sized and large organizations accumulate overhead costs by departments and/or cost centers. They likewise summarize direct labor costs on the same basis. Factory indirect costs are usually not accumulated

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[a] Throughout these excerpts, the emphasis has been supplied.

under shop orders and they cannot be directly identified with any specific unit (or units) of product which are being made. *Manufacturing or shop burden rates are usually determined by dividing the overhead costs for each department or cost center by the direct labor costs incurred in the department or cost center.*"

[fol. 1319] EXCERPT B.

National Association of Cost Accountants Bulletin, Section 1—July 1954

Cost Accounting For A Local Cartage Company By: W. J. Schroeder, Jr., Staff Member, Price, Waterhouse & Company.

(Note by defendant Bowman—The Purpose of this extract is to illustrate how the expenses of a cartage company are developed into a cost rate. By referring to Exhibit 11 of the extract, it will be noted that *all* of the company's operating expenses which are shown on Exhibit 1 are divided by driver time to determine a cost rate.)

[fol. 1320] EXHIBIT 1

The Local Cartage Company, Inc.
Profit and Loss Statement
January 195x

Sales			$14,835 20	100 0%
Less: Variable Operating Expenses (Exhibit 3)				
Direct Labor		$7,565 98		
Direct Truck Expense		841 61		
Total Variable Operating Expenses			8,407 57	56 7%
Marginal Income			$ 6,427 63	43 3%
Less: Semi-Variable Expenses (Exhibit 3)				
Truck Expenses:				
Storage—Repairs—Licenses				
Insurance	$947 99			
Depreciation	830 56			
Total Truck Expenses		$1,778 55		
Operating Supervision		1,254 52		
Vacation Allowances		134 10		
Total Semi-Variable Expenses			3,167 17	21 3%
Operating Margin			$ 3,260 46	22 0%

Less: Fixed Expenses (Exhibit 4)			
Office Expenses	$ 734.93		
Selling Expenses	128.12		
Business Licenses and Taxes	92.50		
Administrative Expenses	1,133.14		
Miscellaneous Expenses	39.71*		
Total Fixed Expenses		2,128.40	14.3%
Net Profit Before Income Taxes		$ 1,132.06	7.7%
Less: Federal Income Taxes		283.02	2.0%
Net Profit After Income Taxes		$ 849.04	5.7%

* (Note by defendant Bowman—operating expenses in this column posted to Exhibit No. 11 of this excerpt.)

[fol. 1321]

EXHIBIT 11

The Local Cartage Company, Inc.
Analysis of Total Per-Hour Costs and Incomes
January 195x

	Total Costs**	Hourly Costs Actual Hours	Hourly Costs Standard Hours
Variable Operating Expenses:			
Direct Labor	$ 7,565.96	$2.022	$2.022*
Direct Truck Expenses	841.61	.225	.225*
Total Variable Expenses	$ 8,407.57	$2.247	$2.247*
Semi-Variable Expenses:			
Truck Out-of-Pocket	$ 947.99	$ .253	$ .250
Truck Depreciation	830.56	.222	.219
Total Truck Expenses	$ 1,778.55	$ .475	$ .469
Operating Supervision	1,254.52	.336	.331
Vacation Allowance	134.10	.036	.035
Total Semi-Variables	$ 3,167.17	$ .847	$ .835
Fixed Costs	$ 2,128.40	$ .569	$ .561
Total Costs:			
Before Taxes	$13,703.14	$3.663	$3.643*
Estimated Income Taxes	283.02	.076	.075
Total Costs	$13,986.16	$3.739	$3.718*
Net Profit for the Month	849.04	.227	.224
Sales	$14,835.20	$3.966	$3.942*
Hours Used in Calculations		3741	3795

* Includes variable expenses based upon actual hours.

** (Note by defendant Bowman—operating expenses posted directly from carting company's Profit and Loss Statement.)

[fol. 1322] EXCERPT C

National Association of Cost Accountants Bulletin, Section 1—August 1, 1926.

Distribution of Burden By: Grant L. Bell, Auditor, Consulting Accountant, Scranton, Pa.

"*Method of Overhead on Burden Application*

"*Productive Labor Cost Method.* The Productive Labor Cost Method is based upon the principle that indirect expenses are incurred in proportion to the cost of labor involved.

"To arrive at the proper percentage to be used, it is necessary only to divide the total amount of overhead expense for the period by the total cost of the direct labor for the period, the result showing the proportion of overhead expenses to the total productive labor in terms of percentage. The amount to be applied is then found by multiplying the direct labor cost by the percentage, the result to be added to the material and labor costs to obtain the total factory cost.

"This method is simple and very widely used, and will often prove satisfactory under the following conditions:

> "a. The labor should be the dominant element in the manufacturing process.
>
> "b. There should be a marked uniformity as to product, wages paid and time of operation in the article manufactured.

"These conditions rarely exist throughout an entire factory, but if each department overhead is distributed separately, the method will prove to be quite accurate.

"*Productive Labor Hours Method.* The principle of the Productive Labor Hours Method differs from the Productive Labor Cost Method only in that the amount of labor is measured by time and not by cost. That is to say, the overhead expenses of a plant are considered to be in proportion to the number of employees engaged and the hours they work rather than to the wages paid.

[fol. 1323] "Owing to the difference in rates of wages paid to employees, the Labor Hours Method is applicable to a wider field than the Productive Labor Cost Method.

"The rate to be used for applying the overhead to the product is determined as follows:

"Total amount of factory overhead expenses divided by total number of productive labor hours equals the rate per hour to be applied to the number of hours of work upon the product."

EXCERPT D

National Association of Cost Accountants Bulletin, Section 1—February 1, 1949.

Spreading Overhead to Cost Centers on the Basis of Standard Earned Hour Rates by Clarence A. DeLand, Cost Accountant, Rollaway Bearings Co., Syracuse, New York.

"Manufacturing overhead can be distributed or applied to direct labor dollars, direct labor hours, or machine hours through use of one of the three following types of rates:

"1. An overall percentage applied to the total direct labor unit.

"2. A general departmental rate, viz., turning department, drilling department, grinding department, applied to the direct labor unit for the respective department.

"3. A cost center or operation classification, viz., drilling-milling machine group, drilling-drill press group, grinding-centerless grinding, grinding-internal grinder, etc.

"The labor unit selected (dollars or hours) for use as the base for spreading manufacturing overhead can, of course, be the result of current determinations of actual period compilations of the components of this base, or the result of a survey of past operations coupled with conservative estimates of future operations. Or a 'standard' [fol. 1324] unit, deemed to be representative of the base can be established as the factor for accumulating overhead. The labor unit selected here for application of manufacturing overhead is 'standard earned hours'. The decision to apply overhead at so much per standard earned hour to

cost centers rather than on a plant wide or departmental scale reflected an intensive survey of the various practical methods for accumulating overhead costs as they related to specific products and processes. The 'cost center' method disclosed itself as much the most equitable solution to our particular problem."

EXCERPT E

National Association of Cost Accountants Bulletin, Section 3—September 1955, 1955 Conference Proceedings—3

Processing Industries

Discussion Leader: Raymond E. Burleu, Controller, Overseas Division, Monsanto Chemical Co., St. Louis, Mo.

Overhead Allocation

"Returning to the subject of overhead allocation, the group indicated through a show of hands that a majority of companies represented are using direct labor dollars as the vehicle for such allocation. Direct labor hours ranked next and machine hours last. Some mention was made of the practice of having several bases for allocating burden. One individual stated that his company uses material, machine rate and direct labor as bases. The group, again through a show of hands, indicated that more companies used departmental rates of overhead allocation than an overall plant burden rate.

"The closing comments pointed out that the nature of the product dictates the system used for costing it in the individual companies."

EXCERPT F

Cost Accountants' Handbook—Edited by Theodore Lang, MFA, SPA, Professor of Accounting, New York University.

Published by The Ronald Press Company—1945

Section 3—Cost Classifications—Page 170

[fol. 1325] "*Departmental Burden Rates.* Total producing department charges (consisting of direct and redistrib-

uted expenses) are reduced to burden rates. Section 26.9(j), T.D. 5000, mentions application on basis of direct labor cost. However, the special government bulletin specifically advocates use of departmental rates based on the usual factors:

"1. Per cent of direct labor dollars.
"2. Dollars per man hour.
"3. Dollars per machine hour.
"4. Dollars or cents per unit (weight, quantity, length, area, cubic contents, etc.)

"In a small plant or within a department of a larger plant where labor constitutes an important part of cost and where the investment per man and the rates of pay are substantially uniform, a percentage of direct labor cost is a simple and satisfactory method of expense distribution. On the other hand, where labor is a relatively minor part of cost and depreciation, repairs, supplies, and maintenance of machinery are relatively large, the expenses are more equitably applied on the basis of machine hours. When direct labor appears to be a logical base but rates of pay are not substantially uniform, the expenses may be absorbed more equitably by means of rates per man hour. Again, in other cases in which these methods are not logical or practicable, but a common unit of measurement exists representing volume or production for a particular process, the expenses may be absorbed by means of a rate per unit."

EXCERPT G

Proceedings of the Eighteenth International Cost Conference Held at The Homestead, Hot Springs, Va., on June 21, 22, 23, 24, 1937, and recorded in The National Association of Cost Accountants Year Book 1937.

Subject: *Distribution Costs in the Ice Cream Industry* by O'Neil Johnson, In Charge, Statistical and Accounting Bureau, International Association of Ice Cream Manufacturers, Washington, D. C.

"The International Association of Ice Cream Manufacturers has maintained an Accounting Bureau for eleven years. About four years ago, the Statistical Bureau was

merged with the Accounting Bureau. A great many of the [fol. 1326] accounting practices of the industry are a result of the research work of this Bureau, working with the Controllers' Council and the Statistical Committee of the Association. All of the charts I am using in connection with this talk and most of the other data were obtained from the Statistical and Accounting Bureau of the International Association of Ice Cream Manufacturers.

"According to the United States Census Bureau, only 10.7 per cent of the ice cream business is done in manufacturer-owned stores. In this discussion of distribution costs in the ice cream industry, therefore, only the wholesale ice cream business will be discussed.

"*Three Bases for Analyzing Distribution Costs*

"Selling and distributing costs can be used or examined from three different viewpoints.

"1. Cost which have to do with the various functions of the distribution organization, and which are watched particularly from the standpoint of trying to keep them in line, or as low as possible consistent with good service. These are such costs as delivery costs, shipping platform costs, costs of furnishing and servicing cabinets, and the check and control of advertising, particularly point of sale advertising, which is usually a service that most dealers very much desire.

"2. The obtaining of distribution costs by products, that is, the cost per gallon of selling and delivering bulk ice cream, package ice cream, ice cream cups, and specialties and novelties, etc. you just saw that there has been a very material change in the quantities of the different products which are sold. For that reason, it does pay to watch carefully the distribution costs for each product.

"3. Distribution costs by classes of customers, that is, costs by the groups into which customers naturally fall. These groups are usually determined by location, type of outlet, and amount and kind of products sold. Under locations we have city routes, suburban routes, and country routes, each with its different problems, and different kinds of customers.

(Note by defendant Bowman—This article stated that the procedures for charging these *Distribution Costs* were as follows:)

[fol. 1327] ***Trucking Costs*** **on a** ***Time Basis*** **(Stopping and Running Minutes)**
Chauffeurs Wages and Commissions
Tires
Gasoline and Oil
Misc. Supplies & Licenses
Insurance—Truck, Compensation on Driver
Repairs to trucks, garage, equipment, etc.
Proportion of Transportation Department
Depreciation of Trucks and Garages
Outside Cartage

Miscellaneous on a Gallon Basis

Shipping Floor Labor & Depreciation
Delivery Supervision
Depreciation and Repair, Cans

Miscellaneous on a Dealer Basis

Cabinet Expense
Cabinet Installation
Phone Calls on Orders
Order Clerk Salaries

EXCERPT H

Cost Accountants' Handbook—Edited by Theodore Lang, MBA, CPA, Profesor of Accounting, New York University.

Published by The Ronald Press Company—1945.

Section 19—Overhead & Product Cost—Page 1018. Research Study by National Association of Cost Accountants (See National Association of Cost Accountants Bulletin, Vol. 19).

Summary of Extent of Use of Methods of Applying Overhead to Product.

[fol. 1328]

Method Used	Number of Companies: Using as Major or Only Base	Using as Secondary Base	Total
Actual direct labor cost	96*	13	109
Actual direct labor hours	27*	21	48
Actual machine hours	30*	13	43
Weight basis	7	29	36
Standard machine hours	13*	22	35
Standard direct labor hours	29*	4	33
Unit of product	11	18	29
Material cost	—	11	11
Prime Cost	5	5	10
Standard direct labor cost	5	—	5
Miscellaneous	1	2	3
Total	224		362

* (Note by defendant Bowman: The 195 companies indicated used time or labor cost (directly related to labor time) as a base for distributing costs to products. These 195 companies represented 87% of the total.)

[fol. 1329] EXCERPT I

Cost Accounting (3rd edition, 1948), by Reitell, National Vice President of National Association of Cost Accountants (1946-1947) and Harris, Professor of Accounting, New York University; Member, Board of Directors, National Association of Cost Accountants, International Textbook Company

Reitell says on pages 347-359 (with reference to Overhead):

"The fundamental theory underlying the selection of any basis for burden application is that a casual, functional or proportional relationship exists between the standard burden budgeted for the normal activity of a cost center and the basis or *common denominator selected for expressing the normal activity of the center.* Many overhead (burden) items are a function of time; that is, they increase with the passing of time. Hence a time basis, such as direct labor hours or machine hours, theoretically—and often practically—is superior to an output basis of direct labor cost basis."

EXCERPT J

National Association of Cost Accountants Research Report. Analysis of Non-Manufacturing Cost for Managerial Decisions.

National Association of Cost Accountants, Research Series 19, 20, 21.

Indirect Costs

"After charging directly those costs which can, as a practical matter, be treated as direct charges, there remain indirect costs to be allocated. These indirect costs are collected as totals and subsequently are spread over the various units to be costed. Allocation as a costing process thus proceeds by breaking down totals to arrive at separate unit costs in contract with direct charging which classifies the costs at their source.

"*In order to allocate indirect costs it is necessary to select a basis of allocation which serves as a common denominator for the units to be costed. The cost is then divided among the various units in proportions based upon this common denominator.* For example, cubic content of goods handled is often used as the basis of allocating warehousing costs to products.

[fol. 1330] "The process of allocating assumes that the cost being allocated is correlated with the basis used for allocation. Where basis and cost are unrelated and do not vary together, the resulting unit costs are determined arbitrarily. To illustrate, where warehouse space is rented and paid for according to the amount of space occupied, there is a definite relationship between the number of cubic feet in goods warehoused and cost of warehousing. On the other hand, there is no such relationship between sales value of the goods and warehousing cost unless sales value is directly proportional to bulk of the goods warehoused."

EXCERPT K

National Association of Cost Accountants Bulletin. Section 1—April 1957.

Subject: *A Job Order Cost System for a Heavy Machinery Co.*

By: Nelson J. Kemp, Vice President, Continental Gin Co., Birmingham, Alabama.

"*Basis of Factory Overhead Rates.* The manufacturing departments of our company are classified as productive departments, semi-productive departments, and general manufacturing departments. *Factory overhead cost rates are based on actual direct labor hours* recorded and accumulated from individual job tickets. Some time ago we made a study of cost difference between costing a representative number of our products through use of individual machine tool overhead rates and average overhead rates for each productive department. It was found that the difference was negligible and use of average department overhead rates has since been adopted."

[fol. 1] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, ET AL., Defendant

Deposition of Herbert F. Taggart—Filed February 13, 1959

The deposition of Herbert F. Taggart, called by the plaintiff for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe, a notary public within and for the County of Cook and State of Illinois, in Room 756, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Monday, April 14, 1958, at 1:30 o'clock, p.m.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

[fol. 2] Mr. Stuart S. Ball, Mr. H. Blair White, and Mr. Joseph Greaves, on behalf of defendants The Borden Company and Belmont Dairy Company.

Mr. Edward L. Hart, Jr., and Mr. John P. Stevens, on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

[fol. 3] Mr. Long: This is a discovery deposition and the direct examination is found in the proposed rebuttal submitted by the Government, beginning on Page 4 and continuing to Page 9.

Mr. Stevens: That is not true with respect to Bowman.

Mr. Long: Pages 5 to 8 is the direct examination of this witness and he is now turned over for cross examination.

Mr. Jinkinson: Discovery, let us say.

Mr. Long: Discovery, proceed to discovery.

HERBERT F. TAGGART, having been first duly sworn, deposeth and saith as follows:

Cross-examination

By Mr. Ball:

Q. Professor Taggart, do you have in front of you the draft of the plaintiff's rebuttal pre-trial orders to the Borden Company?

A. Not at the moment.

Mr. Ball: Would it be possible to have the witness have a rough draft?

Mr. Jinkinson: The record may show the witness now has one.

By Mr. Ball:

Q. Now, I call to your attention Page 5 of that report, [fol. 4] Professor Taggart. You referred to yourself as having been chairman of the advisory committee on cost justification under the Robinson-Patman Act, Federal Trade Commission, from 1953 to 1956.

It is a fact, is it not, that your committee made a report of its deliberations in the year 1956?

A. That is correct.

Mr. Ball: I am going to substitute a clean copy. Will you mark this Taggart Deposition Exhibit No. 1?

(Said document was marked as requested.)

By Mr. Ball:

Q. Professor Taggart, I hand you what the reporter has marked as the Taggart Deposition Exhibit No. 1 for identification. This is a publication of the Commerce Clearing House Trade and Regulation Reports and ask you if you are familiar with this as a reprint of the report made by your committee?

A. I have seen it, yes. I have never compared it in detail with the original report.

Q. But as far as you know this is a verbatim copy of the original report?

A. As far as I know, yes.

[fol. 5] Mr. Ball: Mr. Jinkinson, may it be agreed that we could later on substitute the official copy of the——

Mr. Jinkinson: If there is any argument we will have a chance to compare it and finding it the same thing, we have no objection to it.

By Mr. Ball:

Q. Now, turning now to Page 6 of the Government's report——

Mr. Jinkinson: 6?

Mr. Ball: The draft.

By Mr. Ball:

Q. I call to your attention your statement that you have written sections on distribution costs in the second and third edition of the Accountant's Hand Book. That appears in the fifth, sixth lines; no, fourth and fifth lines. That is correct?

A. That is correct.

Q. Now, I hand you here what I understand to be a third edition of the Accountant's Hand Book, and I call attention especially to Pages 299, or, rather, 297 through 338 and I ask you if that is the section on distribution costs for which [fol. 6] you were primarily responsible in the Accountant's Hand Book?

A. That is right.

Q. Is there a later edition of the Accountant's Hand Book with this section in it or is this the last edition? This was published in '49.

A. There is a fourth edition for which I did no writing.

Q. Yes, it is my understanding that you did the first draft and was generally responsible for this particular section 6 on distribution costs?

A. That is correct.

Mr. Jinkinson: That is in the third edition.

Mr. Ball: Yes. Mr. Reporter, the book referred to is the Accountant's Hand Book, third edition, edited by W. A. Paton, professor of accounting at the University of Michigan.

The book was published in 1949 in New York by the Ronald Press Company.

By Mr. Ball:

Q. My understanding of the subsequent edition, Professor Paton was no longer editor-in-chief?

A. That is right.

Mr. Jinkinson: It is my understanding that this witness [fol. 7] has nothing to do with the subsequent edition.

The Witness: That is right.

By Mr. Ball:

Q. You were also an author of an article entitled "Cost Justification under the Robinson-Patman Act" in the Journal of Accountancy, Volume 101, June, 1946, Page 152?

A. I wrote an article about that time and I am willing to accept your citation.

Q. Now the next one I am sure you will remember, an article entitled "Sacred Cows in Accounting," in the Accounting Review, Volume 28, July, 1953, at Page 313.

A. This, too, is probably correct.

Q. The sacred cows had nothing to do with the dairy industry?

A. Nothing whatever.

Q. Then you wrote an article entitled "The Standard Brands Case," which appeared in Volume 21 of the N. A. C. A. Bulletin. I suppose that is the National Association of Cost Accountants?

A. That is correct.

Q. At Page 195 which is the issue No. 4, dated October 15, 1939?

[fol. 8] A. I remember the date. That is the right date.

Q. And then you also wrote an article entitled, "Work of the Cost Justification Committee," which appeared in the Anti-Trust Bulletin for January, 1956?

A. I wrote such an article. I presume again this is a correct citation.

Q. Also subject to verification, if I am not correct.

Mr. Jinkinson: Yes.

By Mr. Ball:

Q. Now, turn to Page 6 again of the draft of the Government's pre-trial order and I call your attention particularly to paragraph 10.

Were you ever shown the final draft of the pre-trial order with respect to the defendant Borden?

(No response)

Q. I call your particular attention to the fact that it states that you were shown the preliminary draft of defendant Borden's pre-trial order?

A. Frankly, I don't recall that I have ever seen the final draft. I hate to say that I didn't, but I don't recall seeing any such thing.

Q. Do you have any recollection of the date on which you were shown the materials described in Paragraph 10?

A. Oh, yes.

[fol. 9] Q. The first sentence?

A. This was last June.

Q. June, 1957?

A. June, 1957, that is right.

Q. And do you recall just what it was that you did receive for study at that time?

A. I received a great many documents of one kind or another, some memoranda that had been prepared by Mr. Woolley, I believe, and I remember seeing this preliminary draft and the deposition of Mr. Malone. I don't recall. I can't—I was given a list of the things that had been shown me and I still have that list but I can't recall of my own independent recollection exactly what all I saw. There were too many documents entirely.

Q. Now, were these documents given to you by mail or in the course of a conversation or visit by Mr. Woolley or someone else of the department?

A. If I recall, Mr. Woolley brought them along with him. I don't believe they were mailed to me, as far as I recall.

Q. Your first information then came in the course of a visit from Mr. Woolley?

A. That is correct.

[fol. 10] Q. That you think took place about June, 1957?

A. That is right.

Q. And that took place in your office in Ann Arbor?

A. Yes.

Q. Did you have subsequent visits with Mr. Woolley?

A. Well, Mr. Woolley visited Ann Arbor twice, as I

recall. The first time just a general preliminary visit bringing along these documents. The second time for the purpose of discussing some aspect of the case in some detail.

Q. Now, about how much time, Professor Taggart, did you spend on the preparation of the material that appears in this pre-trial draft or pre-trial order?

A. Well, I spent the better part of two pretty solid weeks in reviewing the materials that had been brought to me before Mr. Woolley's second visit.

Q. Yes. May I inquire whether that two weeks was spent just with respect to Borden or was it with respect to both the Borden and Bowman materials?

A. The both cases, both Bowman and Borden materials, that is correct. And then later when Mr. Woolley made his second visit, which I forget how long it was, he and I spent two or three or four days pretty intensively on the material.

[fol. 11] Q. Now, looking at Paragraph 10 which covers the most of Page 6, Page 7, Page 8 and most of Page 9, is that text a text which you wrote or is that a summarization prepared of your testimony?

A. Well, certainly parts of it I wrote personally and parts of it is very possibly summarization; but in any event it is material that I agreed to as expressing my sentiments.

Q. Did you as a result of the two weeks' study of the two documents prepare any written report of those documents at that time?

A. I made notes for my own benefit, rather substantial notes, and I remember preparing a three or four page commentary on the references which were included in one of the studies. Which study it was, I can't tell you.

Q. That may have been the Bowman study, as far as your present recollection is concerned?

A. I would think very probably it was the Bowman study.

Q. Did you send that memoranda to Mr. Woolley by mail?

A. That memorandum I did, yes.

Q. Did you write any letters to Mr. Woolley, commenting on these reports, on the material?

[fol. 12] A. I don't think so. I may have made some incidental comment and certainly did not write any extensive letter of any kind that could be called a report on the materials.

Q. Then your present recollection is that the only document other than that embodied in these two drafts of the pre-trial order that you prepared was this comment on the sources referred to in one of the two pre-trial orders, is that correct?

A. This is the only thing that I prepared in the form of what might be called a formal memorandum.

Q. Did at any time you suggest to Mr. Woolley any questions that Mr. Woolley might wish to ask of Mr. Malone?

Mr. Jinkinson: Just a minute. I am going to object to that question on the grounds of immateriality. I direct the witness not to answer the question. It hasn't anything to do with what studies he had made in this matter. It is improper.

By Mr. Ball:

Q. Passing that up, in view of the instruction, for the moment, may I ask you this——

Mr. Hart: Maybe the witness does not want to follow [fol. 13] the instruction. I think we should find out.

By Mr. Ball:

Q. Yes. Do you wish to answer in view of the instruction?

A. You realize that I am in a somewhat difficult position.

Q. I do not want to place you in a position of embarrassment, Professor Taggart. We can always seek a ruling of the Court if we regard it as important or material. I understand that that can be done on comparatively short notice. But I think it is only proper we should ask you whether you wish to answer or not, in view of the instruction.

A. I think under the circumstances I should prefer to refrain from answering.

Q. Did you ask Mr. Woolley at any time to secure for you any further information concerning the Borden operations or the Bowman operations that might throw some light upon any facet of the cost studies?

A. I don't think so.

Q. I would like to ask you to look at the second sentence in this paragraph, because I do not understand it. [fol. 14] You make your comments beginning with (A) with reference to the principles underlying a properly conceived system of distribution, cost accounting and allocation.

Now, what do you mean by a system of distribution, cost accounting? Would that not have reference, Professor Taggart, to an organization of bookkeeping method to provide a continuous accounting?

A. The word "system" is sometimes used in that sense. It certainly does not mean that here.

Q. Just what did you mean by the word here?

A. Why, I think if we substituted the word "plan" for example, it would come perhaps closer to what I meant.

Q. Well, what we have here in the case of Borden was a study made of or a special study and analysis made of factors entering into costs.

Now, that would hardly be either a system or plan, would it?

A. Oh, I don't see why not, that is, a study of that sort could not be made without first having a plan, a scheme in mind of procedure.

Q. I am trying to get at what you meant here.

You do not mean that there is anything less than satis- [fol. 15] factory in a study as opposed to a continuous course of accounting records?

A. Far from it.

Q. In other words, it is true, is it not, that it is generally necessary in analyzing such problems as the Robinson-Patman Act presents that special studies should be made?

A. Invariably.

Q. And that they be made after the fact rather than in advance of the setting up of a price schedule?

A. Well, they can be made both times.

Q. Yes, but it is perfectly proper to make them after as well in advance?

A. Well, here, this is a legal problem, I think.

Q. Yes.

I mean from the standpoint only of an accounting judgment to be rendered, one would add as much validity to the accountant as the other.

Mr. Jinkinson: I object to that and ask for a ruling, legal ruling, and ask the Court to decide.

By Mr. Ball:

Q. I am asking him, would it have more weight as an accounting matter.

[fol. 16] Mr. Jinkinson: I do not tell him not to answer the question. I want my objection to show on the record.

By the Witness:

A. I have no objection personally to the question. No. I have participated in both kinds of studies, as a matter of fact, on numerous occasions. Th[illegible] both have validity. They are conducted along somewhat the same lines except that a study prior to adopting a price schedule ordinarily attempts in some degree to forecast what cost relationships are expected to be over some period in the future, based, of course, largely on what has happened in the past, whereas an ex post facto study relies, of course, exclusively on data accumulated in the specific past period.

Q. That represents what has actually happened?

A. As nearly as can be ascertained.

Q. That leads us right into the fact that any analyses has to have by its very nature a margin of error?

A. No question about that at all. Might we break off proceeding so I may get myself a drink?

Mr. Ball: Yes, sir.

(A short recess taken.)

[fol. 17] By Mr. Ball:

Q. Now, calling your attention particularly to the cost justification report, that was the product of your commit-

tee of which you were chairman. The general principles of cost analysis are outlined in that report, are they not?

A. I think so, yes.

Q. You are in accord with the pronouncements of that report of your committee, are you not?

A. I should say so, yes.

Q. Are there any major differences of opinion between you and the report or in general does it represent your point of view?

A. In general, it certainly represents my point of view.

Q. And I take it to be equally true that what you said in the section on distribution costs in the Accountant's Hand Book also represents your considered point of view?

A. Representing my point of view at that time at least.

Q. Do you recall of any major changes of opinion that you have had since that section was written in '49?

A. I probably had not looked at it for ten years.

Q. Now, I call your attention particularly to the cost [fol. 18] justification report which is Taggart Deposition Exhibit No. 1 for identification, and I would like to call attention then to certain statements made on Page 6. I call your attention to the first full paragraph and the sentence reading "This section discusses—referring to Section 3 on Page 6, the first full paragraph.

Mr. Jinkinson: The second sentence?

Mr. Ball: This section, referring to Section 3, "discusses basic concepts essential to an understanding of the nature and limitation of cost accounting and the necessity for a broad approach in the administration of the cost proviso."

Now, I take it that you are in agreement with the concept expressed that there are limitations in cost accounting very definitely?

By the Witness:

A. That is right.

By Mr. Ball:

Q. And you are also in accord with the belief that there must be a broad approach in the application of the cost proviso if it is to obtain economic, to approach the eco- [fol. 19] nomic justification of the intendment?

A. That is what the committee holds.

Q. That is your personal view, as well?

A. That is correct.

Q. Now, I turn your attention to Page 9 of the report under the heading "C," the second paragraph, and I am going to read it and ask you if it does not express your opinion as well as that of the committee?

> "In view of the plus or minus leeway which must be granted to all cost figures as discussed later (Section 3-A-1), due allowance should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly so as to require only reasonable allowance for cost differences based on sound accounting and pricing principles."

Now, I take it that you are in agreement with that statement up to that point?

A. That is right.

Q. It goes on:

> "For this reason the committee approves the position taken by the Commission in applying a de minimis [fol. 20] concept to cases where price differentials are not shown to be completely cost justified but where circumstances minimize such failure to the extent that no corrective action is deemed necessary."

You are in agreement with that statement of principle?

A. I am, yes.

Q. The next sentence:

> "In considering the applicability of the de minimis concept a primary test to be applied is the relation of the unjustified portion to the differential itself, not to the higher unit price."

I take it you agree to that principle as well? If not, I would welcome your statement of your difference.

A. Well, my own feeling on that is that a comparison should be made in both ways. As a matter of fact, that is, I think this was a slight misstatement of my own feel-

ing, that is, that the unjustified price which should be compared both with the amount of the—how does it put it?

[fol. 21] Q. To the difference itself, rather than to the price?

A. To the difference itself and also to the higher unit price. On the other hand, I think both things are essential.

Q. Now, dropping down on Page 9 to Section D, the third paragraph, I will read as follows:

> "There are many differing methods or quantities which may give rise to cost differences between customers or classes of customers. Such differing methods or quantities are generally ascertainable upon an analysis of the seller's manufacturing and distribution system. Such analysis should interpret these terms in their broadest connotation, giving full effect to all items of cost difference. The term resulting from also should be given the same broad interpretation."

That still represents your point of view, I take it?

A. It certainly does.

Q. Now, turning to Page 10 under Section 3 the first numbered paragraph, I am going to read that:

[fol. 22] "The nature of cost accounting.

"Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data."

I am going to stop at that point. Those two sentences represent a point of view that I am sure that you are in accordance with?

A. That is correct.

Q. (Reading):

> "For this reason all cost accounting, cost analysis results should be accepted as reasonable approaches to accuracy and not as precise measurements."

And again I take it that that is your considered opinion?

A. That is correct.

Q. And it is with that in mind that the reference was made that I referred to earlier, to the limitations of cost accounting that lie on that fact as in others?

[fol. 23] A. Yes, I think all this says is that cost accounting is an approach to accuracy. It can't be termed precisely accurate because of the inherent limitations.

Q. Let me go on:

> "The fact that unit costs are frequently stated in mathematical terms after elaborate and painstaking calculations gives them an aura of precision that is not warranted. With few exceptions every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation."

Now, now again to that point it states your considered opinion?

A. That is correct.

Q. Now, turn to Page 2. Good Faith Cost Studies.

I would like to read from that as follows:

> "Great weight should be given to cost studies made in good faith and in accordance with acceptable ac-
> [fol. 24] counting doctrine. Great weight should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound. A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent."

Again, I ask you if that does not state your considered opinion?

A. That is right.

Q. Now, I call to your attention Page 13, the first sentence in the last paragraph of the page which reads as follows:

> "The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to straightjacket cost justification would [fol. 25] be self-defeating."

I ask you again if that not only represents the opinion of the Committee but also is your considered opinion?

A. It is.

Q. Now, Professor Taggart, there is no basic difference there between a study to show cost justification under the Robinson-Patman Act and a study made by management to determine a sound pricing schedule or to determine where to concentrate sales effort or to omit such effort? Both deal with ascertainment of economic facts, do they not?

A. To that extent they certainly resemble each other.

Q. Don't they resemble each other also in the fact that the same facts vary on both?

A. The same underlying facts, yes. The same basic fact, yes, that is true.

Q. The same type of analysis can produce those facts?

A. Yes. Of course, this certainly needs to be modified in this respect, that every Robinson-Patman cost study is made in terms of a specific complaint, a specific price relationship.

Q. That is true, isn't it very possible their studies are made by businesses to determine what a price schedule [fol. 26] would be that would conform to the Robinson-Patman Act?

A. All this is perfectly true, yes.

Q. So that in those cases the study would be made without reference to specific complaints?

A. Well, that is true. It would be made on the theory, presumably, that a complaint might possibly arise out of a given set of circumstances, but it certainly is not based on an actual complaint.

Q. Well, you are familiar with the results in the Bird case in which it was found that sales to mail order customers, mail order houses, could stand a cost justification, a

difference of 28.5 per cent, where the actual discrimination is less than 20 per cent, is that correct?

(No response)

Q. I call your attention to 335 of the Accountant's Hand Book.

A. Yes, that is right.

Q. Well, now, certainly the ascertainment of the fact by exactly the same processes would be the type of information that would assist, yes, management in determining a pricing policy with respect to the customers for purely business and economic reasons, would it not?

[fol. 27] A. It would be one of the facts they might well take into account, yes.

Q. Well, what I am getting at is this: If I find that a cost difference of ten per cent is justified as between two classes of customers, and I make a price difference of eight per cent in favor of the more economic of those two classes of customers, I am actually making more profit on my sales to that class at the lower price than I am the sales to the other class at a higher price?

A. Yes, in terms of those figures.

Q. So, what I am trying to get at is this: That if I am trying to find out where my profit potentials lie, the same kind of study will give me that information, would it not? Does it not?

A. Broadly speaking, I say that is true.

[fol. 28] Q. Now, I call your attention to Pages 300 and 301 of the Accountants' Hand Book under a section entitled Need for Distribution Costs. It gives four different situations where an accurate knowledge of differentials and distribution costs serve a management or a business function; is that not correct?

A. There are four numbered paragraphs here which seem to point in that direction, yes.

Q. And, as a matter of fact, the same kind of study and the same kind of economic fact would be relevant certainly to the second, third and—and the third types as it would be to the fourth, isn't that correct, the fourth being the Robinson-Patman?

A. I think you better let me read these.

Q. I do not want to hurry you at all.

(Witness examining documents.)

By Mr. Ball:

Q. Would you like to have me restate my question?

A. Maybe you better now that I have read this material.

Q. The point is this: The same kind of a study and the same kind of an economic fact would be relevant to the decisions under the second and third of those items as it would be under the fourth?

[fol. 29] A. In a general way, yes, sir. There is one aspect of the second which, of course, would not be appropriate for the fourth certainly, and that is the second purpose here of studying distribution costs.

It talks about expansion or contraction of sales territories and limits as to size of orders and profit possibilities of new lines, and so on.

Q. Well——

A. Now, then——

Q. Excuse me.

A. There one very important consideration is marginal and differential costs which, of course, would not be suitable for Robinson-Patman purposes.

Q. Well, I am just wondering, Professor Taggart, if that is strictly true, because a cost study that revealed that sales to customers buying below a fixed amount would have a cost which would be greater than the gross amount of the sales income, would certainly indicate a marginal business and suggest a shift in management emphasis, would it not?

A. It might or might not.

Q. Well, you will recall, for example, that I think that $10 breaking point was one of those in the Standard Brands case, and you pointed out that it was suggested in that [fol. 30] particular classification the cost studies showed that the cost of selling customers buying in the $10 below bracket, the cost of selling was in excess of the income from sales.

A. Well, this was doubtless total cost including fixed cost as well as variable.

Q. Yes; well, putting it this way, if your cost study disclosed that sales to a given class of customer in a low volume bracket were such and allocated in accordance with the proper principles indicated, that the cost of selling were far greater than the margin, the gross margin between the cost of the product and its selling price, that would suggest

certainly that you were dealing with a marginal product, would it not, with a marginal class of customers, wouldn't it?

A. Well, it would suggest that the business with the customer ought to be regarded with some doubt, shall we say.

Q. Which is one of the purposes indicated in your Paragraph 2?

A. It does not necessarily mean, of course, that business with that customer should be dropped.

Q. But it does make the suggestion of the kind that you have reference to in Paragraph 2, that passage in the [fol. 31] Accountants' Hand Book?

A. Yes, but, of course, the whole needs of Paragraph 2 are not answered by merely a study of total costs including fixed and variable costs.

Q. No, but the general point is that you may have to carry your study of total costs to a more refined point to get the answer required by the problem of Section 2?

A. Well, in a sense, to a less refined point because you can confine your attention pretty much to the cost which would be affected by the particular change which you are contemplating making.

Q. Well, but——

A. You would have to pay no attention to the costs which would not be so affected.

Q. I do not mean to argue, but isn't this true, that your cost study of the kind we are talking about would give you the first clue as to where to make the studies required by 2?

A. Well, that depends on what you mean by the first clue.

Q. Well, let us suppose that again you have the cost study that shows that the costs of selling a particular class [fol. 32] of customers are in excess of the mar*gain* between the cost of goods sold and the selling price.

That would certainly suggest the possibility that you were dealing with a marginal class of customers?

A. Oh, surely, yes.

Q. So it would lead you directly into a study of the kind referred to in Paragraph 2?

A. It might very well.

Q. The point is that whether the study is made generally for the purpose of two, three or four, the basis is always to

find the facts upon which a reasonable business judgment can be based, isn't it?

A. That is correct.

Q. Now, if I may call your attention——

A. Incidentally, may I point out that these paragraphs that have been referred to are not my language. I simply took them from a published source.

Q. It so indicates in the text that this was from the Pathfinder Service Bulletin No. 154; but I assumed, Professor Taggart, that you did include them in this section because you were in agreement with the principles there stated.

[fol. 33] A. I think generally this would be correct.

Q. Now, I call your attention to this passage on Page 336 of the Accountants' Hand Book, and I am going to identify it.

"Every analysis presented for Robinson-Patman purposes must stand on its own feet. No general pattern of such analysis to follow is available."

Now, that states a principle, I think, in which you are in full agreement, even though you wrote that sometime ago.

A. Well, this has always been true as far as I know, and it still is.

Q. It is also true, isn't it, that where you have a fairly wide margin of justification quibbling over precise methods of allocation is unimportant in such a study as we have before us?

A. With the proper definition of "fairly wide," yes.

Q. Well, what would be your concept of fairly wide?

A. It depends on the circumstances.

Q. Well, what did you mean when you said in reference to the Bird case that:

> "No amount of quibbling over precise methods of allocation would have substantially affected the conclusion."

[fol. 34] It is a sentence which appears on Page 336 of the Accountants' Hand Book.

A. Well, I think that at the time I thought—I beg your pardon, where is this thing now?

Q. The first full sentence (indicating).

A. Oh, yes. Thank you. I think at the time that was my opinion.

Q. Well, it still is, isn't it?

A. I am inclined to think so, but it is difficult to keep the precise details of all these cases in mind.

Q. Yes; but when you wrote that you were of the opinion that the type of margin shown by the figures in the Bird case was sufficient and it was enough to obviate any value in quibbling over the precise methods of allocation.

A. It was a margin, as I recall, of some 8½ per cent roughly in a total of some 28 or 29 per cent, and this is a pretty substantial margin where the study is reasonably detailed and carefully worked out.

Q. But in a case where the price differential was pretty substantial, too?

A. The price differential was quite substantial, that is true.

[fol. 35] Q. Now, turning attention particularly to the survey which was described and explained in the Borden pre-trial order, do you recall generally the nature of that survey?

A. Very generally.

Q. Do you recall, Professor Taggart, that it was one that was based upon the cost of distribution of all fluid milk products without any attempt to break down the costs as between the various fluid milk products, such as milk, cream and cottage cheese; were you aware of that fact?

A. I assume that that is true. I have no recollection that there was any attempt at such a breakdown.

Q. Now, it is quite proper, is it not, in your opinion, that such a set of commodities or such a grouping of commodities is an entirely proper one for the purpose of a cost study when the purpose is not limited to the ascertainment of a fact with respect to a particular commodity?

A. You mean to pose a situation where a particular commodity is not involved?

Q. No. The discounts—let me remind that in the Borden study we were dealing with a program of discounts that were given on the total purchases by the retail customers—[fol. 36] by the retailer customers, these being sales to retailers, based upon their total purchases of fluid milk

products, and that the study was related to the costs of delivering all fluid milk products to those customers.

Now, it is quite proper, is it not, to lump all the products under those circumstances together in making your study?

A. Well, not necessarily. It might be quite proper, but if some company or if some customers, for example, take substantial shipments of one commodity and other customers specialize in a different commodity, it may well be that the costs as between commodities would be sufficiently different so that you should ascertain costs by individual commodities or more precisely commodity groups.

Q. Well, now, you do not recall apparently that there was a specific testimony set forth in this pre-trial order that these retail customers purchased the various commodities in approximately the same proportions?

A. Oh, if they purchased in substantially the same proportions then I would go along with it; yes, sir.

Q. I call particular attention to the language in the Cost [fol. 37] Justification Report, which appears on Page 8 under 5:

> "The prices to be compared in Robinson-Patman Act cases may be those of individual commodities or of a group or set where different items are normally bought and sold as a set or a weighted average of the prices of a line of related products."

Now, that states a principle with which you are in accord, doesn't it?

A. Yes, wherein the purchases are actually made as described here.

Q. And in the case where retail customers, retail stores buy the various fluid milk products to serve essentially the same type of customer demand in relation to proportions of cream, milk, potatoes, and so forth, that would be an appropriate one for the use of the study of the set as against individual commodities?

A. That may very well be true.

Q. At least you raised no question about that when you reviewed the Borden pre-trial order?

A. That is right, because I presume that I was making that assumption.

[fol. 38] Q. But you must have made it because it ap-

peared natural to make it under those circumstances, if I can speculate with you. At least you raised no question about the validity of the report on that ground.

A. Not in this testimony, no.

Q. Well, or otherwise?

A. Oh, I am sure that I inquired from Mr. Woolley concerning this matter. I have no doubt that I asked him whether these customers took the various commodities involved in reasonably similar proportions, because if this were not true, then this study is false.

Q. Now, do you recall that in this study the dollars of vacation pay were permitted to follow or be allocated in the same way as payroll dollars?

A. If you say so, now, then this is correct.

Q. Well, abstractly, that is a proper method of allocation, is it not?

A. Oh, yes.

Q. Now, you will recall that the study described and set forth in the Borden pretrial order did not include any study of differences in costs of manufacture; you were aware of that fact?

A. I think this is true.

[fol. 39] Q. Now, you are in agreement, are you not, that that was entirely proper not to include a study of costs of manufacture in this study of distribution costs?

A. I should think so, that is, I had no knowledge of the dairy industry that would lead me to believe that a study of manufacturing costs would be particularly fruitful.

Q. And so you find it is quite proper when you are dealing with this kind of study to limit your study to differences of costs of distribution without an attempt to go into the problem of costs of manufacture?

A. I see no reason to assume otherwise.

Q. Now, you recall that the Borden survey, as distinct from the Bowman survey, was based upon a time study of each route for a week?

A. I recall that a time-study man was sent out on routes with a stop watch to see what the drivers did.

Q. Now, in your opinion, Professor Taggart, the sampling of the facts made by that method was an entirely proper one for this type of a cost study?

A. Well, let me put it this way. Sampling is an entirely proper method. I should not like to express an [fol. 40] affirmative opinion here as to whether the sample was adequate or not. I have no reason to assume that it wasn't.

Q. Well, assume these facts, Professor Taggart: Assume that the pattern of consumption remained essentially the same throughout the year; there would be no reason to believe that a test for a week on deliveries would be any other than an adequate sampling?

Mr. Jenkinson: Well, I object to that question as irrelevant and incompetent and immaterial and of no value to the case.

Mr. Ball: There is an express statement in the record to that effect.

Mr. Jenkinson: I am just objecting.

By Mr. Ball:

Q. This is one time you can answer despite the objection.

A. Well, the only thing I can think of that might cause one to wonder whether one week, one particular week was a fair sample, might be such a thing as seasonal variation, for example, in the delivery and consumption of dairy products.

Q. Now, that would be mitigated, would it not, by the [fol. 41] fact that the samples were made on different weeks, on different routes over a period of five weeks, that would minimize any error of that kind?

A. Well, seasonal fluctuations do not show up in that length of time. I am thinking of the difference between summer and winter for example.

Q. But in the absence of a showing of marked seasonal variations, the sampling would otherwise prove to be adequate?

A. A thorough sample for a single week might be entirely accurate.

Q. Now, you recall that in the Standard Brands Case, about which you have written, there was a six-day sampling which you did regard as adequate in that particular sampling?

A. Not only I regarded it as such but the Federal Trade Commission accountants saw no objection to it.

Q. So that under the circumstances comparable to that disclosed in the Standard Brands Survey, a six-day sample would be adequate?

A. Yes, I think so.

Q. Now, it is true, is it not, that in your opinion estimates made by managers and men in managerial positions [fol. 42] who are inside the business as to the divisions of functions in their relation to service units are entitled to great weight?

A. That is a pretty general question. I would like to know a little more definitely.

Q. What I have in mind is this, that if a man who is in the business itself makes the assumption that a particular function has a direct relationship to a particular type of service unit, that, absent some apparent on-the-face logic to the contrary, that would be entitled to great weight, as against some abstract consideration by someone not familiar with the details of the business?

A. That would be entitled to weight, certainly, but I should like to have any such assumption by anyone backed up by some objective evidence that the assumption is soundly made.

Q. Now, also when the problem comes up as to the matter of time spent on various functions, you do accept as valid a manager's estimate of the time spent on the various functions?

A. Sometimes and under some circumstances, yes.

Q. Well, I call your attention on Page 315 of the Accountants' Handbook where you have set an analysis of [fol. 43] cost of distributing wholesale electric goods, you have apparently accepted as valid a number of divisions of time between functions based upon managers' estimates.

A. This is simply a report on a study done by two employees of the Bureau of Foreign and Domestic Commerce, with which I had nothing to do.

Q. But you must have approved their methods of making it or you undoubtedly would not have included that as illustrative in the Accountants' Handbook.

A. I do not think this is true at all. In other words, that may well be perfectly satisfactory, but the mere fact

that I included this long complicated tabulation in the Accountants' Handbook does not necessarily mean I approve of all aspects of it or that I would have done it the same way if I had been doing this study.

Q. Well, looking at it, though, in specific detail, where you have here for example "Salaries of the Buying Staff Allocated Between Different Functions," and the basis of distribution is given as a manager's estimate, would you regard that as a valid basis for making such a distribution?

A. Under some circumstances and for some purposes, [fol. 44] yes.

Q. Well, would you regard that as a valid one for the purposes of the Robinson-Patman study?

A. I would be inclined to question it.

Q. Would you question it in the absence of contrary evidence?

A. I would seek confirming evidence.

Q. But in the absence of any contradictory evidence, if an effort had been made, that would be entitled to considerable weight?

A. I would present it only for what it is worth.

Mr. Ball: Let's take a short recess here.

(Recess.)

By Mr. Ball:

Q. Professor, Taggart, turn to Page 6 of the pretrial order, Paragraph A. You used the term "Functional Activities." I want to ask you if I understand what you mean. Do you mean that there are certain functions that are performed in the course of distribution which embody several activities, but all of them to accomplish the same function, is that correct?

A. Well, frankly, I think that this term Functional Activities is slightly redundant. I believe the term "Fune- [fol. 45] tions" could be used or the term "Activities" could be used, as a matter of fact.

Functions are sometimes conceived of rather broadly. Take the function of selling, for instance. It may include a number of things, that is, it may include calls by salesmen, it may include mail solicitation, it may include tele-

phoning, a number of things that could well be described as activities, or they could even be described as functions.

Q. Well, in a broader sense a function might be a broader term than activity, a function could include several activities?

A. Well, this could be, certainly.

Q. Now, I call your attention, for example, to Page 25 of the cost justification report, and I notice at the bottom of the page a list of some eight distribution cost functions of an integrated manufacturing company. Now, that would be an illustration of what you mean by functions, is that correct?

A. That is right.

[fol. 46] Q. And any one of those functions might include a number of activities?

A. Or they are sometimes called sub-functions. This is a term that is used quite a little bit.

Q. Well, also I call your attention to Page 316 of the Accountants' Hand Book where there are a long list of functions and a comparable list of service units. I take it that that was a list that would be regarded by you as illustrative of the meaning of the word "function"?

A. It is illustrative only, that is correct.

Q. Well, this is not one you copied from someone else in that case, is it, Professor Taggart? This is one you developed yourself?

A. Oh, no; I assembled this from a very large number of studies that various people had made at various times.

Q. And in this particular case you do approve the fact that this represents your concept of a function?

A. I think so, yes.

Q. Now, I am going to ask you to turn to your Paragraph B and explain just what you mean by the use of the word "should" in that particular paragraph, on the top of Page 7.

[fol. 47] Mr. Jinkinson: Here (indicating).

By the Witness:

A. Oh, yes. Well, this is talking about—when it says, "Cost Elements," it is talking about what are frequently called natural expenses, natural divisions of costs, such as, oh, compensation of employees or supplies, insurance.

Q. Payroll is a cost?

A. Taxes and the like. Yes, payroll would be.

Q. But payroll could apply to several different functions?

A. That is correct.

Q. And what you are trying to say is you should take a cost element such as payroll and find out how it should be allocated as between functions?

A. That is right, yes.

Q. And that is in essence what you were trying to say in this paragraph, am I correct? I want to be sure I understand you.

A. Well, it actually goes a little farther than that, of course.

Q. Well, then, explain to me.

A. Because down here in the middle of the paragraph [fol. 48] it says, "Allocated to his sources (functions, products and customers.)"

In other words, I am going a little farther here and simply saying that payrolls should be allocated among functions, and also implying at least that the functions in turn must be carried on to their logical allocations to commodities, customers, territories, whatever the end use may be.

Q. Yes; where the commodity is as it is in this survey fluid milk and all of the costs, the payroll costs of drivers of delivery trucks are all connected with the delivery of fluid milk, you do not have a problem of allocating it to products, then, do you?

A. Well, I think we settled that problem a little while back.

Q. Yes.

A. For practical purposes.

Q. We regard this as a single product.

A. An allocation for products presumably was not called for.

Q. Then what you are saying is that we should take the various cost elements such as payroll, allocate them to the functions, and in turn allocate total costs of the [fol. 49] function to the class of customer that would be involved?

A. That would be involved, yes, that is correct.

Q. Well, if I add then that second step of first allocating the cost element to the function and then the cost of the function to the class of customer, that is really what we have in the problem of the kind that is now under consideration.

A. That carries it out to its logical conclusion.

Q. Now, in making this allocation of the cost of a function, it is ordinarily done by separating first between directly allocable functions and those that are either joint functions or indirect or non-allocable—not non-allocable, indirect or joint functions; is that correct?

A. Spoken like an accountant. That is correct.

Q. Now, in the case of the directly allocable functions, we have no problem, we merely find out where that applies?

A. Strictly speaking. Of course, the word allocation does not exactly apply here. It is a direct charge. It is allocation only in a very broad sense.

Accountants usually use the term allocation in connection with indirect costs.

[fol. 50] Q. Then what we should say is an application rather than allocation?

A. Yes, essentially I think that is a little more precise.

Q. In other words, if a salesman is hired to spend all of his time soliciting a single customer, the cost of his function would be applicable to that customer?

A. I think you are right.

[fol. 51] Q. But now when you have either joint or indirect functions you generally have to find a method of allocation for them between classes of customers if that is the object of the analysis?

A. Yes, you do.

Q. Now, you usually do that by finding what you call a service unit, isn't that right?

A. Commonly it is done that way, yes.

Q. Well, there would be two methods; in certain of the indirect costs the indirect would be permitted to follow the direct?

A. Well, yes, this is true. Of course, this implies that a service unit of the indirect cost is reasonably measured by the direct costs.

Q. Well, what you are saying is you prefer to use the concept of a service unit in all cases although the service

unit may be ascertained merely by a reference to the previously allocated costs?

A. I think that is a fair statement, yes.

Q. Now, to illustrate what we mean by a service unit, I take it that again the list that appears on Page 316 of the Accountants' Handbook would provide illustrations in your own words.

There you have the list of functions, then you have the [fol. 52] possible service units that might be used for allocating the cost of those functions.

A. These are possible service units, yes.

Q. And again turning to the cost justification report on Page 28 you have in the black type at the bottom of the page the various functions and then you have behind the colon following the illustrative service units that might be used in allocating the cost of the function described in the black print?

A. Yes, that is correct.

Q. For example, here where you have, well, the subject sales promotion, sales promotion is the function, if I am using your term correctly?

A. That is right. That harks back to the tabulation we previously talked about.

Q. Yes; and then there might be a choice as far as service units of the following: number of promotional calls for 1, time of sales promotion personnel for 2, or basis of promotional literature might be a third choice of service units; is that correct.

A. This, of course, depends on the character of the sales promotion, how to carry it out, and so on.

Q. So much of the problem in a cost survey is the ascertainment and selection of a service unit to be used in [fol. 53] allocating the cost of the function?

A. This is a very important part of it.

Q. And that again is very largely a matter of judgment, is it not?

A. Judgment enters into it to some extent without any doubt.

Q. Well, again you say that two accountants working for the same one will generally come up with different results because their judgment of the same facts will usually be somewhat different; is that a fact?

A. Well, they might, but do not carry that too far.

Q. Well, I hope that you will agree entirely with us before we are through, Professor Taggart.

Now, I call your attention to Page 15 of the cost justification report, under the heading Direct and Indirect Costs, and I ask you if that does not express—well, the first paragraph I will read:

> "Costs separately incurred for any given product, customer or group of customers are readily assigned. These are direct costs.
>
> "On the other hand, indirect costs which are jointly incurred for two or more products, customers or [fol. 54] groups of customers must be allocated before total costs for any given category can be ascertained."

Now, that expresses your point of view, does it not?

A. This is what we were talking about a while ago.

Q. I wanted merely to tie in what we are talking about to the language of the cost justification report.

A. Oh, yes.

Q. My colleague points out that there might be some ambiguity to a reader of your deposition. Do you mean that you do find in this paragraph that I read on Page 15 of the cost justification report an expression in which you were in agreement of the difference between direct and indirect costs and the distinction in the handling of the two?

A. There is an expression of the distinction in the handling of the two, yes. There is not a definition either of direct or indirect costs here.

Q. That definition could be found more or less by looking—no, cancel that.

Now, it is often true, is it not, that in the selection of a service unit to be used you are perfectly free to choose [fol. 55] more than one with equal validity?

A. I would hate to say that was often.

Q. Well, it would be in many cases, wouldn't it?

A. I am sure it does happen sometimes, yes.

[fol. 56] Q. Well, I call your attention on Page 28 of the Cost Justification Report, and in the first full para-

graph I want to read these two sentences: "The relationships of other functions to the costing segments—"

A. Beg pardon, where are you reading?

Q. Beginning the second sentence in the first full paragraph.

A. Oh, thank you.

Q. (Continuing)

> "The relationships of other functions to the costing segments are more remote, the choice of service unit which will adequately measure a given relationship is of greater difficulty; in many cases more than one service unit might be chosen."

A. That is what it says.

Q. And you are in agreement with that? I am going to read the rest of it.

A. Please remember we are talking here about indirect or more remote relationships.

Q. Well, now, that is a matter of degree, isn't it, Professor?

[fol. 57] A. Well, yes, some are more remote than others, it is perfectly true.

Q. In fact, you do not know just where you would limit this application, do you?

A. It isn't true that one function is remote and the other is absolutely not remote. It may vary in degree.

Q. Now, I call your attention to another sentence here, because I want to ask you again about your judgment:

> "Different service units will yield—"

I think there was a misprint there—quoting again,

> "will yield different dollars and cents results, and a particular service unit should not be chosen merely because it makes maximises cost differences. Where the choice is otherwise a matter of indifference, however, there can be no objection to the choice of the method which produces the most desirable results."

Now, you are in accordance with the principle there stated?

A. That is correct.

Q. And you do recognize that there are not infrequent instances where that principle can apply?

A. It happens every once in a while, particularly when you are dealing with indirect and rather remote fune [fol. 58] tions.

Q. Yes; now, it is also true that it is not a necessary part of a cost study to use a direct allocation of every cost that is susceptible to such an allocation?

A. Well, the only important exception I can think of would be where the cost is a rather minor one and where it just would not pay to take the trouble to do it in the most accurate fashion.

Q. Well, let's look at Page 27 of the Cost Justification Report. The bottom paragraph, let me read it to you and ask if this does not express your opinion:

> "At the outset caution should be exercised with respect to overemphasis on the distinction between direct and indirect costs. This distinction should not be made for minor items of cost or for those where treatment of potentially direct items by a satisfactory application of the indirect procedure will produce completely reliable results."

A. This is perfectly correct in general terms, yes.

Q. Then going on:

> "Establishment and maintenance of the necessary [fol. 59] bookkeeping routines for tabulating all direct costs is burdensome and is justified only where the amounts involved are appreciable and satisfactory results cannot be obtained by other and less expensive methods."

And going on:

> "In many cases the indirect functional approach using an uncontroversial unit of functional service will produce acceptable results."

Again, that states principle with which you are in accord?

A. Oh, yes, this is true. In other words, if you keep track of these particular minor direct costs very meticul-

ously, every penny's worth, showed exactly where it landed, the result might well be not at all different than if you threw it in with some item of overhead or some indirect function and allocated it on a basis concerning which there was no controversy.

[fol. 60] Q. There has to be some rule of reason in the detail with which you have to make those analyses.

A. To be sure, yes.

Q. Now, I am going to call your attention to Page 320 in the Accountants' Handbook, and I call your attention here (indicating).

Again this may not have been your own opinion, but it was based on a study of the Bureau of Foreign and Domestic Commerce. Here was a description of the function of administration and you indicated the service unit chosen was dollar of previously allocated expense. Now, that would represent what you mean by letting the indirect follow the direct, but defining it as a matter of using the previous allocated expenses?

A. This is an example, yes.

Q. And that is a very proper method of making such allocations?

A. Well, for certain kinds of expense, yes, this is true.

Q. Now, I give you still a different illustration here, which appears on Page 327 of the Accountants' Handbook, where the function is described as supervision and other selling cost and the service unit is dollar of salesman's [fol. 61] costs.

Now, there is a case where overhead or indirect expense is allowed to follow the direct expense, is that correct?

A. This is done frequently, yes.

Q. And it is an approved method of allocation?

A. Approved if the circumstances are such that it appears suitable in a particular case.

Q. Now, I call your attention, for example, to Page 27—I beg your pardon, no, 28, of the cost justification report. Now, I call your attention that one function listed as operating service—Now that operating service is the function which is defined previously on Page 26 in the fifth full paragraph, as follows:

> "The operating service function includes the cost of sales office, clerical work and administration of the

physical aspects of the distribution operations. Usually these activities are of greater cost importance when an organization is decentralized than when it is [fol. 62] centralized."

Now, that is the definition of what you mean by an operating service function in the first sentence that I have read, is that correct?

A. Well, that is what it says.

Q. But are you in agreement?

A. This happens to be a part of the report that I did not write.

Q. But generally you are familiar with it as a work of your committee?

A. Oh, yes.

Q. You approved it?

A. I think I would be in agreement with that, yes.

Q. Now, turning to Page 28, I notice that the operating service, it is stated that that could be treated, and I quote:

"—treated as overhead of selling in technical service function and allocated on the same basis."

Now, that again would be a perfectly approved method of such allocation?

A. Well, it might be under some circumstances.

[fol. 63] Q. Well, now——

A. I would have to examine the facts of an individual case before I would necessarily agree that every function or subfunction or activity that came under the general head of operating service should be treated in that way.

Remember that what we are doing here in this report is simply showing illustrations of things that might be suitable in a given case. We very definitely did not attempt to tie anyone down to say this is the way and the only way that this should be done.

These are some of the ways that you might consider as possibilities.

Q. Well, what you do, though, you recognize and you approve when you list them on Page 28 that these are proper methods to be considered?

A. They are proper to be considered, certainly.

Q. And that this kind of a method is in accordance with accounting principles unless there is some fact to show to the contrary?

A. Well, it might make sense, let's put it that way. I do not like to get into this question of being in accordance with accounting principles.

[fol. 64] Accounting principles is a very vague term and it means all things to all men, so I would prefer to adhere to the principles of logic or common sense.

Q. Well, let us put it this way: Certainly you would not have put in this as a possible method of treating of allocating operating service unless you recognized that there were many situations under which that would be a method approved by a general concensus of accounting opinion?

A. If you leave the word "many" out, I will go along; it is certainly common, yes.

Q. Now, I call your attention in the Accountants' Handbook on Page 328, a tabulation there. I ask you if that is one which represents or is in accordance with principles that you approve of.

A. This relates to a study of wholesale druggist operations and was prepared by a man by the name of Carrol for the Bureau of Foreign and Domestic Commerce back in the late 20's or early 30's. I should hate to say that I approved it or disapproved it.

[fol. 65] It is in here as an illustration of something that was done for the purpose intended. Incidentally, the purpose intended had nothing to do with the Robinson-Patman Act.

Q. No, but it had, I assume, some management function purpose, did it not?

A. Well, the Bureau of Foreign and Domestic Commerce at that time was worrying about problems of retail and wholesale distribution. They were trying to help these people out to some extent, trying to show them how they might analyze their operations without expending too much effort.

Actually, that was written, of course, before the Robinson-Patman Act was even passed, if I am not mistaken.

Q. Sure. You do not think that the accounting principles have changed particularly because of the passing of the Robinson-Patman Act?

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A. No, but I do have this feeling, that an analysis for Robinson-Patman purposes presents some problems which might perhaps for purely internal purposes not be allowed to worry anybody very much.

Q. Now, you will recall that you did have some para-
[fol. 66] graphs in the Accountants' Hand Book about the Bird case——

Mr. Ball: Mr. Reporter, that is B-i-r-d.

By Mr. Ball:

Q. (Continuing)—and you will notice there a classification was made between mail order houses, jobbers, retailers, and others, and you commented, did you not, that:

> **"Every analysis presented for Robinson-Patman purposes must stand on its own feet. No general pattern for such analysis to follow is available. In these cases analysis by customer classes will always be involved."**

I think you would assume that that expresses your present opinion as well as your opinion then?

A. Well, yes, although you can very easily get into analysis not by customer classes but by individual customers in some of these cases.

Q. But you went on to say: "Occasionally analysis by individual customers may be necessary."

A. Well, all right.

Q. But that would be, I think, by your own terms, the rare instance?

[fol. 67] A. Well, that isn't the usual way in which Robinson-Patman questions are presented.

Q They are usually presented by customer classifications?

A. Yes, I think that is a fair statement; of course, note that, for example, in treble damage suits under Section 4, the usual problem is a particular customer against other individual customers, sometimes, other customer classes, depending on the circumstances, but in all cases the cost of selling to an individual customer is a question which has to be met.

Q. But almost invariably it is determined by comparing the class to which the customer belongs with the other class which gets the discrimination, is that right?

A. American Can Company tried that and did not succeed too well.

Q. Now, I call your attention to Page 11 of the Cost Justification Report. I will read you as follows. I take it this part was part with which you did have some authorship:

> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a [fol. 68] valid business practice. What this means is that it is not necessary to cost justify each sales transaction or sale to each individual customer.
>
> "This is important for cost justification purposes, since if no transaction or customer could be treated as a member of class or group, the cost of making each individual sale would have to be ascertained.
>
> "Such refinement would be outside the realm of practicality and would tend to make price uniformity a necessity regardless of economies of manufacture, sale or delivery in dealing with certain customers."

Now, I take it that that does represent your considered views?

A. I think I probably wrote that.

Mr. Hart: May I say this off record?

(Discussion had off the record.)

[fol. 69] By Mr. Ball:

Q. Now, Professor Taggart, I want to return to a particular statement you made here. I am looking at your Paragraphs E and F on Page 8.

So far as you know, the Borden survey followed the principles set forth in those two paragraphs, is that correct?

A. Well, I think two things ought to be said. The Borden study, as I recall, broke down the driver's activities into some 40, I believe, pieces.

Certain of those subfunctions or activities, related primarily to his procedures at the premises of customers, that is, after he got there. The balance of them related to his other activities, that is, on the road and at the platform, or wherever he found his truck, and so on and so forth.

In other words, the Borden study didn't, as I suggest here, as I say in Paragraph E, Page 8, simply content itself with breaking the driver's activities into two major classifications; they went a lot farther than that.

Q. Well, that is not a vice in the study, is it?

A. Not necessarily; if the person that is paying the bill is willing to pay for it. So that I can say with respect to [fol. 70] a Borden study, Paragraph E was adhered to and then some in the sense that the driver's activities were definitely broken into various functions or subfunctions, whatever you want to call them.

Q. Maybe in this case you should call them sub-sub-functions.

A. Yes. All right. They belong in the sub-subbasement, the functional hierarchy.

Q. Yes.

Now, with respect to Paragraph F, Paragraph F appears to relate entirely to the activities which the driver performs at the premises of the customer.

A. Yes.

Q. Those would be what you would call direct?

A. Well, yes, I think that is not unreasonable to call them direct.

Q. And what you are saying is that those as direct should be allocated on a direct basis to the classes of customers?

A. Well, what it says is, to be exact: "Should be allocated among the store customers on the basis of the time study."

It does not say necessarily that it needs to be allocated to individual customers. It just says among the customers.

[fol. 71] Q. What I am getting at, there is implied in neither E or F any criticism of the adequacy of the Borden study?

A. I do not think so, no. I do not think—I think you are right.

Q. That is just what I wanted to be sure about.

A. I was not attempting to be critical in E and F, that is right. This does not mean that I would agree in every last detail with what these 40 activities—with the way the 40 activities were handled necessarily, but the general thought of breaking his total job down into activities, I certainly would agree with.

Q. What I am trying to find out, Professor Taggart, here is that this is your direct testimony and I am trying to find out exactly what you meant by it.

A. Yes, of course.

Q. Now, I want to go back to Page 7 and look at Paragraph C. Now, you say here that, "Central office expenses omitted by Defendant Borden——"

Now, are you aware of the fact—I want to call your attention to the pages 74, 75 and 76 of the Borden pretrial order. It sets forth the dollar amounts of a large number of expenses, including central office and others, the numbers [fol. 72] of which are shown in Paragraph 108.

Now, you did not mean to imply, did you, in any way when you say that central office expenses omitted that, no reference was made in the order to such expenses?

A. Oh, I think there was reference to the Borden material, yes. I did not mean that they weren't even mentioned.

Q. Now, the Borden study, Professor Taggart, sets forth the dollar amount of sales by classes of customers. It sets forth certain expenses which are directly allocable to classes of customers which would create some differences in cents per dollar of sales.

Now, any expense which would not be allocated would have exactly the same effect as if it were allocated in relation to the dollar value of sales to the customers, would it not, so far as the effect upon the existence or non-existence of justification for differentials and prices?

A. You left it out completely. In other words, it would have the same effect as if you put it in and allocated it on the basis of list sales dollars.

[fol. 73] Q. Yes.

A. Or, well, if it were allocated, allocated on the basis of list sales dollars?

Q. Yes, on gross sales dollars in the Borden case.

A. Yes.

Q. You understand the computations?

A. Yes, that is true.

Q. So, regarding the order as really setting forth the basic facts, all of the facts then are presented fully without omissions since you have the dollar amount of expenses not allocated and you have the sales, then you could make the allocations——

A. Well, all the facts as to total costs are presumably presented.

Q. Yes.

A. This does not mean that all of the facts that might be pertinent are presented.

Q. No, but you do not know of any facts that were not presented of your own knowledge?

A. Of my own knowledge, I do not know.

Q. Now, when you say in C that "Central office expenses were omitted by Defendant Borden," you were not correct in the sense that the information was omitted from the pretrial order itself?

[fol. 74] A. Well, the choice of words was unfortunate; "omitted" is perhaps a little too broad a word.

[fol. 75] Q. It carries connotations you did not intend?

A. That is correct.

Q. And the result is exactly the same as if those expenses had been allocated in relation to the gross dollar sales?

A. The results are the same in this sense, that there is derived from these costs no differential.

Q. That is right.

A. Of any kind for dollar sales.

Q. It would neither increase or decrease the differential indicated by the figures that have been allocated on a different basis.

Q. Well, if you allocated them on a dollar sales basis, it would not decrease or increase.

Q. Yes; you do not know, as a fact, do you, Professor Taggart, whether executives and their office staffs spend any time obtaining and maintaining customer accounts?

A. As a fact, I do not know it.

Q. And unless that were a fact there would be no point in attempting to allocate the time of executives and their office staffs in connection with the times allegedly so spent?

A. Well, I think this probably is true.

[fol. 76] Q. Incidentally, what do you mean by "maintaining customer accounts"?

A. Keeping them happy.

Q. Now, I call your attention to a sentence entitled, "Fixed and variable costs" at Page 337 of the Accountants' Hand Book, and I call particularly your attention to this section here:

> "An example is truck deliveries. If regular truck delivery service is maintained over certain routes, the total costs of operating the trucks is a relatively fixed amount, including gasoline, wages of drivers, and all other items.
>
> "Comparatively little difference is caused by weight or bulk of goods carried or the size of individual orders, although the number of delivery stops has some influence on the time required and may affect certain cost elements."

Now, that sentence expresses your considered judgment, does it not?

A. Do you mind if I read the whole paragraph?

Q. No, I certainly do not.

(Witness examining document.)

[fol. 77] By the witness:

A. This is perfectly correct, provided this is read in context. I am talking here not about Robinson-Patman studies at all; I am talking about cost studies for managerial decisions.

I would like to read the short paragraph at the end of this sentence or this particular section which points out what I am talking about here really:

> "This substantial degree of fixity has an important bearing on the interpretation of all analyses and on the type of managerial action to be taken."

Note, that we are talking about managerial action.

> "The remedies, appropriate for variable costs, are of no avail in connection with fixed costs."

In context, therefore, this is perfectly correct. This I talked about earlier, as a matter of fact, when we were discussing the same subject, namely, decisions whether to add certain customers, routes, products, or on the contrary, where the question of fixed costs against variable costs enters into the picture very importantly.

[fol. 78] Q. Now, I call your attention to Page 316 of the Accountants' Hand Book, and I take it again that this list of functions and service units was one of your devising or compilation?

A. Compilation, preferably.

Q. And in general that represented your considered opinion at the time as appropriate service units to measure the allocation of the functions?

A. Yes, these were actually chosen, as I said before, out of various studies that had been made by various people for various purposes. It is purely illustrative.

It does not necessarily mean that I thought they were good or bad.

Q. But that——

A. But that they had been used.

Q. And they were reasonable alternatives?

A. They might be under the proper circumstances, that is correct.

Q. Now, I call your attention that you list with respect to City delivery choice of service unit, truck mile or hour or order or invoice line or unit of goods sold for City delivery.

You regarded them as all possible service units to be used for measuring the cost of City delivery?

[fol. 79] A. Depending on the analysis and the circumstances under which it is made.

Q. Were you familiar with the delivery route pattern of the wholesale routes making deliveries to store customers in the Chicago market? I mean, did you study that? Are you familiar with how those are worked out?

A. Well, only as far as they were described in the material that I saw.

Q. Now, turning to Page 9 of the report, I am going to

hand you—I call your attention to your first sentence of Paragraph H:

> "It is apparent from Paragraph 196 M.D. of Borden's pre-trial order drivers do exercise some influence on volume delivered, and that such commissions should be allocated to the store customers on the basis of volume of products delivered to each."

[fol. 80] Now, I hand you this report and I would like to have you point out what it is that you find in Paragraph 196 MD that led you to the conclusion that drivers have any influence over the volume sold upon which their commissions are paid.

A. Well, I think that what I had reference to here is pretty largely this material which says that "the wholesale routemen anticipate the requirements of each individual customer and at the time of delivery leave quantities which in the routeman's opinion are sufficient to supply the daily sales need of the customer."

In other words, this seems to place considerable amount of the burden of determining quantity on the driver.

Q. Well, now, you understand, do you not, that if milk is not sold by the retailer, the retail store customer within a specified period of time returns the milk and receives full credit?

A. Yes, this is what I understand.

Q. You understand also that the Commissions paid are on the net points which are after the reduction of returns?

A. I am not sure I would agree to that.

[fol. 81] Q. Well, assume that for the moment.

A. I will accept it as an assumption.

Q. Now, are you aware that—Now, it follows, therefore, does it not, Professor Taggart, that the sales of the retail customer are not in any way, to his customers, are not in any way influenced by the amount of milk delivered provided it is sufficient to cover his daily needs?

A. Well, in a sense this is true. In other words, if he delivers more milk than the store sells it is not to his advantage.

Q. That is right.

A. In that sense you are right.

Q. And there is no way in which the amount of milk he

delivers is going to increase the sales of that store to its customers?

A. No, but it still may well be true that he can help in the display of milk, for example, or perhaps in the merchandising of milk, something of that sort, in such a way as to help the storekeeper in his milk business, to carry on his milk business.

Q. Well, you understand——

A. Thus increase his sales.

Q. Well, but you do not find anything in the descriptions [fol. 82] of the activities of the driver where he does any of that kind of work?

A. The description of the activities of the driver are fairly detailed, but one of the items that is mentioned there is conversation. Now, with what this conversation is about, I do not know, frankly, but it certainly could be this.

Q. But you have no knowledge of it at all that it could be on this subject?

A. I never watched a driver do this, if that is the question.

Q. Now, I call to your attention Page 70, Paragraph 112, and I ask you if you are aware of the facts set forth in Paragraph 112 MD, beginning at the bottom of Page 770.

A. It looks as if the solicitors do this sort of thing as part of their job.

Q. So that the order does show that there is a division of responsibility between the solicitor and the driver and the driver has no responsibility for promotions?

A. I don't recall anything like that. It does not say, as far as I read it, that the driver never does anything of the sort.

[fol. 83] Q. Well, then, you base the assumption—you make the flat statement here that it is apparent from 196 that the drivers do exercise some influence. Now, where is it apparent in 196 that the drivers do exercise that influence on the sales?

A. It says that the drivers determine what the customer's requirements are and they decide how much to leave in effect.

Q. But they do not get paid commissions on the amount they leave, do they?

A. They certainly must exercise some judgment in the amounts they leave, but if they leave more than the customer sells they have to take it back, and that is netted, understand that. There is nothing in this that indicates to me that they might not exert the influence which their daily calls have on these customers to participate in promotional activities, new methods of selling, new methods of display, and so on and so forth.

Q. But, Professor Taggart——

A. It is to everybody's advantage for them to do this.

Q. But there is nothing in Paragraph 196 that says they influence the sales by the customers, is there? You are [fol. 84] drawing this inference from facts outside of what is in 196?

A. Well, 196 does not say that in so many words, but it certainly leaves the door open.

[fol. 85] Q. Well, then, it is inaccurate to say that it is apparent from 196 that the driver is influencing sales?

A. Maybe I should have stated it that the drivers may influence. It certainly is apparent that they may influence, without a doubt.

Q. What you are saying is that you do not know whether they do or not, that they might, and that is the most you can draw, is that correct?

A. Well, I think there is a little more than that, that is, both driver and customer are interested in maximizing the sale of fluid milk products. It is to the mutual advantage of both of them.

It seems a little unlikely to me that a driver who, for example, might notice that the milk sales of a given customer have gone down recently, might not ask the customer, "Well, how come? What have you done? Have you been leaving your cases dirty or doing something to turn your customers away? Have you failed to call your customers' attention to the fact that you sell this product and it is available for them?"

Q. Well, now, Professor Taggart,——

A. "There is some way in which you and I can mutually benefit by increasing your sales of milk."

[fol. 86] Q. Isn't it equally possible he will suggest the solicitor call on the customer?

A. He might in a suitable case, sure, of course.

Q. So there is nothing——

A. He has a real interest in volume. There is certainly no doubt about it.

Q. Now, did you read over or are you aware of the terms of the union contract that covers the compensation of drivers?

A. Well, I saw the union contract.

Q. Now I want to call your attention to Article 4 in the fifth paragraph of the union contract which is in here as an exhibit, a rebuttal exhibit N on Page 1:

> "In case a route is too large to be run within the proper time schedule, adjustments, when warranted, shall be made within two weeks by the employer so that such route can be properly serviced within the 45 hour week.
>
> "If adjustments are not made within two weeks after request is made by union representative, such shall be considered in violation of this agreement."

[fol. 87] And I ask you if that does not indicate the intention of the parties were to fix an overall remuneration for the route as a route, rather than to offer an incentive to produce sales on the part of the driver?

Mr. Jinkinson: To which I object and direct the witness not to answer the question on the grounds he is called upon to interpret the union contract, which, of course, he is not a party to, did not make and knows nothing about the terms thereof.

Mr. Long: He is not a lawyer.

By Mr. Ball:

Q. I will show you the language here.

Well, I am going to withdraw the question and ask this:

In the statement which stands as your direct testimony in Paragraph H on Page 9, did you take into account or were you aware of this provision of the union contract? (indicating)

A. I think it is safe to say that I have not read that provision of the union contract.

Q. Now, I want to read you also another provision from Article 25 of the union contract:

[fol. 88] "It is agreed that no employee shall be required to deliver more goods than he can adequately serve within the regular working time specified in this agreement."

I ask you if you were aware of that provision at the time this paragraph H was drafted?

A. I would say I assume that I had not read that particular paragraph.

Q. Now, I want to read you Article 24:

"It is further agreed by the employer that when a route is split, the driver whose route is so divided shall have first choice of the two routes with full pay for the six months following or such part thereof as he continues in the employment of the employer, to be governed by the 30 days average sales previously dividing said route."

Were you aware of that provision at the time Paragraph H was drafted?

A. Again I doubt very much if I read that provision.

Q. Now, were you aware when you drafted that paragraph that on the basis of seniority a driver could bid for a route that had a larger total number of aggregate [fol. 89] points?

A. Bid for a route?

Q. Yes, that became open.

A. I do not understand what you mean by bidding for a route.

Q. Were you aware that if a route were opened for a new driver that——

A. Oh.

Q. (Continuing) —that those who had seniority could bid for it in the order of their seniority and obtain it from the employer if the route had more points than the route which they were serving.

A. You mean by bid, simply make a request?

Q. That they would be entitled to.

A. Now, I think I have forgotten the question.

Q. Were you aware when Paragraph H was written, that a driver at any time who had seniority could request and compel his transfer to a route which was open?

A. I am sure I was not aware of that.

Q. Were you aware of the fact that under the union contract that the men on so-called bulk wholesale routes were not paid any commission but received a flat salary only under the same contract?

[fol. 90] A. I do not know what a bulk wholesale route is.

Q. Well, that is a route serving restaurants and stores,——

A. Oh, I see.

Q. (Continuing) —and hotels and drug stores?

A. Part of the milk is consumed on the premises, is that what you mean?

Q. Well, yes, generally. Generally that is considered the inside of buildings. Restaurants, hotels, drug stores, certain routes composed of those customers, only the drivers received only salary and no commission on sales.

A. I think I have been told that at some time or another, but when I do not know.

Q. Did you take that into consideration when Paragraph H was drafted?

A. No, because we are not dealing with that kind of route here.

Q. But you were dealing—but you understand that that was provided for in the same union contract, do you not?

A. If that is what you say.

Q. You did not take that fact into consideration?

A. No.

[fol. 91] Q. What was your understanding as to how the routes—as to who determined the routes and the customers to be placed on different routes?

A. I do not think anybody ever told me precisely who does this. Obviously, it would be someone in charge of the operations, retail operation, whoever might be involved, perhaps with the union, for all I know.

Q. Did you take account of that fact in the drafting of Paragraph 8 or did you consider it not relevant?

A. Frankly, I do not think it is very pertinent.

Q. Do you know whether or not a driver was permitted to solicit a new customer?

A. This I do not know.

Q. Now, there is no invariable rule of accounting that requires commissions always or compensation based on volume of sales always to be allocated on the basis of sales, is there?

A. No. It certainly is the most common way to do it, but this isn't necessarily an ironclad rule.

Q. Well, allocating compensation which is measured by the volume of sales can be done on other bases than allocating it in proportion to sales, can it not?

A. It could be under suitable circumstances.

Q. And those circumstances might exist in this present [fol. 92] case so far as you know?

A. Well, it might, but it did not seem to me that they did.

Q. You were basing that only upon the matters that you considered when you wrote Paragraph H?

A. Yes. Of course, remember that I had discussed the milk business with Mr. Wool-ey, and to some extent with Mr. Jinkinson.

Q. Well, now, did you base your opinion in H partly upon what Mr. Wool-ey told you?

A. Oh, I think so, yes. It confirmed an impression that was created by whatever paragraph this number is here.

Mr. Long: 196, I believe.

By the Witness:

A. (Continuing) —196 M.D.

Mr. Ball: Let's take a short recess, shall we?

(A recess taken.)

By Mr. Ball:

Q. Now, Professor Taggart, I would like to call your attention to Page 119 of the Borden pre-trial order. I call your attention to Item 23 and ask you if that is the matter that you had reference to as to the opportunity of [fol. 93] the driver to influence sales to a store.

A. Well, this would certainly give him an opportunity to do that, yes.

Q. Yes; and that is the only item there that you had reference to, isn't it?

A. Well, I would have to review all these forty items to make absolutely sure.

Q. That is the one you had in mind?

A. This is certainly the one I had in mind, that is right.

Q. Yes; well, would you like to review those forty, because I would like to see if there were any others that you thought had any effect on this. It starts on Page 114.

A. Well, I should think Item 9, for example, might give some opportunity for the driver to exert the arts of salesmanship. Sometimes a customer will require more merchandise than the amount estimated by the routeman.

Q. Well, does that indicate that the routeman has done any selling of the store manager?

A. It might, it could; certainly could.

Q. You notice that the word is "required?"

[fol. 94] A. It could very well be. Why does he require it? Perhaps because the routeman made a suggestion.

Q. And perhaps because his customers had increased in number and were using more milk, that is also true?

A. That would be very nice.

Q. Huh?

A. That would be very nice.

Q. I mean, it is equally a possible reason?

A. Sure, but the point is it might very well be at the suggestion of the routeman.

Q. Will you go ahead?

A. I might point out there are a number of other activities, whereas, the routeman certainly has pretty direct contact with the owner or manager of a store, there is nothing in the time study to indicate that at least occasional bits of conversation may not take place then.

Collecting credit accounts, securing customer signature for credit deliveries, somebody in some degree of authority is accessible to the driver at these times. The time study, while it includes Item 23, there is no proof that the

time study man clicked his watch every time he heard the driver say a word or two to the customer.

[fol. 95] Obviously, if he spent quite a little bit of time pointing out to the customer how he could do business better, I would say it probably would belong under Item 23; but, then this—very likely then he would be caught by the time study man, but this does not necessarily mean that the time study man catches all the conversation that goes on and records it under Item 23.

Q. Do you recall what the instructions were to the time study man in recording Item 23?

A. I do not remember whether I saw those instructions or not. I might have.

Q. Go ahead.

A. I am not sure.

Q. Are there any other items in here that indicate any possible activity on the part of the driver that would influence the sales by the retailer?

A. Well, most of the rest of these, of course, take place off the customer's premises, not entirely, that is, but, well, I think approximately in Item 23.

It looks as if the rest of the operations here take place off the customer's premises, so that I would assume there would be little or no opportunity in these cases.

[fol. 96] Q. Now, you understand, do you not, that a storekeeper does not consume the milk that is sold to him but in turn he sells it?

A. I assume that is the principal reason he buys it.

Q. And that his sales are dictated by the demands of his customers?

A. Well, this would not deny that the storekeeper in turn could not influence the demand of his customers. This is a little out of context, but are you referring to the kind of situation we have in the book called Booking Backward, perhaps?

Q. That is the dullest book that ever was written. When you drafted Paragraph H did you or did you not know that the route is not determined by the driver or the customer on the route is not determined by the driver?

A. Well, I do not know that anybody told me that, but I think—I certainly assumed it, that the driver would not determine what particular places he would stop all by himself.

Q. Well, did you think the driver had anything to do with the selection of his customers or the addition of customers to his route?

A. Well, I would assume not directly; that is, I should [fol. 97] think he might have something to do with it in this way, that if he saw signs that a new grocery store, shall we say, was going to go up on some certain corner, he will probably call it to the attention of the proper parties so that they in turn might hustle out and solicit this new storekeeper. I think he might in a situation somewhat that way.

These drivers are businessmen, after all. They are not just robots or automatons; they are anxious to increase their personal income, and the best way to do that is through increasing volume.

Q. They are also union men, aren't they?

(Discussion had off the record.)

Mr. Ball: Leave it this way. I will go over my notes tonight. I think I will have a few additional questions tomorrow, but I think we will save time if Mr. Stevens started the first thing in the morning. We do want to resume.

Mr. Jinkinson: Very well. Nine-thirty in the morning.

Mr. Ball: Fine.

(Whereupon the deposition in the above entitled cause was continued until the following day, Tuesday, April 15, 1958.)

Volume II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 439

UNITED STATES, APPELLANT,

vs.

THE BORDEN COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED SEPTEMBER 22, 1961
PROBABLE JURISDICTION NOTED DECEMBER 4, 1961

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Volume II

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[fol. 98] In The United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America, Plaintiff,

vs.

The Borden Company, et al., Defendants.

The deposition of Herbert F. Taggart was resumed, pursuant to adjournment at Room 756 at the United States Courthouse, Chicago, Illinois, at 9:30 o'clock a.m. April 15, 1958.

Present: Mr. Earl Jinkinson, Mr. Bertram Long, Mr. Stuart S. Ball, Mr. H. Blair White, Mr. Joseph Greaves, Mr. Edward L. Hart, Jr., Mr. John P. Stevens.

[fol. 99] Herbert F. Taggart, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Stevens:

Q. Professor Taggart, you have expressed an opinion that cost accounting is not an exact science, is that correct?

A. That has been expressed by me and a great many other people.

Q. That I take it is true of distribution cost analysis?

A. Yes, indeed.

Q. If anything, is it more true of distribution cost analysis than other types?

A. To a degree, yes.

Q. In selecting a method of allocating costs or selecting an appropriate service unit, is it correct that you draw on your knowledge of cost accounting principles and also on your knowledge of particular circumstances involved in the problem?

A. Well, I would think the major element would be the particular circumstances in the problem. That is, you do this in a factual setting.

Q. And is it sometimes true or has it been true in your [fol. 100] experience that you sometimes form an initial impression as to what is the most appropriate method of making a particular allocation and you sometimes change your opinion as you become more familiar with the detail and circumstances surrounding the problem?

A. Oh, this happens, yes.

Q. And it is not at all unusual for that to happen, is it?

A. Well, you are asking me to generalize in a field where generalization is pretty difficult but let us put it that I know of instances this has happened.

Q. Professor Taggart, have you made any cost studies in the dairy industry?

A. No.

Mr. Jinkinson: That is in this one.

Mr. Stevens: I think he has answered the question, "No."

By Mr. Stevens:

Q. Except for your work with the plaintiff in this case, have you done any advisory or consulting work for dairies in connection with the dairy industry?

A. No.

Q. Professor Taggart, do you know how many hours you devoted to the work that you did in connection with the preparation of your proposed direct testimony here, and [fol. 101] I don't mean to include your testimony yesterday or any meetings you may have had a day or two before that?

A. No. I testified yesterday that I had spent two pretty solid weeks in careful review of the materials that were furnished me and that a number of days following that in consulting with Mr. Woolley primarily about certain tentative conclusions that I have drawn, a clarification of some of the facts in an attempt to formulate what might be put into the document which we have been discussing.

Q. Was that the entire work you did in connection with this matter?

A. I think that is fair to say that it is.

Q. Did you ever have any occasion for billing purposes or any other purposes to determine just how many hours that covered?

A. Oh, I billed the government in accordance with the records that I keep.

Q. On an hourly basis? I am not interested in what the amount of the billing was, or what your rate was.

A. Surely, I understand. Yes, I think it is undoubtedly because some days I would not work full time and other days I did work full time, as a matter of fact.

[fol. 102] Q. I am just wondering if perhaps you do remember, and again I say I am not asking for the amount, if you do remember the amount of your bill, perhaps you could mentally divide it by your rate and thereby recall how many hours you did devote to the matter?

A. This is a very difficult computation.

Q. If you do not recall that is all right. I thought you might.

A. No. It was—I would say roughly an equivalent of three weeks, approximately what might be called full time work.

Q. You indicated yesterday that a list of the material that was left with you was prepared or given to you?

A. That is right.

Q. Do you have that list with you?

A. Yes.

Q. May I see it?

A. Yes.

Mr. Stevens: I would like to have the reporter mark this—why don't we start with a new series of numbers, Taggart Bowman Exhibit No. 2 for identification.

(Said document was marked as requested.)

By Mr. Stevens:

Q. Professor Taggart, directing your attention to Tag-[fol. 103] gart Bowman Exhibit 2 for identification, is that a complete list of the documents which were left with you when Mr. Woolley first visited you?

A. Well, my impression is that it is. I should hate to say that Mr. Woolley left nothing else, but at least he left these things.

Q. You don't recall anything in addition to that?

A. Nothing specific, that is correct.

Q. Do you know if the statements made in your proposed direct testimony were based on any documents that you can recall other than those listed on that exhibit?

Mr. Stevens: Just for the record I think I should clarify that. Whenever I referred to Professor Taggart's direct testimony I intend to be referring to the proposed direct testimony which is set out in writing in pages 5 through 8 of the government's proposed rebuttal as to the Bowman Dairy Company. That is all I am inquiring about.

The Witness: May I have that last question?

(The last question read as recorded above.)

By the Witness:

A. As far as I can recall on no other document.

Q. Who prepared Taggart's Exhibit 2 for identifica-
[fol. 104] tion?

A. I am not the one to answer that question.

Q. I mean did you prepare it or did someone give it to you with the documents?

A. Oh, they gave it to me.

Q. In other words it was delivered with the document?

A. Yes, that is right.

Q. At least insofar as your testimony pertains to the Bowman Dairy Company, is it fair to assume, Professor Taggart, that your proposed testimony is at least in part based on all of the documents which are listed there, which pertain to Bowman?

A. Well, I feel quite sure I took into consideration the things that I thought were pertinent.

Q. You did not select a certain group of documents and say, "This is what I am using for my"—and leave any others out?

A. Not intentionally.

Q. The first item is transcript Volume 8, civil trial, 51 C 947. I do not have that with me. I assume that is one

of the transcripts of the pretrial conference before Judge Campbell.

Mr. Stevens: Is that correct? I am asking the government.

[fol. 105] Mr. Long: That now generally is a transcript of the trial, the 1953 trial involving both the Sherman and the Clayton Act charges.

Mr. Stevens: That is a transcript, one day's proceeding at the original trial?

Mr. Long: Yes. That would be, yes, the day.

Mr. Stevens: I see.

Then, the Roman numeral II on this Taggart Exhibit 2 refers to government pretrial order for A Bowman and B Borden. With respect to A am I correct, Professor Taggart, and I will ask Mr. Long to check this with you if he will, I assume that refers to this document; namely, government's initial pretrial order?

Mr. Long: That is correct.

By Mr. Stevens:

Q. Is that your recollection, too, Professor Taggart, it was a copy of this document?

A. As far as I can recall, yes. I would have to look at the document carefully.

Q. Perhaps I can shorten this. Do you by any chance have the documents that were originally given to you?

A. No.

Q. Just for the purposes of identification?

[fol. 106] A. No, I doubt if I have any of them as a matter of fact.

Q. All right then. And a Roman numeral III, Bowman documents cost defense, a wholesale store account. The first document, let us say, is described "Manual". Would I be correct in believing that that was the document which has been identified in the proceeding as Bowman Exhibit 4 and sometimes referred to as the basic manual, and I show you a copy of that.

A. This I have studied, yes.

Q. The second item is called "Discount tests, March, 1955, September, 1955 and January, 1956" and I will ask you, Professor Taggart, if that refers to these three docu-

ments; namely, Bowman Exhibits 14, 15 and 16 which have previously been identified in the case?

A. Yes. That is correct.

Q. Now, the next item is government cost analysis, memos. The first one is A, July 10, 1956. First I would like to ask you, Professor Taggart, was that merely a copy of extracts from these documents?

A. Not as I recall, no.

Q. Did that document contain additional material?

A. Well, I think it contains some further analysis of material which was in the manual and these tests, as I [fol. 107] recall it. I can't—I would have to look at the document in order to be entirely sure what it contained but my impression is that it was certainly not a mere transcript of material that appeared in the Bowman document.

Q. Would the same be true with respect to Item B, February 6, 1957 revision?

A. This would be true, yes.

Q. Do you have those documents with you?

A. No, I am quite sure I do not.

Mr. Stevens: We would like to see those documents.

Mr. Long: I don't know whether—my feeling would be that that is not to be produced. They were work products here, Mr. Woolley's and the office's. We would object.

Mr. Ball: Let the record show that Borden joins in the request that these documents which were submitted to Professor Taggart and which were considered by him in the formulation of the opinions expressed by him in his direct testimony.

Mr. Long: Let the record show that we object to the tendering of these documents that Bowman and Borden on the basis of the fact that they constitute work products and to that extent would — privileged and also that [fol. 108] there would be no hardship on Bowman or Borden because, as I understand it, you are going to take Mr. Woolley's deposition at which time you will examine him in full with respect to his analysis of both the Bowman and the Borden cost which would be adequate.

Mr. Ball: Borden objects then to the admission of incompetent testimony on the opinions expressed by Professor Taggart on the ground that the basis of those opin-

ions cannot be properly ascertained without reference to and knowledge of the material that was in his hands at the time the opinions were formulated.

Mr. Hart: May I interrupt just a minute. I think before we get out further with this we ought to find out from Professor Taggart.

By Mr. Hart:

Q. Did you ever return these documents to the Government?

A. I am quite sure I returned all of them. I think those were my instructions and I am quite sure this is true.

Mr. Stevens: You have our request in any event.

[fol. 109] By Mr. Stevens:

Professor Taggart, did Mr. Woolley indicate to you that he prepared the documents to which you have just been referring?

A. These two government memos?

Q. July 10 and February 6 memos?

A. This is certainly the impression I had and I assume Mr. Wool-ey must have told me.

Q. Then, Item 4, referring to the Bergfeld deposition, Volume I and II, I take it that was a deposition that was taken here in this proceeding?

Mr. Long: Yes.

Mr. Stevens: We are, of course, referring to the man who supervised the Bowman cost study there, is that correct, Professor Taggart?

A. This is as I understand it.

Mr. Ball: Could we go off the record?

(Discussion had off the record.)

Mr. Ball: Let the record show that as far as Borden is concerned that it cannot consent to the closing of the deposition of Professor Taggart until an opportunity has been had to obtain a ruling from Judge Campbell upon the production of the material used by Professor Taggart in the formation of his opinion.

[fol. 110] Mr. Hart: I do not know what position we want to take on that by Bowman. We will go as far as we can with Professor Taggart. We may be perfectly willing to close the evidence at the end unless we feel there is something in these documents from the further questioning that we want to go into and then we might make the same objection.

Mr. Stevens: In any event we would like to go ahead with the examination and cover as much or more as we can while Professor Taggart is here.

By Mr. Stevens:

Q. The next item on the list, Professor Taggart, is B, bulk wholesale accounts, restaurant. And under that (1), Bowman cost analysis, March, 1956.

Do you recall what that document was?

A. I certainly don't recall it in any particular detail.

Q. Perhaps we can ask it this way:

Do you recall reviewing a document which was prepared by the cost accountant employed by Bowman dealing with delivery of dairy products to restaurants, hotels and bulk accounts?

A. I think I reviewed such a cost study, yes.

Q. I assume that would be that one listed there, under I. [fol. 111] Item C is Bowman proposed pretrial order, subject to revision.

Professor Taggart, do you have a copy of the proposed pretrial order as to Bowman that you examined?

A. I examined a copy of this document, yes.

Q. It would also be true you did not retain it?

A. I did not retain it.

Q. Did you ever see the final draft of the pretrial order as to the defendant Bowman?

A. I am quite sure I did not. If it was not in existence last June or July I have not seen it.

Q. And Item 4 relates exclusively to Borden, I take it so we do not have to go over that.

For example, this Item 2 that pertains only to Borden, does it not?

A. Well, it appears to.

Q. As far as you recall?

A. Yes.

Q. So that we have now reviewed all of the items pertaining to Bowman that you examined as best you can recall?

A. That is right.

Q. Now, I would like to direct your attention to a portion of the pretrial order entered on behalf of the Bowman [fol. 112] Dairy Company beginning with Paragraph 28 carrying through to and including Paragraph 34, which would be pages 19 and 26. I would like you if you would, please, Professor Taggart, to look through that material and tell me if you recall whether you ever saw that before or whether you read it?

A. Okay.

[fol. 113] Q. Are you in a position to answer the question now, Professor? The question was whether you had read that material.

A. I think I have not read that particular material. Some of the suggested possible testimony of Mr. Bergfeld there has a familiar sound, because I think some statements are similar to those that were in the original deposition; but a good deal of it is new.

Q. To the extent that it is not incorporated in the deposition of Mr. Bergfeld it would be new, is that correct?

A. I think that is true.

Q. And we are referring, just to be sure the record is clear, to the material beginning at the bottom of Page 19 with Paragraph No. 28 to and including Paragraph 35, which discusses Central Office Overhead, down to the bottom of Page 30?

A. That is right.

Q. So that except insofar as material incorporated herein is also found in the Bergfeld deposition, you could not have taken this into account in preparing your proposed direct testimony?

A. I think that is true.

Q. Professor Taggart, I do not see on the list of docu- [fol. 114] ments on Taggart Exhibit 2 any reference to the union contract. Do you recall when you first saw the union contract, or whether in fact you did see it, or merely were told about it?

A. Well, I am quite sure I have seen it at one time or another. As I recall, what I had was a positive photo-

static copy; but precisely when I got it and from whom, I cannot tell.

Q. Did you ever see any Bowman discount schedules?

A. Well, to the extent that they may have been included in some of these documents.

Q. Well—

A. Not otherwise, as far as I know.

Q. You were never given a separate group of a series of Bowman discount schedules, to the best of your recollection?

A. Not as far as I recall.

Q. Do you recall whether or not the Bowman discount schedule was a bracket discount schedule?

A. Well, would you explain what you mean by a bracket discount schedule?

Q. Well, let me put it this way: Do you recall what kind of a discount schedule the Bowman Dairy Company had [fol. 115] that you examined? I would rather have you define these things than try to do it myself.

A. Well, this is a pretty difficult thing to ask me to recall at this particular time, and especially in view of the fact that it is a little hard to keep Bowman and Borden completely straight in my mind.

I remember that they both offered discounts.

Q. Do you recall any striking difference between the types of schedules used by Borden and by Bowman?

A. Oh, I cannot say that I do as of this moment.

Q. Let me find what I believe you probably would have seen.

Professor Taggart, directing your attention to what has been identified as Exhibit 1 to the Government's initial supplemental pre trial order in this case, which purports to be a copy of a Bowman Dairy Company's retail store discount schedule, I will ask you if you reviewed that in connection with your study of the material?

A. I recall it now, yes.

Q. Now, do you recall whether that is similar or quite different to the type of schedule which was used by the Borden Dairy Company?

[fol. 116] A. Well, if I recall the Borden Dairy schedule correctly, there were about five steps, or something like that, five or six steps to it, whereas, to this there are a

considerably larger number of steps, or brackets, if you prefer.

Q. Was it your impression in reviewing this study, just taking an example at random, that a customer who purchased 35 points, in other words, midway between 30 and 40 points, received a discount of 4.2 per cent or 4.6 per cent, or what was your impression?

A. Well, if I remember rightly, the impression was that he would receive a discount proportioned between 4.2 and 4.6.

Q. But there was in effect a continuous sliding scale with increases in volume giving an increased discount?

A. Yes. I remember that gave me a good deal of trouble in trying to make some computations that I attempted to make.

Q. I will just leave that there. You may refer to it later. In addition to Mr. Wooley, did you confer with any other representatives of the plaintiff?

A. Mr. Jinkinson.

Q. Was he with Mr. Woolley on the first visit that Mr. Woolley made to you?

[fol. 117] A. Yes, he was.

Q. Then how long did that visit last?

A. Well, I think they were there just one day at that time, if I remember rightly.

Q. Now, I show you the transcript of proceedings in this matter, dated March 10, 1953, bearing a Volume No. 8, and for the most part it seems to contain the testimony of a Mr. Eggleston.

I will ask you if this is the transcript which they left with you when they were there.

A. I recall seeing this, yes.

Q. Did you read that transcript?

A. Well, I presume I did. I cannot say that I necessarily read all of it, but I read——

Q. Did you find that there is anything in that transcript that had anything to do with the assignment you were to perform for the Government?

A. It had a bearing, it seemed to me, on one particular matter, namely, a question as to whether relatively high-placed officials of Borden had direct dealings with some of the chain store customers.

Mr. Jinkinson: You mean Bowman?
The Witness: I am sorry, Bowman. I beg your pardon.

[fol. 118] By Mr. Stevens:

Q. During what period of time, do you know? Well, the record will show it.

A. Well, whatever period of time Mr. Eggleston was testifying about.

Q. Did the representatives of the Government indicate it might have any other value to you?

A. I don't think so.

Q. Did you have any discussions with Mr. Woolley or Mr. Jinkinson—I take it those are the only two representatives of the Government you talked to?

A. Until I came here to Chicago yesterday.

Q. Did you have any discussions with either of them as to the availability or non-availability of additional material that you might desire in connection with your study?

A. I do not recall any such discussion.

Q. Did you ever indicate to them that it would be helpful to you to obtain any additional material in order to form opinions on various aspects of this study?

A. I would hate to say yes or no to that question specifically. I could easily think of things that might have been useful in making a more exhaustive study than I did.

[fol. 119] Q. You mean you could think of such things now?

A. Yes, or I could have thought of them then.

Q. And I take it you did from time to time get information from Mr. Woolley orally about the dairy industry?

A. Oh, yes, very definitely.

Q. You did? And specifically, about the Bowman Dairy Company?

A. Oh, I have no doubt of that.

Q. Were you advised that the record in this case was in large part being stipulated, and that supporting data was being informally made available to the other side for review and examination?

A. I think I probably understood that, yes; that is, I understood that these depositions, and so on, for example, were being taken outside of Court, and that, obviously, they were available to both parties, and that proposed orders,

and what not, I do not know the lawyers' terms for these things——

Q. But, just for example, did you understand that the various underlying time studies and work papers and calculations that went into the basic manual on these various studies had been tendered to the Government for [fol. 120] their examination?

A. Oh, yes, I understood that very well.

Q. Either in these memoranda that are referred to on Taggart Exhibit 2, or else in oral discussions, did Mr. Woolley indicate to you the objections that he felt could probably be made to Bowman cost studies?

A. I think so, yes.

Q. And to the extent that you agreed with Mr. Woolley's suggested objections, are they incorporated in your proposed direct testimony?

A. I believe so.

Q. Does that apply to the Borden Dairy Company as well?

A. That is true.

Q. Now, I would like to refer to Page 6 of the Bowman order. I think Mr. Ball asked you about the similar language in the Borden order immediately after—do you have a copy for him?

Mr. Jinkinson: Yes.

By Mr. Stevens:

Q. (Continuing) The sentence which introduces the various lettered subparagraphs is what I have in mind, Professor. I just would like to ask you if you would [fol. 121] consider the proposed direct testimony which follows that sentence an adequate statement of the principles underlying a properly conceived system of distribution, cost accounting, and allocation compatible with the requirements of the Robinson-Patman Act?

A. Well, as applied to this particular situation, this is very possibly true.

Q. I was wondering if that is your language, that introductory sentence, whether that is something you testified to or is an introduction to your testimony?

A. Well, that appeared to be an introduction.

Q. So what you would say is what follows rather than that sentence itself?

A. I think so, yes.

Q. Professor Taggart, yesterday on the subject of platform costs, which is not allocated in the studies, I believe you in effect said that you had no knowledge of the dairy industry that would lead you to believe that a study of manufacturing costs would be particularly fruitful; is that a substantially accurate statement?

A. I think that is true.

Q. Do you have any knowledge of the dairy industry that leads you to believe that a study of the Central Office [fol. 122] expenses of the Bowman Dairy Company would be fruitful?

A. Not of the dairy industry specifically, but of industries generally.

Q. Professor Taggart, you wrote an article on the Standard Brands case some years ago——

A. I did.

Q. And it is my recollection that in that article you did not—First of all, it is my recollection that the cost study involved there contained no analysis of Central Office overhead, is that correct? Is that your recollection?

A. Yes, that is my recollection. I do not believe they included any home office costs.

Q. It is also my understanding of this rather long articles, so I won't try to read it all, that you did not criticize the cost study because of that omission, is that correct?

A. Well, that may be true. I would not say it wasn't; but that is a long article and it is difficult for me to remember it all, too.

Q. I will try to find the page on which you discussed that subject.

[fol. 123] Mr. Stevens: Off record, please.

(Discussion had off the record.)

By Mr. Stevens:

Q. Professor Taggart, I show you what purports to be your article on the Standard Brands case in the October 15, 1939 issue of the NACA Bulletin, and direct your atten-

tion to the bottom of Page 209 and over onto Page 210. I will ask you if that refreshes your recollection as to whether or not you criticized that study for omitting any discussion of Central Office overhead?

A. Now, what is the question?

(Question read by the reporter.)

By the Witness:

A. Well, it refreshes my recollection. My statements here with respect to Central Office overhead are somewhat cautious. Specifically, of course, the sentence which appears to me to be the key sentence is this:

> "In the case of the other items, that is, other than transportation from factories to agencies, and also other than the salaries and expenses of bakers' consultants——"

[fol. 124] I say:

> "In the case of the other items the cost of making the analysis and the many other uncertainties surrounding the results would probably give enough reasons for leaving them out."

Now, this is not an expression of approbation. It certainly is not an expression of disapproval, either.

Q. Do you indicate some reasons which would be valid reasons for leaving an analysis of Central overhead out?

A. Well, yes, unless they were offset by other reasons more particularly concerned with this matter. I am sure that whatever I said here was influenced to some extent by the fact that the Federal Trade Commission accountants, who are notoriously meticulous in these matters, had not raised any objection.

In other words, they had made a much more thorough first hand study of what Standard Brands had done than I had, and if they felt that it was not a matter of importance that these costs be analyzed and included in the study, then very possibly the reasons that I have suggested here are adequate.

[fol. 125] Q. Professor Taggart, how much time did you devote to the preparation of this article?

A. This article was published in 1939, which is nearly 20 years ago.

Q. Just in a general way. I appreciate you could not remember exactly.

A. I honestly have not much idea. It was certainly more than a few days, let's put it that way.

Q. Was it more than three weeks?

A. Probably less than six months without a doubt. I think it was very likely more than three weeks, because, for one thing, I remember I reviewed all the testimony in the case, which takes time.

Q. In Paragraph C of your proposed direct testimony you refer to an item of clerical time for billing, accounting and additional statistical services. Do you see Paragraph C at the bottom of Page 6?

A. Yes.

Q. Would you consider it a significant omission of a study if it could be demonstrated that the time required to bill the chains, the A&P and the Kroger Company, by Bowman could be shown to be less relatively than the time required to prepare and send individual rebate checks to all of the independent store customers who receive rebates? [fol. 126] A. Well, my attitude on that is that it has to be shown; that is, I would have to have some objective evidence, some explanation of the facts of the situation before I could come to the final conclusions.

Q. But if it were shown merely that the expense of sending the rebate checks to independents was relatively larger than the expense of billing the chains, would that be a sufficient showing to justify omission of the billing?

What I am asking is whether that would be enough, or would you have to make a detailed analysis to show just how much greater it was in order to say?

A. Well, my feeling would be offhand that would be sufficient to show that both things probably ought to be included. It seems obvious, for example, that if one element of Central Office overhead, so-called overhead, is included in the study, and there are other equally pertinent elements that ought to be included in the study, then both ought to be included.

Q. But I am asking if either were included? See, there is nothing in the study now pertaining to this matter of sending rebate checks to independents.

[fol. 127] A. As I recall, this is correct.

Q. Your suggestion, you would feel that both should be included? Is that your opinion?

A. Well, my feeling would be substantially this, that the billing costs probably ought to be included for the sake of completeness of the study, and it is certainly Bowman's privilege and, very possibly, their duty to include any offsetting costs that they might find in their exploration of Central Office operations.

This is very commonly done in studies of this sort.

Q. You also refer to the matter of executives and their office staffs in that subparagraph.

What procedure would you follow in allocating the salary of a president of the dairy between chains and independents?

A. Well, when you get up to the pres-ent, I am not entirely sure. I do not know what the pres-ent does. I would want to find out specifically what he did.

In the case of many corporation presidents, obviously, their duties are so general and so remote from any actual operations that there would be no particular point in including it at all.

Other presidents, however, are extremely active in sales [fol. 128] or production or some other specific aspect of the business, and it would be not at all unreasonable to associate costs of them and their office with the activities that they are primarily concerned with.

Q. Well, how would you take another executive, say, a sales manager, who deals with both chains and independents, and also with bulk customers and also with retail customers, and has people working under him; how would you allocate his salary and expense of maintaining his office?

A. Again remember, please, allocations of this sort cannot be made in a vacuum. They cannot be made in this room. They have to be made on the premises with the information that is available.

One thing that has to be looked at and has been used in analyses of this kind is a study of the correspondence files of such officials, a study of their travel records, their traveling expense accounts, which gives some indication as to the kind of activity that they indulge in.

Q. Of course here they are all right in Chicago.

A. Obviously, also, their own estimates are of some value. I should be reluctant to take an official's estimate [fol. 129] without any objective back-up unless it were the type of estimate which might have been made in the routine course of business for the company's own internal purposes of budgeting or cost control, or what have you, which, therefore, could not be said to have any conceivable bias.

Q. Well, assuming that you did have either a reliable estimate or some objective means of analyzing the work of such an executive, what yardstick would you use for apportioning his salary and other expenses, as between different customer groups?

A. Well, the key question here, it seems to me, is what particular customer contacts does this executive have? Does he contact chain store accounts, let us say, substantially, to the exclusion of independent accounts?

Does he contact some large accounts but fail to contact some small independent accounts?

These are questions that have to be asked first.

Now, to the extent that it can be determined by any method, that he has such contacts, then the cost of such contact, of course, becomes the cost of doing business with those customers.

[fol. 130] Q. Assume the executive has both kinds of contacts, with chains and with independents of varying sizes. Let us assume that to be the fact. What groups of independents do you use?

You notice on the Bowman discount schedule there is a sliding scale from zero up to some high figure. How do you assign independent costs as between different size groups?

A. Again, of course, you are trying to get me to make a cost analysis in a complete vacuum. I do not know the kind of evidence that is in front of me. I do not know the extent of his contacts, the character of them.

The information I should try to get certainly is whether there is any reason to suppose he contacts the, shall we say, upper levels and size of the independents more than the lower levels and, if so, is there any reasonable way of evaluating or measuring it?

Q. On the basis of the facts which you now have, you do not have an opinion as to how it should be done?

A. I cannot say definitely how it should be done, no. Of course not.

Q. Would the difficulty in selecting a reasonable yardstick be a valid reason for not attempting an allocation? [fol. 131] Perhaps not a sufficient reason, but just a valid reason to consider?

A. Well, it might be one of the reasons. It would, for example, have a bearing on the cost of the study. It might be, for example, that a yardstick actually exists if the accountants or cost analysts are sufficiently persistent in their efforts and have a sufficient budget to back them up. This is a practical consideration. This is not a theoretical consideration. It is purely a practical one.

Q. If a yardstick of time, allocating time of the executive were used for the executive's salary, would you think it proper to allocate the expenses of maintaining a stenographer in his office and his furniture on the same basis?

A. Broadly speaking, yes, I think so, sure.

Q. Would that be on the theory that the equipment and the supporting facilities which are needed to enable the executive to perform his task should be allocated on the same basis as the executives own salary should?

A. I think so.

Q. If the duties of the executive whose time we are [fol. 132] endeavoring to allocate or whose salary we are endeavoring to allocate, as between different customer groups could be shown to fluctuate substantially from time to time, so in some periods he might spend most of his time on production and other periods on chain store accounts and other periods on independents, so that his study might be unreliable for purposes of prediction over a long run period, would that be a valid reason—and again I am not asking or suggesting it is necessarily sufficient, but at least one valid reason for not making such a study of that particular executive's time?

A. Well, I do not think so. It would be a valid reason for not taking a time study of a single week, for example, to put one of Borden's stopwatch men in the corner of the executive's office to listen in on his conversations, this would be rather fruitless.

An executive in the nature of his job has broad overall duties. He turns his attention to the areas which demand his services at the time.

So that a limited time study of a day or a week, or even a month, would almost certainly be inadequate for this purpose.

Q. But even if you took into account all of the different [fol. 133] seasons of the year, it still might not be a basis for predicting what would happen in the future with respect to an executive, would it?

A. Well, it seems to me this way about that, is that if the data you have convinced you that you have the basis for a reasonable allocation for a given year, a 12-month period, then unless it could be shown that this year was for some reason or other an unrepresentative year, it does not seem to me that it would be unreasonable to say, "Well, this is it."

If, oh, you had a strike or all the cows got Bang's disease, or any one of a good many calamities might happen, obviously that would interfere with the executive's normal course of duties.

Q. Yesterday, Professor Taggart, you were asked about what you meant by maintaining customer accounts in this paragraph C, and I think you said you meant keeping them happy.

A. Well, that is a shorthand way of putting it.

Q. Now, I take it you do not intend to include such work as maintaining and improving the quality of the product, and things of that nature? I suppose that helps keep the customers happy.

A. Well, yes, of course, obviously it does, but that was [fol. 134] not the kind of thing I had in mind.

Q. I am wondering if what you had in mind was work which pertained specifically to one customer group and not to other customer groups?

A. No, not necessarily. I think you would have to keep all your customers happy.

Q. Well, say the executive's time is in some substantial part devoted to working out a price schedule or something which has an effect on all customer classes, how do you go about assigning that kind of work?

A. Well, I think that is part of his general duties in all probability. I would think that that should not necessarily be allocated to one customer group any more than to another.

Q. I want to be sure I understand you correctly. You said that should not necessarily be allocated?

A. Not necessarily, that is right.

Q. Now, on the subject of transportation expense, Professor Taggart, first of all are there any different methods of allocating transportation expenses which are recognized by cost accountants?

A. Depending on the type of transportation, the type of transportation expense, yes.

Q. It would not be your opinion that there is one method [fol. 135] which should be used in all types of industries in all types of circumstances?

A. It depends on how broadly you define the term "method."

Q. Pardon me.

A. It depends on how broadly you define the term "method." I am sorry.

Mr. Hart: Before we go into this, it is 11:00 o'clock now. Suppose we give the Professor five or ten minutes off.

(A short recess taken.)

By Mr. Stevens:

Q. Professor Taggart, we were discussing methods of allocating transportation expense. Would you indicate to me some of the different methods which you consider appropriate under varying circumstances?

A. Well, are you thinking of a Robinson-Patman study, allocation of transportation expense among customers, or are you thinking of product allocations, or——

Q. No, allocation among customers for Robinson-Patman purposes.

A. Of course, there are at least two basic kinds of transportation which might be involved. One is transportation by common carrier, or something resembling a common [fol. 136] carrier, where the charge would presumably be direct; that is, no allocation in the usual sense of that term

would be involved normally; even there, though, there might possibly be allocations.

If, for example, you had a pooled car involved, or something of that sort.

The other type of transportation, of course, is the type where the seller furnishes transportation through the use of his own trucks or trucks that he may rent, for example, which presumably are driven by his own employees, and where essentially you have a joint cost.

Here obviously allocations are necessary among the customers, that is, there can hardly be literally direct charging, unless, perchance, each trip of the truck relates only to one customer or perhaps to only one customer class. If each trip relates only to one customer or customer class, the problem of allocation is probably relatively simple, although even there there are basic allocation problems if the one truck is not used continuously and exclusively for the one customer or the one customer class. [fol. 137] But where transportation is supplied under circumstances similar to this, the general approach which seems to me most valid is an approach which would be based on the benefits which the various customers or customer classes receive from this transportation service.

Essentially, your truck is a rolling warehouse. I have a feeling that I stole that phrase from somebody; but there is much truth to it. If you have a stationary warehouse and you are trying to allocate the cost of that amongst customers, you naturally allocate it in terms of the customers' participation in the services which that warehouse performs, and those services are usually expressed in physical terms of some kind—square feet, cubic feet, some other measure of volume.

[fol. 138] Where you have a rolling warehouse, one that goes around from place to place, I see no essential difference.

Q. Well, Professor Taggart, I intended to ask you, I am afraid I did not phrase it very well, what different methods are appropriate under different circumstances for the allocation of transportation expense where the company owns its own trucks and trucks are used to deliver to more than one customer?

Are you suggesting that the only method which is ever appropriate is a volume method?

A. Maybe he better read that question back.

(The question was read.)

By the Witness:

A. Well, I think you want to add to that one further qualification, to more than one customer on a single trip.

By Mr. Stevens:

Q. And then you would say that a volume method is the method.

A. Well, my feeling is it is certainly the best method. It is the most sensible one.

Q. Would you ever use the ton mile method?

A. This takes into consideration, of course, both volume [fol. 139] and distance. There might be some circumstances under which distance would be an important factor. Frankly, I hesitate to try to imagine such circumstances, but I would not want to say that they did not exist.

Q. When you used the term volume in the proposed testimony, did you have reference to size or weight?

A. Well, I should think the answer will probably have to depend on what the limiting factor in loading the truck is, that is, does the truck carry so much because of the cubic content, the size of the material that it carries, or is the load limited primarily because of weight?

If the answer is one way it might point in one direction, but if the answer is another, it might point in a different direction.

Q. Do you know what the limiting factor is in the loading of a milk truck?

A. No, I don't.

Q. I take it, for example, if you had a truck load of feathers you would not use weight as a basis in that kind of an estimate.

A. Well, I might very well use weight for feathers if they were delivered some of them to one customer and some of them to another, but if you had a truck half full of [fol. 140] feathers and the rest filled with bars of lead, for

example, it does not seem to me necessarily that weight would be a correct factor.

Q. Well, Professor Taggart, what if you had a situation in which the truck was not filled to capacity, either in terms of weight or in terms of volume, but the time required for the driver to spend at each stop was so large that he was unable to take on any additional load, so the limiting factor was time.

Would time then be an appropriate possible method of allocating transportation costs?

A. I don't think so. The customer benefits from the operations of this truck in terms of the volume of goods that he receives, whether the volume is measured in weight or number of packages or cubic content, or some other way.

Q. Well, what if it could be shown that neither weight nor volume provided a limiting factor on the availability of the truck for additional delivery, which of those two factors would you then select as the yardstick?

A. Oh, which, I am not sure, and I do not know that it would make a tremendous lot of difference. It would make some difference, yes, but this is one of the points, it seems [fol. 141] to me, where a certain amount of discretion might be allowed.

I think I might make the analysis on both bases and see what they looked like.

If I may be permitted to add a slight comment, that might be one of the points that the committee was thinking about when they made the remarks somewhere in their report that the respondents should be allowed to choose a method which under circumstances where there truly is no basic logical choice, the method which is best suited for the purposes.

Q. Professor Taggart, at the bottom of page 7 and at the top of page 8 of the Bowman Exhibit 4, the basic manual, there is a description of certain types of services. The question I would like to ask you is, which of the groups of functions which are described on page 28 of the Taggart report you would place those services in, which comes closest? I appreciate you did not have those particular services in mind.

A. Well, as near as it comes under any, it could come under the broad heading of selling and technical services.

Q. And would you just tell me generally, referring to the Taggart report on page 28 again, what is referred to by the [fol. 142] subheading "Operating services"?

A. Well, I can read you what it says in the report.

Q. All right.

A. Which is certainly the best I can do:

> "The operating service includes the cost of sales office clerical work and administration of the physical aspects of the distribution operations."

Q. And that type of cost should be, according to page 28, treated as overhead of selling and technical service functions and allocated on the same basis?

A. This does not say this. I cannot agree that this says that it should be so treated. What it says is—what in effect it says, it may be so treated under certain circumstances.

Q. Professor Taggart, I would like to again refer to the standard brands article. There is a rather long discussion on pages 249 through 252 of what you have reference to as an outstanding example of understatement of the study. I think perhaps I will read it for the record so everyone can hear it. Perhaps that would be the best way. Then I can ask you a question or two about it.

> [fol. 143] "The outstanding example of understatement, however, is found in the analysis of route selling and delivery costs (See Tables 8 and 9 in the accompanying text.)
>
> "The driver-salesman's time, it will be remembered, was divided into two parts, stop time and other time. Stop time was assigned to the price brackets directly by means of time study over a 6-day period.
>
> "Other time was assigned to the brackets on the basis of pounds delivered to customers in each bracket. The contrast between the two time distributions is clearly shown in Table, 9 which shows, for example, that the 25-cent bracket was responsible for 52.05 per cent of the stop time, but only 23.35 per cent of other time.
>
> "Stop time was used for the bracket allocation of that part of driver-salesmen's salaries which was

paid for the time involved, and indirectly for about half of the salaries of route foremen, extra salesmen [fol. 144] and feeder men as well as the expense of route salesmen and route foremen.

"The result is that more than 50 per cent of the costs thus distributed are charged to the 25 cent bracket and only about 2½ per cent to the 14½ cent bracket, thus, the 25 cent bracket is charged with about twenty times as much of each cost as the 14½ cent bracket, or about forty times as much per pound of yeast, since the customers in the 14½ cent bracket bought about twice as much yeast as those in the 25 cent bracket.

"Other time was used as a basis for assignment of route salesmen salaries for the amount of time involved and for car costs and a portion of other salaries and expenses not allocated on the basis of stop time.

"This allocation basis resulted in charging less than 25 per cent of these costs to the 25 cent bracket, and about nine per cent to the 14½ cent bracket.

[fol. 145] "The small customers therefore received charges for only 2½ times as much of these costs as the large ones or about five times as much per pound of yeast."

Stopping there for one question, Professor Taggart, I take it this indicates the procedure followed in the Standard Brands study was substantially similar to the one you suggested be followed in your proposed testimony; in other words, there is a division between stop time, and other time which would be comparable to the service function, and the transportation expense?

A. I should think roughly this is true.

Q. I appreciate there would be qualifications.

Then going on:

"Standard Brands accountants could easily have found authority in Government publications and elsewhere for charging all route selling and delivery costs to customer brackets on the basis of stop time."

Now, that was your opinion at that time, I take it?

A. That is a statement that I made at that time.

Q. And you did, as a scholar, of course feel that there were Government publications and other authorities which [fol. 146] would justify that type of a——

A. I think I must have felt that way at that time. I should like to have the privilege, however, of calling attention to the fact that more recently in the course of reworking of this material I made a strenuous effort to find what I could have been referring to at that time, and I could not find it.

Q. When did you make this effort to find out what you were referring to?

A. Oh, within the past, well, certainly within the past six months.

Q. Was it in connection with this proceeding?

A. Oh, no, no; I am writing a book on this subject and I intend to include the account of the Standard Brands situation in that book. Just as a matter of recollecting some of the steps that I took and the statements I made there, I started hunting to find out what it was I was talking about, and to be perfectly honest with you, I could not find it.

I had an extensive library in this area and I do not know where that came from.

Q. You did in your article refer to that as the outstanding example of understatement in the study, is that not correct?

[fol. 147] A. Well, yes, but this again does not mean that I thought that they should have done it in some other way. It means only what it says, namely, that they could have done it in some other way and would have had some degree of authority, something that they could point to as justification for doing it that way.

Q. You concluded your discussion over on Page 52 with the sentence: "This decision—" that is, to adopt the procedure they did—"lends weight to Standard Brands' contention that no attempt was made to load the figures in such a way as to produce a wanted result."

Do you recall that?

A. Well, I think this is true, and I do not know, frankly, whether doing it some other way would have resulted in such loading or not. In other words, the method used is, you might say, an approved method. In fact, it was not

objected to in the slightest degree by the Federal Trade Commission accountants, so far as I recall.

Now, whether some other method which would have been more favorable to their point of view could have been used is, of course, a question, and I simply pointed out [fol. 148] at that point that here was at least one other method.

In fact, I think there were two other methods I suggested there for which they could have found some authority somewhere. This one particular one that you read to me I completely failed to find any source that I could have based that statement on.

[fol. 149] Q. Immediately after that sentence there is another sentence which says:

> "In point of fact they could have found examples of charging such costs on the basis of delivery calls unweighted by time."

You did make that statement?

A. This is correct. Such studies I did find.

Q. Is it not true, Professor Taggart, that a study based on stop time would be more conservative than one based on the number of calls, conservative in the sense it would not justify giving as large a discount.

A. Now, wait a minute. A study based on stop time would be more conservative?

Q. Than a study based on the number of delivery calls.

A. Oh, that is a difficult question to answer.

Q. Let me read you the next sentence. You say:

> "If they had relied on such authority—"

Referring to the basis of delivery call.

> "—and had used delivery stop time—"

Excuse me. No, I did not read that correctly.

A. I thought there was something wrong.

Q. I did not. I am sorry. But you would say there would be a precedent for the use of number of calls for this type of allocation?

A. Sort of a precedent, yes. The particular studies that [fol. 150] I observed were both studies of wholesale drug distribution.

Now, whether wholesale drug distribution sufficiently resembles Baker's Yeast distribution to justify using the same methods, frankly, I don't know; but there is a family resemblance, shall we say, in that both are wholesale distribution, at least.

Q. Now, Baker's Yeast field, was there a substantial amount of time spent in any type of in store service by the driver?

A. I can't remember. I really don't know about that.

Q. Let me turn to commissions for trading now, on page 8, subparagraph (h) and you indicate in that paragraph that "commissions would be essentially a direct charge exactly determinable for each customer on every route."

Could you amplify that a little bit, Professor Taggart? Do you mean that the commissions on a particular route would be charged against the customers on that route and commissions paid on another route would be charged against the customers on another route? Just what do you mean?

A. I should have to say that a driver's commission is certainly connected with a specific route and that driver's [fol. 151] compensation, be it salary or commission or what it is, is a cost of operating that route, it seems to me.

Q. So that if you had two routes, one of which carried commissions and the other did not, the cost of the commission on the commission route would be charged against the customers on that route and not against the customers on the route against which no commissions were paid?

A. That would seem reasonable.

Q. First of all you are aware of the fact that there is a volume level at which no commissions are paid up to a certain point?

A. This, I think, was referred to yesterday and I think I have understood this, yes.

Q. Supposing you had two routes, each of which had no commissions on them.

Mr. Ball: Excuse the interruption. I didn't cover this matter.

Mr. Stevens: Let us take the Union contract, the last page is torn off.

By Mr. Stevens:

Q. Just direct your attention to Article 42-A, subparagraph (e) and assume you had two routes each of which had 2400 points on it; then, therefore, no commissions were [fol. 152] payable on those routes and a customer is added to say Route A, because that driver has the time and these facilities to take on an additional customer on that ground because he is able to service his other customers in less time than the driver on Route B, would you say that the commissions applicable to the additional business that goes on Route A should be charged against the other customers that are easier to be served than it is on Route B?

A. Surely.

Q. Would you explain why?

A. Otherwise you would get into the impossible position of saying that the new customer is solely responsible for these commissions.

It is like the old simile the last man on the raft, is he the one that tips it over? Or is it the fact that the raft already has twenty-four people on it and he being number 25 overweights it?

Q. Assuming, Professor Taggart, that the twenty-four people on the raft, on the route that you do not add the customer to requires so much service that the driver does not have time to take on another account, whereas the twenty-four people on the route B which does get the additional load requires less service or are easier to serve [fol. 153] from the point of view of time and distance and everything else; therefore, the new customer can fit on that route and they both take exactly the same amount of merchandise, is it a correct analysis to say that the old customers on the route to which the addition is made are more costly to serve than the old customers on the other route?

A. They both may be equally costly conceivably. I don't know. I don't know whether that was included in your

assumption. They may be both equally costly to serve before this change in the situation was made. If so, the cost may be somewhat different after the change was made.

Q. Even though there is no change in what the driver does in the store with the particular customer?

A. You are getting into the marginal cost field. This was the subject of conversation during the consideration of the Robinson-Patman Act. One of the objects expressed by the advocates of the Robinson-Patman Act was that a new customer taken on who, for example, reduced his volume or added volume, reduced overhead which, of course, wouldn't be true in this particular instance should not get all the benefits of that reduction. Likewise he doubtless should not be charged with all the differential cost that is [fol. 154] involved.

You see both of these things are not involved here. It is impossible to say, in other words, that merely because a driver starts collecting a little commission because he takes on Joe's grocery to whom he has not previously delivered, it is impossible to say, in vacuum again, that this will alter basically the cost of delivering to the other customers. If you allocate to them a share of the total commission for which they are just as responsible as Joe's grocery, you also allocate to them somewhat a smaller amount of the fixed costs of operating this route. The two might well offset each other.

Q. You do not definitely allocate the cost to the additional customers entirely to the new customer? That is what you are saying?

A. This is correct.

Q. But I think you are saying, Professor Taggart, that an efficient route on which there is room for another customer may be penalized for that efficiency by having a new customer to put on the route whereas an inefficient route is certainly less costly because it does not get this additional burden.

A. I don't think efficiency or inefficiency enters into this [fol. 155] picture at all. They are completely irrelevant considerations.

Q. Efficiency in the sense time required to perform the job required by the customers on the rural routes?

A. Getting into a lot of speculation there it seems to me is pretty difficult to deal with and again in a vacuum but I will not agree for a moment that the added cost which is incurred because a customer is added to a route is solely under these circumstances a cost of serving that particular customer. It is not true.

Q. I have not asked you to agree to that, Professor Taggart.

A. No.

Q. You are saying it is a cost which should be assigned to that particular route.

A. Well, to the route I have no objection. It is a cost of the route. It is a direct charge. You cannot blink that in the slightest degree.

Q. Did Mr. Woolley ever show you the method in which he allocated commission cost when he made a study of this subject matter?

A. Well, I would guess maybe he did, but I don't recall for sure. It may have been contained in some of these memos we have been talking about.

[fol. 156] Q. Professor Taggart, let us see at page 17 of the Taggart report, do you have a copy?

Mr. Jinkinson: We could get him one right here.

The Witness: I have one.

Mr. Jinkinson: You have one.

By Mr. Stevens:

Q. The second paragraph which deals with direct cost varying the sales price and I wanted to call your attention to the last sentence in that paragraph which shows, if for example the differing sales commission costs per unit could be shown not to be a proper reflection of the time and effort expended in selling to different customers and classes of customers, such cost differences would not be acceptable but a more precise method of allocating sales commission should be utilized.

Is that a sentence with which you are in agreement?

A. Yes, surely.

Q. Would you give us an example—do I understand from that that there are occasions in which a method other than a direct charging of a commission to different cus-

tomer classes should be used for allocating sales commissions to different customer classes?

A. It is conceivable.

Q. Those would be instances where the time and effort [fol. 157] expended selling to the different classes of customers did not correspond to the commission payments?

A. I once dreamed up an example. As a matter of fact there isn't any practical example; frankly, but in an article, the title of which was read by, I believe it was Mr. Ball yesterday, if I recall.

Q. The sacred cows?

A. Sacred cows in accounting. I dreamed up a very unusual example where, if I recall rightly, the salesman was paid strictly on a commission basis but was directed by his employer to do something which was presumably inimical to his earning power. The employer for reasons of policy, if I remember this example correctly, thought that every possible customer for his particular product, should be contacted by a salesman regardless of whether the customer, whether the contact was a profitable contact either to the employer or to the salesman, the salesman is directed to do this. It seems to me that in a situa- [fol. 158] tion of that sort consideration might be given to some other method of allocating the commission.

Q. In the example that you use, I believe you indicated that the salesman got five per cent or something like that and he adds an account which was a regular account that was easy to call on and the volume was substantial, so that there was a substantial commission earned from that account very easily and he was required by the company also to call on a number of less expensive, I mean lower volume accounts, and to spend relatively more time and earned very little from those accounts.

A. I think I confined it to some one particular exceptional low volume account. I have forgotten exactly the details. What I was trying to do was to search the thing around in such a way that you had a reasonably clear case for this sort of thing.

Frankly under those circumstances a straight commission method of payment is possibly unfair to the employee, but a straight commission to sales employees is somewhat unusual.

Q. In those situations or in the hypothetical situation in which a company in effect gave the salesman some very [fol. 159] profitable business and then required him to perform less profitable duties, the direct charging of the commission would not be a fair method of allocating this commission cost, would it?

A. It might not be.

Q. Is there any reason why the same reasoning would not apply to delivery wages where the commissions are paid?

A. Well, it might apply under certain circumstances, yes.

Q. Let me just read this example into the record so we have what we are talking about, and again I wasn't able to get the article itself and I took some notes and I will read them and they will be subject to revision later.

In the article on Sacred Cows which is found in the Accounting Review, Volume 28, No. 3, July, 1953, my notes indicate that you stated the following: You have been in- [fol. 160] dicating before that allocations are difficult to make at times.

> "So important is this point that another example seems desirable. In the field of distribution cost analysis are found some of the most perplexing of cost accounting situations. Joint costs are particularly prevalent. In the allocation of salesmen's compensation among products and customers it is generally agreed that time spent, if ascertainable, is an important factor. The measurement of time of salesmen is a matter of no small difficulty, and resort is therefore had to other expedients, such as the unweighted number of calls in the case of customer analysis or gross margin in the case of product analysis. Where salesmen are paid on a commission basis, almost all writers on the subject seize upon the commissions as the ideal basis for cost allocations. It is assumed that outward appearances furnish an entirely adequate basis for solving a complex problem.
>
> "Assume, however, that the Universal Coffee Company, which pays its salesmen a flat 5% commission [fol. 161] on all sales, follows the policy of requiring them to call on all grocers, however large or small,

and wherever they may be found, in order to get truly universal distribution for its 'Universal' brand of coffee. Salesman A calls on Joe's Supermarket, located in the middle of town. Joe is an old customer. He does not need to be educated in the merits of Universal, and needs no merchandising assistance. He buys 1,000 pounds a week at 50¢ a pound, and A's commission is $25.00. His weekly call takes 15 minutes, including travel time. The Hayseed Corners Grocery, on the other hand, is located ten miles outside of town, and five miles off the main road. Its capacity to sell coffee is limited and the proprietor is indifferent to the advantages of Universal. After A has driven out to this store and has spent a full half hour showing the storekeeper how to display Universal Coffee to better advantage, the weekly order is ten pounds, and the commission is 25¢. Query: Does it really cost 100 times as much to obtain the business from Joe's Supermarket as that from Hayseed Cor- [fol. 162] ners? The answer clearly is in the negative, and yet this is the result which is produced when the salesman's compensation is allocated by the obvious method."

Is that the example you referred to?

A. That is the example I was referring to. Thank you for refreshing my recollection.

Q. If in this example a large customer was dropped so that the $25.00 commission that was previously charged to him was eliminated, would it be hard to say that that $25.00 amount should not be charged entirely to that customer?

A. Again you are talking about the marginal situation, the incremental cost of adding a customer or subtracting a customer. This isn't pertinent.

Q. It would not be chargeable to that customer.

Well, Professor Taggart, what did you mean in the last, paragraph (h) of your proposed testimony? I am sorry, do you have it there? Begin with this.

Mr. Jinkinson: The question is what did he mean, in what way. Don't you?

Q. The last question?

A. You asked me what I meant. I think the last two sentences should be read together. The two will help [fol. 163] to clarify the one. To justify allocating commissions on any other basis; namely, any other basis than volume, would require a definite showing that such direct charge produces inequitable or illogical results. If an expense is such that it can be eliminated, if the customers were dropped it is hard to say that it is not a specific cost to that customer.

That simply means the presumption is in favor of an allocation of a cost of this sort on a volume basis; that if you are going to allocate it on some other basis you have to show that and the presumption, of course, is because of this last sentence; if you are going to allocate it on some other basis then we have to show that the results produced would be illogical or inequitable.

We went around and around with the—I say we. I am sorry. The attorneys for the Sylvania Electric Products Company went around and around with the accountants for the Federal Trade Commission on this very point in the Sylvania case, the Sylvania attorneys taking the position that a cost, which in that case happened to be royalties based on dollar sales, on the dollar amount of sales, was properly allocable to the customer classes to whom the sales were made and we got varying expressions [fol. 164] of opinion—I beg your pardon, the attorneys got varying expressions of opinion as to the theoretical or philosophical aspects of this question.

Q. Well——

A. There was some disposition on the part of the commission accountants to try to see circumstances under which such payments would not be allocable by straight volume basis but they had a great deal of difficulty in trying to pose situations in which this would be true.

Q. Professor Taggart, it is probably my lack of understanding but I frankly am puzzled by the language in this last sentence. It does not seem to be consistent with what you are saying. If expense is such it can be eliminated if the customer is dropped and this is customers; I think it should be singular. For example, on the two routes we take one customer out and we drop him and we

remove the commission. You go on and say it is hard to say that it is not a specific cost to that customer. I take it you don't mean to say that the cost should be charged to the one customer who is being dropped and thereby eliminating the cost?

A. Well, the practical fact is if the particular customer is dropped the particular incremental cost that is [fol. 165] involved serving him will also depart from the scene.

Now, this simply means that it is pretty difficult as a practical proposition to take any position other than that volume is a proper basis for allocation of such cost.

Q. Then, Professor Taggart, wouldn't that sentence read more closely to what you're saying now if you eliminated the word "not" from the last line? It is hard to say it is a specific cost to that customer.

A. Well, I can't agree with you.

Q. Let me put it this way without regard to the language. In our hypothetical example we take one man off the route and thereby eliminate the commission expense.

A. Take one customer off the route?

Q. One customer off the route.

A. Yes.

Q. Would the commission expense be a specific cost to that customer?

A. This is specific expense which is eliminated as the result of eliminating that customer.

Q. Is it a specific cost to that customer within the intendment of this last sentence of paragraph (h)?

A. Well, not in the sense that if you were trying to de- [fol. 166] termine the cost of serving every customer on that route that this particular customer would happen to be charged with this entire commission, not in that sense at all.

Q. Is that the sense in which the words are used in that sentence?

A. I tried to explain my position as completely as I can.

Q. Again, I tried to understand this paragraph, Professor Taggart, is the entire paragraph predicated on the assumption which is stated in the first sentence where

it is indicated that drivers do exercise some influence on the volume delivery.

Is that merely an assumption which goes to the first sentence?

A. I think it is probably predicated on that, the entire paragraph.

Q. Now, turning our attention to chain stores as distinguished from independent stores, was any information given to you in any of this material or any of the oral discussions which indicates to you that the driver of the milk truck has any influence on the volume of milk which is purchased by the Great Atlantic and Pacific Tea Company from the Bowman Dairy Company?

[fol. 167] A. Well, discussion have not been very definite on this point. I have obtained the general impression that the driver was less likely to be able to influence the manager of an A & P store, for instance than he might the owner of an independent. I think this stands to reason, because the managers of an A & P store are employee-and governed by company policy.

Q. Are you also aware of the fact, Professor Taggart, that the driver for the chain store does not go into the store and put the merchandise in the case. I think that affects the work he does in the independent store.

A. I have forgotten whether I knew that or not, frankly.

Mr. Jinkinson: Let us go on the record so that I can state my position clearly, Mr. Ball. The position of the government, of course, is this: That we consider any papers that Mr. Woolley has drafted or drawn that we shall claim the privilege that we, of course, will not offer them.

Mr. Ball: I thank you for your statement of position.

Mr. Jinkinson: I don't think there is any question. That is the question we will argue to the Court many ways.

[fol. 168] Mr. Ball: I have no questions about the fact that you may wish to claim the privilege if the privilege exists or not. That is correct. I am not so concerned with whether the privilege exists as I think it does have a very definite bearing on the identity of the expert when we are denied an opportunity to examine the basis of his work.

Mr. Jinkinson: Of course the record will show that you are not being denied the examination of the witness as to anything that he has seen or heard or anything else. What

you are calling attention to is to examine the work of Mr. Woolley which is a different proposition entirely.

Mr. Hart: No, don't misunderstand us. It is a work product perhaps of Mr. Woolley but it was turned over to this witness on the basis of his examination.

Mr. Jinkinson: No, I don't think he used it for formulating the opinion. He had it. I don't think anything is going to influence Dr. Taggart's opinion. I think even a reading of the government's proposed rebuttal order would show that Mr. Woolley and Mr. Taggart are not at all on all fours on this subject.

Mr. Hart: I think Professor Taggart has sufficiently oftenly said in the course of the record, "That I can't [fols. 169-170] decide these things in a vacuum"; or anything that gave him less of a vacuum that he might start out with he probably reiterated assiduously.

Mr. Stevens: Well, I don't think that I want to call Mr. Woolley a vacuum.

Mr. Ball: I think it is as clear, Mr. Jinkinson, that it is a matter we will have to submit to the Court, because we think that the business kind of qualifies it that in order to make that point sufficient we are going to have to test out the problem of whether you should be required to provide them.

Mr. Jinkinson: Of course, I think, Mr. Ball, you have a perfect right to do so. Of course I suppose you will wind up by arguing it and Judge Campbell to rule on it.

Mr. Hart: Do you want to suspend now until 1:30?

Mr. Jinkinson: Shall we suspend until 1:30?

Mr. Stevens: Why don't we do that. I think we are almost there.

(Whereupon at 12:30 o'clock p.m. a recess was taken until 1:30 p.m. of the same day, April 15, 1958.)

[fol. 171] HERBERT F. TAGGART, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination (Continued).

By Mr. Stevens:

Q. Professor Taggart, do you recall how Bowman allocated transportation expense in this study?

A. If I remember rightly Bowman ascertained the amount of time spent at customers' premises and then allocated substantially everything on the basis of that time.

Q. When you referred to transportation cost in the proposed testimony, what various items did you include in that category?

A. Well, all the cost of operating the truck, including gasoline, oil, repairs, tires, depreciation, insurance, taxes.

Q. Yes.

A. Whatever is involved in keeping the truck running, plus the proportion of the driver's time essentially involved in the same thing; that is, namely, actually driving the truck or preparing to drive the truck.

Q. Do you know—excuse me.

A. The time which he would spend, if he spent essentially [fol. 172] no time to his customers at the premises.

Q. Do you have any recollection of what percentage of the driver's time is spent in the transportation aspect of his activities rather than the service aspect?

A. I have no recollection, no.

Q. Would you include the expense of licenses also included in transportation costs?

A. Yes, yes.

Q. What is the connection between this item and depreciation of the truck and the volume of goods carried on the truck?

A. The connection is the one that I described this morning; namely, that the truck is a rolling warehouse and that all costs appertaining to that truck, keeping it going, should be distributed among the customers in proportion to their—to the benefits which they derive from the fact that this truck containing the product gets around from place to place.

Q. Would you have the same opinion even if the volume carried on the truck had little or no effect on the amount of depreciation which the truck had?

A. This is absolutely correct, yes, sir.

Q. And I take it that you would not suggest that there is any direct relationship between the amount of gas and oil [fol. 173] consumed by the truck and the volume carried by the truck?

A. Relatively little.

Q. And the same would be true for the cost of the tires and these other items you just indicated?

A. Of course we went through that yesterday, you remember where I pointed out that for certain purposes the cost of operating this truck is a fixed cost or substantially so. I did that in some of my writings that Mr. Ball called my attention to.

Q. What do you mean by a fixed cost, the depreciation being a fixed cost, Mr. Taggart?

A. The cost does not vary because of the fact that a truck carries more or less of a product. In fact the way depreciation is usually figured it does not vary even whether the truck runs or it doesn't run. There is almost always depreciation figured on a straight line basis.

Q. Depreciation is figured on a time basis?

A. Generally speaking, yes.

Q. Isn't that also true with respect to license expense?

A. Oh, yes, sure the license is good for a year. The insurance would be paid for a year, for a long period of time. [fol. 174] Q. If this truck spends, let us say, half of its time sitting out in front of a particular store because it is required to be there in order for the merchandise to be delivered and service performed in the store, wouldn't you find some connection between the service time required during which this truck is parked there and this item of depreciation expense?

A. Oh, no very important connection.

Q. Professor Taggart, supposing you had a—I am trying to get a different kind of product. You talked about different products. Supposing you had a problem of delivering a, say jewelry, diamonds to various retail establishments and the delivery man or salesman who brought the merchandise around was required to spend a very large

proportion of his time, say seventy-five or eighty per cent of his time in the store explaining to the retail merchant how to display the merchandise and how to polish it and how to price certain things of that nature, how would you on such fact allocate the expense of maintaining a vehicle that this salesman must use to deliver the diamonds or whatever article it is?

A. Of course in the first place the vehicle in that case is [fol. 175] not a truck. It is an automobile, might be Volkswagen. The difference in physical volume among customers would be in all probability so small it would hardly be worthwhile worrying about this.

Q. I appreciate the volume would not be an appropriate measure there. I am asking you what would be an appropriate measure there?

A. Well, I can't be absolutely sure. Again let us refer to the vacuum and there is a considerable vacuum around your assumption. It seems to me that you might be able to make an argument there to the effect that since transportation, the transportation function as far as the merchandise is concerned is of very minor importance, that perhaps a stop basis might be satisfactory as a basis for applying the car cost and possibly the time of the driver while he was driving the car. I don't know.

Q. Would it be not unreasonable to use a stop time basis?

A. Well, I am not sure that I would. It would be questionable. But again let me reiterate what I have said before. It is very difficult to set up a complete set of assumptions, complete enough so that any reasonable individual can give a categorical answer to a question like the [fol. 176] one you are asking me.

Q. I appreciate that. I am merely trying to ascertain whether or not you think it might be the only permissible basis, depending on all the other facts and circumstances that might bear on the subject, of course.

A. I would be inclined to hesitate. I would have to think about it. I would have to study the facts and factors involved much more closely than I can sitting here.

Q. In the hypothetical example which I suggest I was assuming that the salesman or delivery man whoever we are going to call him was spending the major portion of his time in the store, say seventy-five or eighty per cent

of his time. Would not such a fact if it did exist be a reason which would tend to make the stop time basis more appropriate than if he spent less time in the store?

A. I don't think so at all.

Q. You would not think so?

A. I would think the contrary, if anything.

Q. Would you explain the basis for that statement?

A. Well, while he is in the store he is a salesman and he is a technician or something of that sort. If he spends that length of time in the store it is because he has a service to [fol. 177] offer which has nothing to do whatever with the delivery of diamonds but it is due to his specialized knowledge of the kind of merchandise that he is dealing with.

His function as a delivery man is purely incidental in a situation of that sort.

Now, granted that there is some cost there which has to be allocated, it doesn't mean that it should be allocated necessarily on the basis of time spent by him, not in delivery, but in offering some kind of advice or expert assistance to whatever it might be.

Q. You would say in that situation his function as a delivery man would be purely incidental because such a very large proportion of his time was spent inside the store?

A. His function as a delivery man?

Q. Yes.

A. Yes.

Q. Now, it is true that in this Taggart report the operating service which we referred to is suggested may be treated with all overhead in selling of technical service and allocated on the same basis. You are suggesting that although operating service may be so treated the cost from providing this hypothetical salesman or delivery man with a vehicle couldn't be so treated?

[fol. 178] A. Well, I would certainly question it, yes.

Q. And your reason for treating the portion of a milkman's compensation which represents the portion of his time in driving to and from stores as distinguished from the in store time as transportation expense because you regard him primarily as a delivery man rather than primarily as a service man.

A. Well, let us put it this way: It is more important to

treat his transportation correctly perhaps than it is this hypothetical diamond salesman that you are talking about. I am not sure about that again and possibly that is true. That is, the greater the proportion of his time is spent in driving a vehicle than the greater the amount of cost involved, and obviously the more careful you have to be in allocating.

Q. Is there any point at which the proportion of time in the store would become large enough that you would regard it proper to treat all of his salary as attached to the service function rather than the driving function?

A. All of his salary?

Q. Yes.

A. Oh, this could happen I should think. Again you [fol. 179] would have to do a lot of speculating and a lot of assuming but if say ninety-eight per cent of his time was in the customer's premises and only two per cent of his time on the road I would think it pretty largely a matter of indifference as to how you would allocate the two per cent.

Q. If say eighty per cent of his time was in the customer's premises and twenty on the road, you would think it improper to allocate his entire salary on the basis of stop time?

A. Well, I am sure this gets into the area where I would call it into question without any doubt.

Q. Professor Taggart, do you have any information as to the frequency of change in the composition of milk routes?

A. No.

Q. In other words do you know how regularly a given driver serves the same customers how often those customers change on his round, or anything like that?

A. All I know is the same milk route drivers had been serving the Taggart family for the last twelve years I am sure of and maybe more than that.

Q. You do not operate a grocery store, I take it?

A. No, I don't.

Mr. Stevens: Thank you, Professor Taggart. I am [fol. 180] through.

Mr. Ball: May I have the Taggart deposition No. 2, the exhibit?

Cross-examination.

By Mr. Ball:

Q. Professor Taggart, looking again at Taggart Exhibit No. 2, I notice that you were furnished, among other matters, with a government's memo, cost defense analysis September 25, 1956.

You did receive that?

A. I am sure I did, yes.

Q. And that was one of the matters that you considered in reaching the opinion expressed in your testimony?

A. That is one of the matters that I looked at as I looked at these other things.

Q. In preparing your testimony?

A. That is correct.

Q. Now, I want to ask you if it isn't true that it is impossible for you to have kept the fact relative to Borden separate from the fact relative to Bowman in your consideration of your opinion with respect to the Borden order?

A. Well, I made every effort in my study of this thing [fol. 181] at the time I studied it to keep these documents separate. So that I arrived at my conclusions with respect to Borden and then I arrived at my conclusions with respect to Bowman, or it might have been the other way around.

Q. But there were certain facts that might be relevant to the method at which the milk business was conducted that appeared in one that would have affected your judgment with respect to the other, isn't that correct?

A. Well, there are certain generalized facts with respect to the milk business I would assume would be more or less identical. It would not matter whether it is Borden or Bowman.

Q. No doubt you made some of those attempts in this consideration?

A. I would not be at all surprised, surely.

Q. How long a memo was this government memo of the cost defense analysis?

A. I haven't the slightest idea.

Q. You have no recollection whether it was fifteen or fifty pages?

A. Well, if I had to guess I would say it was closer to fifteen than fifty.

[fol. 182] Q. Somewhere between the two?

A. I think that is a fair estimate. I might be wrong, yes.

Q. Again as far as you recall in the list appearing on the Taggart deposition, Exhibit No. 2, are all of the documents that were furnished you by the government in your preparation of your testimony?

A. At that time last summer, that is right.

Q. You recall of no others that were furnished you any later date?

A. Well, I saw some material at a later date at the time that this—what do you call it?

Mr. Long: Proposed rebuttal.

The Witness: Proposed rebuttal.

By Mr. Ball:

Q. Our proposed order, yes.

A. Proposed order?

Q. What was this material?

A. Well, as I recall, for one thing I am quite sure that there was a copy of this contract among the things I saw there but whether I had seen the driver's contract before that I frankly can't remember.

Q. Do you recall whether there was some tabulations prepared by Mr. Woolley that went along with that supplemental memorandum?

[fol. 183] A. Oh, yes. Mr. Woolley had prepared some tabulations, some charts, and this and that which I saw.

Q. And you had that in mind, and did you have that in mind at the time you prepared this testimony?

A. Well, remember that when I saw this, those documents, this was all in the form we see it now.

Q. Oh! But that entered into, and it has perhaps colored the opinions you have expressed here in your testimony?

A. Oh, I doubt if it has to amount to anything.

Q. Do you recall what it was that appeared on that data in any detail at all?

A. No, no.

Q. Now, you said—what did you say, two or three weeks—no, three or four days with Mr. Woolley for discussion?

A. He came there to Ann Arbor and I forget whether it was three days, four days, some such length of time.

[fol. 184] Q. How long was Mr. Jinkinson with him?

A. As far as I recall, Mr. Jinkinson was there just one day, and how long he was there that day I was not sure. I doubt if it was more than half a day.

Q. Now, I suppose that you cannot recall specifically what Mr. Woolley may have said to you about these facts of the case during that four-day discussion?

A. No, I certainly can't.

Q. Can you recall anything at all of the subjects you discussed with him in the course of that conversation?

A. Well, I recall one thing particularly, this matter of whether or not the drivers have any control or influence over the amount of milk that might be delivered on their routes.

Q. What did Mr. Woolley say to you, as best you recall, about that?

A. Well, again——

Q. You can't recall?

A. I am reasonably sure of this, that what he said to me caused me to confirm the rough impression that I had already, that these drivers do have some control over the amount of milk.

Q. Well, what it was specifically, you said you cannot [fol. 185] recall?

A. Oh, no, I cannot recall specifically. Mr. Woolley was represented to me as a man who had been involved in this discussion over a considerable period, and I am sure I asked him questions that I thought were pertinent, and I am sure he gave me answers which he thought were responsive.

Q. Well, you understand this is not a problem of attacking the integrity of anyone.

A. Oh, I understand.

Q. But to find out what the factual bases were or the assumptions of fact that you made in arriving at these conclusions. Do you recall what Mr. Woolley may have said about the facts of the case?

A. This is impossible for me to recall. This was ten months ago or longer.

Q. Well, I do not doubt that, but I merely want to give you an opportunity at this time, if you do recall anything specifically that was said to you that we can bring it out.

A. Well, I would be delighted to bring it out, but I just do not burden my mind with that sort of thing.

Q. Now, very frequently in your answers you have said that a problem cannot be answered in a vacuum or that [fol. 186] a decision must depend upon the facts of the case. Now, I take it that you mean by that that in determining what allocations should be made or what service units should be selected, that the facts of the individual case govern rather than any abstract principles?

A. Well, yes; that is, if you get abstract enough in your principles, sure, a principle governs, namely, a principle of logic, as I pointed out, or a principle of common sense.

Q. But if there were three or four possible service units to be selected, the determination of which one would be appropriate would depend primarily upon the circumstances of the individual case, would it not?

A. All of the circumstances, yes.

Q. And it would be those circumstances which would suggest which one of the service units might have the most nearly logical connection with the expenditures?

A. I think so, yes.

Q. What I am saying is, there are no dogmatic rules that would govern the selection as opposed to the analysis of the facts of the case?

A. Our committee report, and this represents my own [fol. 187] personal conviction, did the very best we could with the English language to state this, namely, that the cloth has to be cut to fit the particular situation that you have in mind.

Q. Well, with that in mind, on Page 28 of the cost justification report from which we have read some pages before, there is one sentence that was between two passages that were quoted that I do wish to call your attention to and see if that does not express your judgment, and that is the sentence in the first full paragraph, reading:

> "In many cases more than one service unit might be chosen. The precise choice will depend on two main considerations: 1, which service unit most closely approximates a satisfactory measure of benefit or

activity in terms of rational analysis, and, 2, which service unit can most readily and economically be counted both in total and in terms of the costing segments."

Now, that is an expression which you, I take it, are in complete accord with?

A. Oh, yes, sir.

Q. Now, when we speak of a service unit that most [fol. 188] closely approximates a satisfactory measure of benefit or activity, that is to be determined by an analysis of the facts and circumstances of the particular case?

A. I think so.

Q. Now, your experience has been, has it not, that studies for Robinson-Patman Act purposes have often led to changes in management policies?

A. This has happened; this has happened, I am sure.

Q. Well, you probably have personal acquaintance with some of those instances, have you not?

A. Well, yes.

Q. Now, turning to the proposed pre-trial order as to Borden Company on Page 7, I call your attention to the language of the first sentence:

"Because of the foregoing inherent characteristics in the distribution function, each cost element or homogeneous grouping of same should be identified and analyzed separately to ascertain the various economic conditions and factors which create such costs and then be allocated to its sources."

Now, that word "should" implies a quality of being man- [fol. 189] datory, and I do not think you intended to have it be a mandatory requirement that each cost element should be analyzed, did you?

A. Well, there is a good deal of mandate involved in that sentence, that is, I do not think a cost analyst is doing his job unless he looks at all the cost elements.

Some of them he may not look at very hard. He may arrive at a snap conclusion and discard them conceivably.

Q. Well, what I am trying to say is, you do not mean to imply that it is mandatory that every cost element should enter into a cost study?

A. Oh, not necessarily. Oh, no, of course not.

Q. And it may become very apparent on looking at a cost element that it is either sufficiently indirect or remote or sufficient- insignificant in amount, or so indefinite in character, as to make the analysis not a fruitful one.

A. Well, this certainly happens, yes.

Q. Well, you did not intend in what you said in B then to say there is anything improper in leaving out in the long run of a cost analysis elements of cost?

A. Oh, no. What this sentence says is that every element [fol. 190] should be looked at. It should be regarded to see whether it should be included in the analysis or should not be included in the analysis, and an informed judgment should be made.

Q. Isn't what you are saying simply this, that every cost element should be out on the table open for inspection?

A. Absolutely no question about it.

Q. Whether or not more is done with that particular one in cost study is a matter of choice and judgment and the circumstances of the case?

A. That is right.

Q. Now, I have a reference today to an article which you wrote, entitled "Cost Justification Under the Robinson-Patman Act, Volume 1, June, 1956," at Page 52.

If you will recall that article in a way commented upon the report of your Committee.

A. Yes, I think it did. This was June of '56, and the report of the Committee was submitted in February, as I recall it.

Q. Now, I am going to read you certain passages from your article and ask if that expresses your present opinion.

A. May I inquire, do you have these passages simply [fol. 191] excerpted from there or do you have the whole article?

Q. I just have them excerpted, although I have a full text of another article which contains substantially the same material.

A. Of course, it always bothers me a little bit to have to consider any passage completely out of context.

Q. Well, appreciating that, I would be very happy to have you comment when you feel something should be added; but let me read these before your comment.

A. Also please remember that I wrote this article three years ago.

Q. June of '56, I think it was.

A. Or, I mean, two. I am sorry. Two years ago.

Q. (Reading):

"The Committee's grounds——"

This appears at Page 55, and I will quote:

> "The Committee's grounds for urging a continuance of the de minimis doctrine and similar aspects of reasonableness is the proposition that no cost analysis procedure in a complex situation can do better than arrive at approximations. The results are reliable only in the sense that they determine a range within which [fol. 192] the true cost differences may reasonably be said to lie.
>
> "They do not pinpoint cost differences with precision. Judgments based on the results of such studies must recognize their approximate character."

Now, that states a general proposition which I think is in accordance with your present opinion?

A. I surely would agree with that at the present time, yes.

Q. Now, you comment again on the same page as follows:

> "The report takes a strong stand in favor of the propriety of reasonable classification of customers, commodities, and transactions for cost justification purposes."

And a little later on in another sentence:

> "Cost justification of each individual transaction with each individual customer has not been required."

Now, again, those are comments that properly characterize the conclusions reached by you and the Committee?

A. Yes. Of course, that last one, I am sure I was talking about Federal Trade Commission actions where the Com- [fol. 193] mission has never seen fit to require a meticulous costing of each individual transaction to each individual customer.

Q. Yes; in fact, you did make a reference to the position of the Committee on that matter?

A. Yes, I am sure I did. That is what I had in mind.

Q. Now, on Page 56 of the article you discussed the reasons why the Committee did not set out specific rules for cost analysis, and you made this statement, among others:

> "Operating organizations and procedures are so diverse and the details of particular complaints are so unpredictable that no logical approach to cost justification should be ruled out simply because it is found to be non-comformable to some recognized procedure."

Now, I take it that is consistent with the position you have taken here?

A. Oh, entirely.

Q. And that expresses your present point of view as well now as it did at the time you wrote the article?

[fol. 194] A. Yes.

Q. I just mislaid a piece of paper that I had here a minute ago. Now, you wrote an article entitled "Work of the Cost Justification Committee," which appeared in the Anti-Trust Bulletin for January of 1956 also, did you not?

A. That is probably true. I think, if I remember rightly, that was a report on a speech I made here in Chicago, isn't it? I believe that was the thing.

Q. Well, this is a photostatic copy. Perhaps you recall it.

A. Yes, I think this is true, yes.

Q. Now, on Page 587 of that article you made this statement: "This matter—" Perhaps we can go back to an earlier sentence where you said:

> "We shall also not recommend continuous Robinson-Patman accounting."

And then dropping down, you said:

> "This matter, as well as some others with which the Committee has to deal, has a special aspect with which we have tried not to be unmindful. This is the fact that price-makers must make due allowance before

transactions are consummated, though the costs con-
[fol. 195] sidered in each litigated case have been those actually incurred in some past period.

"The Committee would not like to lend even negative support to the proposition that because a company has not set up a Robinson-Patman cost finding system it has not made due allowance; hence, our very positive statement that continuous Robinson-Patman cost finding is not practicable."

Now, that expresses an opinion which is in accord with your present thinking, does it not?

A. It sure does.

Q. Now, on Page 588, again referring to the report of your Committee, it is stated——

A. Note that this reference is before the report had actually come out. It was made at a time when the report was pretty well along in its preparation.

Q. Yes, that appears from the context.

A. Yes.

Q. And I am not so much interested, Professor Taggart, in exactly whether the report followed this, but whether these expressed your point of view.
[fol. 196] (Reading):

"The Committee's grounds for urging a continuance of the de minimis doctrine and similar aspects of reasonableness is the proposition that no cost analysis procedure in a complex situation can do better than arrive at approximations.

"The results are reliable only in the sense that they determine a range or area within which the true cost differences may reasonably be said to lie; they do not pinpoint cost differences with precision, hence, judgments based on the results of such studies must recognize their approximate character."

Now, that is saying about what one of the earlier passages said?

A. This is essentially what I said in the article in Journal of Accountancy. This, however, does not carry to the point of condoning sloppy procedure.

Q. Now,—but it does recognize that the basic problem each time is to ascertain the facts of the given situation as best you can?

[fol. 197] A. Yes.

Q. Now, I read to you the next paragraph, which is a little different subject:

> "The report will advocate a broad interpretation of the phrase 'Cost, of Manufacture, Sale or Delivery.' It is the Committee's position that there are few if any items of cost that may not properly be said to contribute in one way or the other to the production of goods or distribution.
>
> "In the case histories there appears a tendency to place some costs outside the pale because of the notion they are not costs of manufacture, sale or delivery.
>
> "No Commission ruling seems ever to have been based on such a contention. The Committee's hope is that none ever will."

Now, again, that agrees with the position you stated a little earlier, that all the facts should be laid on the table?

A. Well, yes, and, of course, it goes beyond that, too. I obviously had examples in my mind when I wrote that where either Commission accountants or Commission at-[fol. 198] torneys or maybe attorneys for plaintiffs in damage suits had taken the attitude certain costs ought to be excluded completely from the picture, because they were not costs of manufacturer, sale and delivery in what they assumed was the very narrow language of the statute.

The hope I expressed there was that the statute would not be so narrowly interpreted.

Q. Now, I turn your attention to Page 589 to this sentence:

> "The report will take a strong stand in favor of the propriety of reasonable classification of customers, commodities, and transactions for cost justification purposes. The Commission in all of its decisions seems to agree that classifications of customers and transactions are proper if they are reasonable in view of the purposes of the Act.

"The cost justification of each individual transaction with each individual customer has not been required."

Again, that is saying essentially what you said before and [fol. 199] expresses your present point of view?

A. That is right.

Q. Now, I call your attention to the next paragraph of the article where you are referring to some of the pitfalls of cost justification, and say:

"For example, we shall point out the advantages of using a sampling approach rather than trying to cover the universe."

Now, you still believe that the sampling approach must be stressed, is very often more effective than an attempt to make a superficial analysis of the entire area?

A. This is perfectly true, and that, of course, is exactly what I say in the later part.

Q. Yes. Specifically what you said was: "In the great majority of situations well chosen samples can save much time and money and at the same time actually give the Commission a better picture of company activities than a less intensive job on a company-wide basis."

A. That is right. That is very true, indeed.

Q. And again in this article you made the statement similar to one you have stated that I quoted before:

"Operating organizations and procedures are so [fol. 200] diverse and the details of particular complaints are so unpredictable that no logical approach to cost justification should be ruled out, whether it conforms to some recommended procedure or not."

And again, that expresses your consistent and continued opinion?

A. This I think is almost, if not identically, the same sentence as read before. These two articles were actually the same article with slight changes in view of the time and circumstances.

Q. Now, in one of the passages from the Accountants' Hand Book on Page 337 that we referred to, you did recognize that the number of delivery stops had some

influence on the time required and may affect certain cost elements.

Now, I take it that in that passage you have reference to such cost elements as consumption of gasoline, wear and tear on motors?

A. And—brakes.

Q. Brakes, and the rest of it that are particularly affected by the starting and stopping process.

A. I presume that is what I had in mind in all probability.

[fol. 201] Q. Are you aware of studies that have indicated, for example, that with respect to such an item as gasoline, that the major amount of the consumption of gasoline takes place in the process of starting the motor?

A. Well, I have never seen such studies, but I will take your word for the fact that they exist.

Q. You drive an automobile yourself?

A. Yes, I do.

Q. And you are aware of the fact, I take it, that when you start an automobile that you should not race it because initially the lubrication is not where it should be and the wear and tear on the engine at the beginning until the lubrication functions is greater than it is when a motor is running?

A. Of course, we are talking about the first start of a morning and particularly a nice, cold morning when you talk like that.

Q. Well, are you sure that isn't true every time you start a motor?

A. It depends on how long it has been standing, I should think. Now, of course, this is a layman's opinion. I am not an automobile mechanic.

Q. Well, what I am trying to say is that assuming there [fol. 202] are factors like that, that could show a direct relationship between the cost of driving trucks and the number of stops?

A. I suppose that I probably had considerations of that sort in mind when I wrote that in the Accountants' Hand Book back whenever it was I wrote it.

Q. Now, the kind of facts you have in mind have to be ascertained to determine the rational connection between a service unit and the total expense?

A. I suppose so. Frankly, I would not know just what the connection with that is.

Q. Well, you say that because what you have reference to is again that none of us can generalize on facts of which we do not have a particular personal knowledge, isn't that correct?

A. Well, it is a little unsafe to be too dogmatic in your generalizations.

Q. Well, what I have in mind is that you are not in position, I take it, Professor Taggart, any more than any other layman, to estimate what proportion of the wear and tear or maintenance expense or gasoline or oil consumption of a truck relates to the process of starting and stopping, as against the continuous driving?

A. Oh, no, of course I have no basis for judgment on [fol. 203] that point.

Q. But facts relative to that might be also relevant to the question of a rational connection of the allocation of the driving expense of the truck?

A. Oh, surely. That is, if facts of this sort were available and if the cost analyst and the company whose costs he is analyzing are willing to take the time and trouble, this might possibly affect some conclusion, they might arrive at one.

Q. Or if there were studies of that general subject that had been made that were available to the officials of the company, they could base their judgment on the basis of such technical studies made elsewhere if they were applicable?

A. Well, I am sure they do base judgments in various areas on technical studies made by other people.

I say, assuming that the study is covered, a type of transportation and type of situation with reasonable comparability there, I should think they might get some benefit out of it. This is why we have technical journals.

Q. Now, are you familiar with any of the literature relating to the study of distribution costs in the area of the dairy industry?

[fol. 204] A. Well, there was one quite a long time ago by a man by the name of Johnson, if I remember rightly, on distribution costs in the ice cream industry. Now, I assume

that the ice cream industry is a branch of the dairy industry. Is that a fair assumption?

Q. Well, the gentleman referred to is a man named O'Neil Johnson.

A. O'Neil Johnson. I was trying to remember his first name.

Q. Do you recall of your own knowledge an acquaintance on your part with any other studies in the dairy industry?

A. The Federal Trade Commission made a rather considerable study apparently of the costs of milk delivery back in, well, I do not know when. I would say it was the Thirties, perhaps '35, something like that.

Now, how considerable it was, I do not know. I have never seen the study, but I have seen references to the study and I have also seen extracts from it as published by the Federal Trade Commission in a book they got out in 1941.

Q. You yourself have not referred to any of the literature with respect to the dairy industry in formulating your [fol. 205] opinions expressed in the proposed draft of a pre-trial order in this case?

A. Not as of last June or July, when these opinions were formulated, no.

Q. You mentioned that you had some acquaintance with the University of Minnesota. You were acquainted with a study by John Elmberg and Fred Kholer, the studies by those gentlemen at the University of Minnesota?

A. No, I am not.

Q. Are you aware of, or do you have any knowledge of these various studies that have been conducted in the State of California that happened to be those under Professor B. A. Clark?

A. No. Were they for Robinson-Patman purposes, by any chance?

Q. Well, I do not recall whether they were. They were studies of milk delivery costs and volume pricing procedures in the State of California. I suppose they were for all purposes including Robinson-Patman Act purposes.

A. Could well be.

Q. You have no familiarity with those?

A. No, I have not.

[fol. 206] Q. Do you recall at this time any other literature relating to the dairy industry with which you are acquainted, which you may have had in mind at the time of the formulation of the opinions set forth in this drafting of the pre-trial order?

A. Well, I cannot recall any.

Q. Now, I want to ask you this situation. Suppose that I had a delivery truck that had five customers on a route and each one was five miles apart and you delivered varying amounts of goods to each one of those customers, what would be the service unit that you would select as most reasonable for determining the cost of that delivery service?

A. I would be inclined to select physical volume or its rough equivalent, list dollar sales.

Q. Despite the fact that the truck had to drive the same number of miles to each customer and the same usage of truck was involved in each case?

A. Yes, I think so; yes.

Q. Wouldn't it be perfectly proper to allocate that on a mileage basis in that situation?

A. I do not think so. I would not do it.

Q. Why?

[fol. 207] A. Because this does not reflect the benefit that these customers get out of the utilization of this truck, this rolling warehouse.

The benefit that they get out of it is reflected by the amount of milk that they have delivered at their premises.

Mr. Ball: May I have just one minute to look over my notes here?

(A short recess taken.)

[fol. 208] Redirect examination.

By Mr. Jinkinson:

Q. Professor Taggart, now I just have a few questions to ask you here. Do you remember the occasion of my first telephone call to you making an appointment with you?

A. I remember you called me, yes.

Q. In that telephone conversation I asked you whether or not it would be convenient for me to see you with ref-

erence to possibly employing you as an expert in this matter?

A. Yes, I am sure you asked me that.

Q. And we made an appointment to see you then at your office in Ann Arbor, Michigan, some time in early June, 1957?

A. That's right.

Q. And Mr. Woolley and I met you at your office?

A. That's right.

Q. At ten o'clock, I believe, a.m.?

A. If you say so, I presume that was the hour.

Q. And we were through by lunch, were we not?

A. I have a sort of recollection of eating a rather late lunch that day and you had gone. I think this is correct.

[fol. 209] Q. Now, at that time neither Mr. Woolley nor I brought any papers or documents with us, that you recall?

A. No, I don't think I recall any at that time, at the time of your visit. I think the documents appeared later on.

Q. We were merely, or I was, in particular, merely interrogating you with reference to the terms of your employment and outlining to you the nature of the study to be made?

A. Yes, that was what you were concerned about.

Q. And it was agreed that some time later we would send to you the documents which have been outlined in Taggart-Bowman Exhibit No. 2, is that right? They would be sent to you?

A. Well, I presume so. To be perfectly honest I had forgotten whether they were brought to me by hand or sent to me through the mail, but it is certainly conceivable that they were sent through the mail.

Q. And under the terms of your employment were you employed to make an objective study of this material and this problem which was submitted to you?

A. Why, yes, of course.

Q. You weren't requested to substantiate the views of

[fol. 210] Woolley or anyone else with the Government, were you?

A. Not at all.

Q. The material was sent to you through the mail and you studied it, had the benefit of the study of it before we talked to you or discussed the matter with you again; is that right?

A. Before we discussed any details whatever, yes.

Q. And the next occasion was after you had the material, Mr. Woolley saw you?

A. Mr. Woolley came up then for several days.

Q. And were you asked at that time, the occasion of either the first time or the occasion of Mr. Woolley's second visit, to substantiate his views, or were you asked for your opinion in this matter?

A. I was asked for my opinion.

Q. And your opinion, as reflected in the proposed plaintiff's rebuttal order, is your opinion and no one else's?

A. That's right.

Q. Now, referring to Taggart Exhibit No. 1, which is the cost justification report made by your committee, of which you were chairman. The report itself, on Page 5, sets forth the aim of the committee, does it not?

[fol. 211] A. Yes, I think so.

Q. And particularly the first—the second paragraph on that page, which says:

> "It is further stated that the work of the committee is advisory only, and its function will be to continue to make recommendations to the Federal Trade Commission."

It was not put out as a work which everyone had to follow in using, making cost justification defenses or study in this matter?

A. Obviously not.

Q. Mr. Taggart, prior to the time that your statement was included in the pretrial, the plaintiff's rebuttal proposed rebuttal pretrial order, was that material shown to you for your comment?

A. Yes; yes, of course.

Q. It was not something that was put in and then shown you afterward?

A. Oh, no, not at all.

Q. Just one further question. I believe you said yesterday and this morning also that you had not seen the labor

contracts which were in existence between the Bowman and [fol. 212] Borden Dairy and the local union, and prior to the time you reached your conclusion, and particularly with reference to Paragraph (h) of the Borden proposal.

A. Well, I can't be absolutely certain about that, Mr. Jinkinson. The contract is not listed as one of the documents that was sent to me in June. I certainly saw the contract at the time the pretrial order reached me some few weeks back, because it was one of the exhibits that accompanied that.

Now, whether I had seen the contract while Mr. Woolley was in Ann Arbor, I am not sure. It almost seems to me as if I did at that time, but——

Q. Well, let me ask you this: If you had or had not seen the labor contracts which were in existence between the Bowman-Borden Dairy and the labor union, would it have made any difference in the opinion you express in Paragraph h on Page 9 of the proposed Borden pretrial order?

A. Paragraph h?

Q. H.

A. Yes. No, I don't think it would have made any difference.

Mr. Jinkinson: I have no further questions.
[fol. 213] Mr. Long, I think, has a few questions.

Redirect examination.

By Mr. Long:

Q. I have a few questions, Mr. Taggart. You were examined at length by counsel for Borden and some by counsel for Bowman with respect to the alternative method of allocating direct and indirect costs covered there in Taggart Exhibit 1. Now, do I understand that while there may be alternative systems of distribution of costs they both might not be valid as cost defenses under the Robinson-Patman Act if the ultimate conclusions to be drawn are altered by the alternative method.

Mr. Ball: Will you read that question back to me?

(Question read.)

Mr. Ball: I must say I do not understand what counsel has in mind.

Mr. Long: Let the witness answer. Does the witness understand?

By the Witness:

A. Perhaps the witness had better give his understanding of the question before he answers it. As I understand it, you are asking me about two alternative methods, one [fol. 214] of which perhaps would produce one answer Robinson-Patmanwise, namely, that everything was fine; the other one of which would produce the opposite answer, namely, that cost justification had not been established.

Well, if you are considering methods so far different from each other as they are, then you had better look at them pretty carefully to see which one is logical and which is not before you finally choose the one that is the final answer.

By Mr. Long:

Q. One of them might be invalid under the Robinson-Patman Act?

A. It is a red flag. It is a signal that perhaps something is wrong. The kind of alternative methods that we usually were talking about in this report were alternative methods where details might differ somewhat; perhaps the degree of spread of costs among the customer classes might be a little wider, a little narrower, but where no basic difference in the final result would take place.

Q. Would you consider it wise for the cost accountant who is working on a cost justification defense to work out these two alternative systems to see whether they would [fol. 215] work out the same result?

A. Oh, oftentimes.

Mr. Ball: Pardon me. I would like to note an objection here to the form of that question, because the form of that question asks not for the opinion of this witness as an incumbent or expert on a common matter, but he asks for the problem what we should, or how one should go about to prepare a defense, which is a matter of judgment as to how one prepares a lawsuit. I don't think the witness is competent on that subject.

Mr. Long: The lawyers would have to depend on someone like him to work out the results.

By Mr. Long:

Q. Your answer, sir, now, if you would, please?
A. Well, I guess we had better have the question again.

Mr. Long: Read the question to him.

(Question read.)

Mr. Stevens: I would like to add the objection that I [fol. 216] think the question should specify why and for what purpose, or else I don't think the answer will be meaningful.

By Mr. Long:

Q. Do you understand it so you can answer it, Mr. Taggart?

A. I think I understand the question reasonably well. I do think that an accountant would be, shall we say, not necessarily wise, but smart, on the job, on the ball, if he does work out some alternative solutions, providing, of course, always, that through working out of two alternative solutions he doesn't double the cost of his cost study. I don't think any accountant ought to do that unless there is some very good reason for it.

Q. Now, in your answers to counsel's questions here about Taggart Exhibit 1, Page 6 to 11, they read several quotations there. This went again to this alternative methods of allocation.

Do I understand that you in your answers considered that these alternative methods were each completely difinitive, and that each alternative method contained all relative costs, consideration of all relative costs, and that would [fol. 217] be necessary before these alternative methods might be considered as possible, as proper cost studies, valid cost studies under the Robinson-Patman Act?

A. Well, I wouldn't think that cost methods are, properly speaking, alternative cost methods unless they include substantially the same costs in substantially the same general degree of definition and form. That is, if one cost study is a very—I don't like to use the term "sloppy"—casual,

shall we say, cost study, which results, for example, in simply getting a grand and glorious over-all cost per dollar of sales, and another method works this down function by function, cost item by cost item, and arrives at an answer. I wouldn't say those were two alternative methods at all. They are two totally different methods. The casual one may have its uses as a rough rule of thumb approach to fast judgments in certain areas, but it doesn't deserve to be bracketed wih the more meticulous method as an alternative method.

Q. Now, did I understand you also to testify on cross examination that the relative cost factors all should be factually found, taking cost and other items into consideration, in order to determine whether any of them might be [fol. 218] omitted in the final cost study?

A. This is right. They all ought to be looked at.

Q. And you can't omit anything, am I right, until you have first found what the facts are on it and then determine whether it should or should not be omitted or eliminated from the cost factors?

A. That would be my opinion.

Mr. Ball: To avoid too constant interruptions, several times Mr. Long has used the expression "making valid the cost study." I think that question is improper in form, because I don't think this witness is one called upon to decide whether a study is a valid cost defense in the sense it presents a valid defense of the Robinson-Patman Act. I think your choice of words calls for an opinion outside of the degree of the expertize—I am not going to repeat, Mr. Long. I would just like to note that.

By Mr. Long:

Q. Is there anything mechanical or fixed about the choice of system of cost, distributionwise, under the Robinson-Patman Act?

[fol. 219] A. No, not at all. All kinds of different approaches have been taken, and different approaches have been equally successful or unsuccessful.

Q. And does it depend primarily on the distribution system, the facts and circumstances with respect to the distribution of the product?

A. To a very large extent. It depends also on the amount of money that the respondent is able and willing to spend for this purpose, because no study that is worth even bringing into court is costless.

Q. Now, you were also examined about the permissibility of ignoring certain overhead allocations on the grounds that they would follow the direct cost. Now, in order for you to agree with that as an expert, would you not also have to assume that such overhead had no direct relation to any of the customers being served.

A. Yes. Of course, this term "overhead" is a badly misused term and costs which, in a very broad sense, are overhead aren't necessarily overhead in the ultimate sense of being strictly and totally indirect. That is, if you take overhead and actually break it down, that is generally called overhead, actually break it down into its component parts, very frequently you will find certain elements of that [fol. 220] overhead which have quite direct relationships to the segment, the segments, of business that you are dealing with. It is overhead, yes, in a sort of non-technical sense. It is overhead in the sense that perhaps it is incurred in New York City, whereas the operation is out in Wichita or somewhere in the factory. But, nevertheless, you may have by the process of analysis and application of logical reasoning, may have very direct relationships, which should be taken into account.

Q. I wonder if you would again for the record tell us in your opinion, there may be differences between a management cost survey and a cost study for Robinson-Patman purposes?

A. Well, a management cost study, of course, may be anything from a very brief and very incomplete examination of a very limited territory of costs up to a pretty full-blown examination of a very large area and pretty expensive. I have seen both kinds. A management cost study, of course, can and does rely on the integrity, the objectivity, the openmindedness of most of the people it deals with. Now, of course, you have to watch your step there, naturally, because some people might in furnishing [fol. 221] information give you the information that they think you ought to have or the information that they think will do you the most good, rather than the information that

actually exists; so that usually what is needed, even where you have rather complete confidence in executives and other people, what you usually do is try to test the validity of the information they give you in terms of some kind of objective test.

Now, for Robinson-Patman purposes, well, there are obvious—I think the differences are obvious, particularly to legal gentlemen such as yourselves. The costs obviously have to be proven in a legal sense to a Court, to a trial examiner, to the Federal Trade Commission. This requires, I think, a standard of objectivity, a standard of completeness, which is oftentimes lacking in a purely managerial cost study.

I have seen many examples of this. Take, oh, such a thing as the operations of a tabulating department. Here we have a battery of IBM equipment, key punches, and all the rest. They perform services for all the departments of the business involving sales, administration, finance, everything you can think of. They work on payrolls and [fol. 222] everything else. For a managerial study it is hard for me to believe that anybody would ever take the trouble to count the holes punched in a million or so key punch cards. This has been done for Robinson-Patman purposes. I don't say that it is necessary. I think maybe this was an exercise of excessive caution. Nevertheless, it was done. It is an extreme example, of course. But it is an example of the kind of thing that you will do under compulsion of the fact that you have to prove this to the satisfaction of judges, trial examiners, commissions, which perhaps you wouldn't think of doing for your own purposes; because for your own purposes oftentimes the relatively rough approximations are satisfactory.

The merchant, for instance, watches the ratio of certain expenses to sales. This is a crude measure, but nevertheless he gets a certain amount of satisfaction out of it. If he guides his conduct in accordance with the way his ratios trend, he is perhaps not doing a bad managerial job. It is a crude instrument, which certainly wouldn't be satisfactory for Robinson-Patman purposes.

Q. And a management survey might have to be changed, altered, to make a Robinson-Patman cost survey?

[fol. 223] A. Oh, there isn't any question about this. The

Robinson-Patman cost studies have sometimes had a foundation, or an ancestor, let's put it that way, in the form of managerial studies made from time to time. The management studies, for example, time study operations in a warehouse. Why? Because they want to control operations of the warehouse; they want to see to it that the warehouse is operated efficiently, effectively; they want to see to it that the employees do their jobs in the length of time allotted to them and keep the unit costs down. This kind of thing is tremendously valuable in a Robinson-Patman study. It is not a whole study at all, but it can fit into a Robinson-Patman analysis beautifully.

Q. Let me ask you now, Professor Taggart, did you in your proposed testimony here, both in rebuttal, both as to Bowman and as to Borden, you testified that both Borden and Bowman in their cost studies have omitted certain central office expenses. Is that still your understanding, that they have omitted consideration of certain central office expenses?

A. Well, they have omitted them in the sense that they have not included them in their cost computations.

[fol. 224] Q. In your opinion, they should have at least found the facts with respect to the central office expenses there and made determination whether or not they should be allocated?

Mr. Ball: Just a minute. I object to the form of the question as assuming the fact that the witness has already been informed to the contrary. These costs were set forth in the order, and the facts were given to show that consideration was given.

Mr. Long: We just disagree with you on that; that is the state of that apparently.

Mr. Ball: The fact is that they were set forth in the pretrial order.

Mr. Long: We take it that they were not set forth. They may have been identified generally, but there was not any sort of factual finding as to what their central office expenses were.

Will you read the question that was objected to?

(Question read.)

By Mr. Long:

Q. Now, what is your answer?

[fol. 225] A. Well, I think, of course, they should have found, or they should find the facts. Now, whether in fact they did or not, I don't know, but if they did it is not reflected in their study.

Redirect examination.

By Mr. Jinkinson:

Q. There is just one other question. Do you have any interest, Professor Taggart, in who wins this lawsuit?

A. Not the slightest.

Recross-examination.

By Mr. Ball:

Q. I have got a few questions in the light of that. One question that Mr. Jinkinson asked confused me as against your previous testimony.

When were you first shown this draft of this pretrial order, proposed rebuttal pretrial order?

A. Well, the whole thing just within the past, oh, well, one of them came along maybe a couple of months ago, three months ago, perhaps—I am not sure of the date; and the other came along a little later. I would say both of them reached me within the past, at a guess three months.

Q. And that text was prepared here in Chicago and sent [fol. 226] to you by mail, is that correct?

A. Well, it was obviously typed here and multigraphed or whatever they do it here, yes.

Q. Well, was there an earlier draft of that text at any time that you saw it?

A. As far as my present personal testimony is concerned, yes. Yes, I saw this, oh, substantially earlier. How much earlier I don't know.

Q. Now, you say you saw that. In what form did you see that?

A. Oh, it was—I assume in typewritten form. I don't suppose it was in anybody's handwriting.

Q. And where was that typewritten form prepared, here in Chicago?

A. I assume so, yes.

Q. And that was again submitted to you by Mr. Woolley or Mr. Jinkinson, is that correct?

A. It came to me from this office, yes.

Q. Through the mail?

A. Yes.

Q. Were there letters of transmittal with these drafts?

A. Oh, I should imagine so. I wouldn't doubt it at all. [fol. 227] Q. Now, in each of these cases the text had finally been drafted here in Chicago, is that correct?

A. Well, yes, in terms of discussion that Mr. Woolley and I had had at very considerable length and certain penciled notes that I had made for my own benefit and for his.

Mr. Ball: That's all.

Recross-examination.

By Mr. Stevens:

Q. Professor Taggart, on Page 11 of the Taggart Report is the sentence:

> "A mere showing that a method other than that used by the respondent would produce narrower cost distribution would not serve to overthrow an equally acceptable method used by the respondent."

I think there has previously been reference to that, and that does reflect your opinion?

A. Oh, yes.

Q. Now, would that reflect your opinion even if one of the methods showed compliance with the Robinson-Patman Act and the other method showed non-compliance?

Mr. Ball: Is that in addition further to the——
[fol. 228] Excuse me, John, are you finished?

Mr. Stevens: No.

Mr. Ball: I beg your pardon. I thought you had stopped.

By the Witness:

A. Well, again what the committee was thinking in terms, what I would think in terms of, when we are talking this kind of language would be two methods that aren't necessarily extremely far apart. One method, for example, using sales dollars and another method using pounds, for instance, where there is no relationship whatever between sales dollars and pounds. But where there is a reasonable approach to similarity, then merely showing—you see, what this statement says is this: Merely showing that some other method might produce a different result doesn't disqualify the method that has been used.

Q. I take it your answer to my question is——

A. Now, the emphasis there is on "mere".

Q. That's right. The mere showing that one of the methods would show non-compliance with the Act if the other method was equally acceptable and was reasonably [fol. 229] close—I think you have that qualification—would make it permissible to accept the more favorable method rather than the other one?

A. If they are both equally acceptable from this standpoint of logic, from the standpoint of a logical analysis of the facts in the case, then I would agree.

Q. Then, Professor, on Page 9 of the Taggart Report there was a reference to this sentence:

> "That in considering the applicability of the de minimis concept the primary test to be applied is the relation of the unjustified portion to the differential itself and not to the higher unit price."

And I believe you have indicated that your personal view was that the higher unit price should also be considered?

A. I would personally be inclined to consider both things. I think of this in these terms: Suppose you had a price difference, we will say, of three cents on a dollar. Now, maybe this is sufficient to create the injury to competition and so on that the Act requires. Suppose it is all justified, if I may use that term, except one cent. Well, now, one [fol. 230] cent on a dollar doesn't sound like very much. One cent on three cents, however, sounds a little bit different, so I have a feeling that perhaps what we were

trying to say here was really—and I think the language could have been a little more, a little better written; and as I said yesterday, I didn't write it—that you should look at the unjustified portion of the differential itself, as well as to the higher unit price.

Q. Now your example refreshes my recollection of having read from a document—and I don't have it with me—indicating that you would consider a one per cent of the higher unit price, that differential would be de minimis.

A. Oh, I don't think I ever wrote such a thing as that.

Q. Didn't you?

A. Oh, my, no. I wouldn't be guilty of a thing like that.

Q. That is the example you just picked, one per cent on a dollar price.

A. I also suggested in that case that one cents on three cents usually gives you cause to stop and wonder whether this really is de minimis.

[fol. 231] Q. That's right, because that is thirty-three per cent if you give that example.

A. The Federal Trade Commission in the Sylvania case, for example, where the final argument between the accountants on the two sides amounted to eighty-seven hundredths of a cent, concluded that eighty-seven hundredths of a cent—at least I assume they concluded—that eighty-seven hundredths of a cent, with about a fifty-five or fifty-six cent price to the group of customers that were supposedly being discriminated against, came to the conclusion that that was de minimis. Now that percentage relationship—I figured out just the other day, as a matter of fact, if I remember right, that the percentage was 1.56 per cent. It is a Federal Trade Commission or the Court that decides what is de minimis. I don't. I wouldn't even aspire to decide what was de minimis. I might have my own personal opinion.

Q. The examples you have just given would indicate to me that your own personal opinion is that one per cent of the higher unit price would be de minimis in your opinion?

A. Not necessarily. Again let me talk about this Sylvania case. The price difference here was not three cents; [fol. 232] the price difference was about fifteen cents. Fifteen—or it was more than fifteen cents, fifteen, sixteen cents, something like that. Now, this eighty-seven hundredths of a cent doesn't stack up too big against fifteen

cents. I am simply talking as a man on the street, for instance.

Q. Mr. Hart has some questions, too.

A. I wouldn't presume to question the Commission's right to decide that that was de minimus. They did. I think, if I am not mistaken, that is almost as far as they have ever stretched the de minimis concept, but I am not sure.

Recross-examination.

By Mr. Hart:

Q. Professor Taggart, in response to some of Mr. Long's questions you distinguished between a Robinson-Patman cost study and a management cost study. Now, do I understand that that distinction means that you are distinguishing a cost study made for Robinson-Patman purposes after a company is under investigation or under suit, or something like that, and a management study for the purpose of determining prices or discounts?

A. Well, there is a distinction there, as a matter of fact, [fol. 233] without any question. I think a management study made in anticipation of the issuance of a new discount schedule, for example, is oftentimes a—not a crude approximation, but let's say a relatively rough approximation. What management usually works for, in a situation like that, is assurance to itself that the cost differences, even though the study were carried out in tremendous detail and with fine-spun accuracy, would still stand up to be something like the amount of the price questioned.

It doesn't follow that they have to for that purpose, for that kind of preliminary purpose, it doesn't follow that they have to go through all of the expense and the time consumption which is necessary, which is forced upon them by a formal Robinson-Patman complaint.

I have participated in many of these strictly internal cost studies of this sort. They may, for example, confine their attention almost entirely to one general element of cost, maybe they do nothing with anything except salesmen's time and salesmen's expense. And if they become convinced, as a result of some study of salesmen's time and expense, that perhaps that cost alone would be enough to

[fol. 234] justify the price differences they propose. Then why should they go into the problem of counting up all of their invoice lines and the spots on their tabulating cards, worrying the executives about whether they spend five minutes with the president of A & P a week, and all this sort of thing.

Q. Would it influence your judgment of such a study if when it was begun and when a large portion of it was completed, the company involved was in a lawsuit in which they were being sued for $16,500,000?

A. Well, if you are being sued for $16,500,000 you proceed with caution, I would assume.

Q. In other words, it would be quite possible under those circumstances that the cost study that you would embark on to justify or not your discounts and situations would be somewhat detailed and somewhat cautious and the best you could certainly afford?

A. I would be inclined to make it so. You are talking to me now as if I were a company official, for example, trying to decide this question.

Q. I am asking your opinion, yes. Under those circumstances you——

A. I think I would jump the budget a little bit under [fol. 235] those circumstances and authorize the expenditure of more time and money.

Q. And your criticism of the ordinary cost study that you were discussing is when management is doing it in a more or less cursory fashion, for the purposes of just determining what their own policy should be——

A. Well, I don't recall criticizing this. I think this makes good sense. Because, after all, you have got to make a profit in business, as I understand it, and you can't make a profit if you spend all the money on accountants and industrial engineers and all the other people that have to be pulled in to a thorough-going cost study of this sort. I tell my students sometimes that accounting is a necessary evil and they ought to get used to being so regarded.

Q. You understood, I believe you testified earlier, that all of the work papers behind either specifically the Bowman study and the Borden study were available to the Government?

A. I was told this, yes.

Q. And I assume that Mr. Woolley and Mr. Jinkinson also informed you that they would be available to you if you wanted anything?

A. Why, I am sure they would have been, yes. I don't [fol. 236] know whether they gave me that specific assurance or not, but I have no doubt that if I had requested it——

Q. You came to the conclusions that are contained in your proposed testimony in the Bowman rebuttal order without any examination of any of those work papers, in fact, the examination of no documents other than these mysterious memorandums by Mr. Woolley, other than those listed on Bowman-Taggart Exhibit 2?

A. Now these are the documents that I reviewed. This is correct.

Mr. Hart: I think that's all.

Mr. Ball: What I started to say is that I would like to ask the Government if they would produce, before we close with Professor Taggart, the copies of the correspondence that passed between Professor Taggart and them in relation to the transmittal of these documents.

(Discussion held off the record.)

(Whereupon the further hearing of the deposition was continued to Wednesday, April 16, 1958, at 1:30 o'clock P.M.)

[fols. 236a-236b] Notary Public Certificate. (omitted in printing)

[fol. 236c] Stipulation as to signing depositions. (omitted in printing)

[fol. 237] TAGGART DEPOSITION EXHIBIT NO. 1

Trade Regulation Reports

Second Extra Edition

Number 44, March 26, 1956

Cost Justification Report

Cost Accounting Procedures under the Robinson-Patman Price Discrimination Act

Text of Report to the Federal Trade Commission by the Advisory Committee on Cost Justification

Also Text of Robinson-Patman Act

[fol. 238] Foreword

Here is set forth the full text of the Report made to the Federal Trade Commission by the Taggart Advisory Committee on Cost Justification, based on its two-year study. The Committee was formed by the Commission in 1953 to investigate the feasibility of developing standards of proof and procedures for cost accounting to determine compliance with the Robinson-Patman Act, which prohibits certain price discriminations not justified by differences in cost. In its Report, the Committee recommends general principles of accounting and procedure to insure and to prove compliance with the Robinson-Patman Act. The Commission has taken no action on the Report except to release it to interested persons for study and comment.

The Report will be of interest to company officials who help to establish price policies for their companies, to accountants who are responsible for accounting procedures of companies subject to the Robinson-Patman Act, and to attorneys who are interested in insuring or proving compliance with the Act.

For the convenience of reference, the text of the Act is reproduced. Court decisions and Federal Trade Commission rulings interpreting and applying the Robinson-Patman Act are covered in CCH Trade Regulation Reports.

Commerce Clearing House, Inc.

Trade Regulation Reports, published biweekly by Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago 30, Illinois. Subscription rate $110 per year. Entered as Second Class Matter, November 22, 1948, at the Post Office at Chicago, Illinois, under the Act of March 3, 1879. Tenth Edition, No. 44, Second Extra Edition, March 26, 1956. Printed in U. S. A. All rights reserved.

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[fol. 241] Cost Justification Report

A Report to the Federal Trade Commission by the Advisory Committee on Cost Justification Under the Robinson-Patman Price Discrimination Act

I. Purpose and Scope of Report

The formation of the Advisory Committee on Cost Justification was announced on November 30, 1953. In an accompanying statement the objectives of the Committee were outlined as follows:

> "The Advisory Committee will ascertain whether it is feasible for the Federal Trade Commission to develop standards of proof and procedures for costing which can be adopted by the Commission as guides to business enterprises. To the extent that such standards of proof and reliable guides to satisfactory costing procedures are susceptible of development, sellers who wish to facilitate a determination of compliance with the Robinson-Patman Act would be able to organize their cost records accordingly."

It was further stated that "the work of the Committee is advisory only, and its functions will be confined to making recommendations to the Federal Trade Commission."

While in the area of accounting, dealing as it does with widely diverse situations, it is impractical to express highly definitive standards of proof, much can be gained from a statement of principles which the Committee believes would help toward the achievement of the objectives envisioned at the time of its appointment. Accordingly, the Committee has invited the views of other interested persons, groups and organizations. It has reviewed and carefully considered the history of the administration of the cost proviso of the Robinson-Patman Act by the Federal Trade Commission and the courts. In addition, Committee members have prepared detailed analyses of specific phases of the subject matter.

This report is a summary of the material which the Committee has developed. While the Committee has endeavored to reflect the cost proviso as it has been interpreted by

the decisions of the Commission and the courts, it is recognized that these official interpretations have been few in number and related to a limited number of specific situations. It is not possible to say, therefore, that every recommendation of the Committee reflects such official determinations in their entirety under all circumstances. The Committee has tried, however, to avoid an expression of principles which are in conflict with either the intent of the Congress or subsequent administrative and judicial interpretations. It hopes that its expressions of accounting principles may point the way toward the achievement of the purposes for which the law was enacted and assist the Commission in arriving at its goal of voluntary compliance.

As part of the over-all problem of cost justification under the Robinson-Patman Act, the Committee has also carefully considered and recommended interpretations of key words and phrases in the cost proviso in the light of [fol. 242] accounting and economic realities, as set forth in Section II of the report.

Section III is concerned with general principles of accounting proof and methods and procedures of cost analysis. This Section discusses basic concepts essential to an understanding of the nature and limitations of cost accounting and the necessity for a broad approach in the administration of the cost proviso; acceptable general principles of accounting proof; and acceptable techniques for ascertaining cost of differences, including special problems of cost analysis under the Act.

The Committee is of the opinion that the Commission's administration of the Robinson-Patman Act would be facilitated by certain organizational and procedural changes relating to cost justification. Our recommendations in this area, set forth in Section IV, relate to the adoption of consultation facilities; the continuing issuance of accounting opinions; the appointment and functions of an Accounting Adviser at the Commission level; the use of pre-trial techniques in formal litigation; and the role of the expert witness and the preference for written expert opinions over expert oral testimony only.

A concluding statement appears in Section V, and an

appendix covering details of cost analysis procedure is attached.

While each member of the Committee has signed the report as an individual, the report is a group product, and the signatures mean only that the members agree to the substance and general intent, and not necessarily to the precise language of the report, which may conceivably be interpreted with different shades of meaning.

II. Basic Interpretations of Cost Proviso

A. The cost proviso

The Robinson-Patman Act, approved June 19, 1936, amended Section 2 of the original Clayton Act. The provision of the Act with which we are concerned is the cost proviso in Section 2(a) which permits a seller charged with illegal price discrimination under that Section to defend such a charge on the ground that his differentials in price "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

It is essential to the cost analyst that he have an understanding of the requirements of the statute. For this reason, we shall present our interpretation of key words and phrases of the cost proviso in the light of accounting and economic realities.

B. The meaning of "differentials" in price

1. In general. One of the first tasks confronting the cost analyst is to determine the price differentials to be cost-justified. The records of Robinson-Patman Act administration contain many examples of disputes as to what constitutes "price" and how "price differentials" are to be measured. In general, the price of a service or com- [Fol. 243] modity is measured by the value of the consideration which passes from buyer to seller in the exchange: it is the amount which the buyer agrees to pay and the seller agrees to take.

2. Delivered prices. In all instances of "geographic" or "delivered" pricing the intent of the parties must be con-

sidered—what they mean the price to be. If the arrangement is for the buyer to transport the goods, or pay for the transport, the price obviously does not include freight charges (e.g. $1 per dozen f. o. b. seller's factory, no freight allowed). On the other hand, if it is understood that the seller will transport the goods to the buyer or pay for transport, price includes transport (e.g. $1 per dozen f. o. b. buyer's plant, or $1 per dozen f. o. b. seller's plant, full carload freight allowed). In each case (whether transportation is prepaid or allowed) the price is $1 per dozen, i.e., there is no price differential. In finding price it is reality that counts, not form; it is, for example, of no consequence that in one case the seller pays the freight and in another the buyer pays it and deducts the amount on payment of the invoice; either way freight is seller's cost. However, if a seller charges one buyer $1 per dozen and delivers the goods to him, and charges another buyer who picks them up at the seller's plant 90 cents a dozen, there is a price differential of 10 cents a dozen, which the difference in transportation charges may or may not fully justify.

In practice, there are many price arrangements intermediate between these two extremes. In these the seller agrees to "absorb" greater or smaller proportions of transport cost. Under such circumstances, the price is the amount which the buyer agrees to pay to the seller for goods, including as "goods" whatever transportation the seller may furnish. If competing buyers pay different prices (as here defined) for like goods the resulting price differentials must be justified by cost differences, or otherwise defended.

In zone pricing systems, prices are established according to geographic areas (the sellers, in effect, averaging transportation costs within zones). Zone pricing may result in different prices to competing buyers located in different zones which must be defended. Zone pricing, by its nature, involves a grouping of customers for pricing purposes. The problems of customer grouping are dealt with in Section III, B, 7.

3. Discounts, allowances and rebates. The price, in any instance, is net of all applicable allowances, discounts, and rebates which the buyer receives or is entitled to receive in

view of the quantities and methods of his purchases. Thus, if a buyer is billed and pays $10 at the date of sale, but is later given a rebate of $1 upon the performance of some specified act or the attainment of a specified volume of purchases, the price is $9.

If an allowance is not readily translatable into a percentage of sales dollars or into dollars and cents per unit of product, it may be treated as a cost rather than as a sales deduction. The distinction between a cost and a sales deduction may be difficult to make. However, such a distinction is likely to be academic since it will have no effect on the final result.

Discounts are called by various names according to their characteristics or the circumstances under which they are given, such as trade, functional, volume, quantity, cash, and many other types of discounts. Sometimes customers are [fol. 244] billed net and the discount does not show on the invoice; in other cases the billing is gross, with the discount computed and deducted; and in still others it is merely shown in the terms, so that the buyer can do his own computing and deducting. In any case, the price is the net amount—that is, the amount which the seller stands ready to take and which the buyer must pay.

Indirect price concessions, such as varying terms of sale and allowances for so-called "services" rendered by a buyer, also should be considered in determining net price.

4. Cash discounts. Whether or not the buyer pays his bills in time to receive a cash discount does not in any way affect the price. Where a careless or ill-financed buyer fails to take a cash discount, the excess is a payment for credit accommodation, and not a payment for goods. Thus, if the invoice price to buyer A is $10, and to buyer B is $9, and each is entitled to a two per cent discount for cash payment within a specified period, the effective price to A is $9.80 and to B is $8.82. The price differential to be justified is 98 cents, no matter whether either A or B takes advantage of the discount. Similarly, if the invoice price to both A and B is $10, A's invoice being subject to a two percent cash discount and B's price being net, the price differential in favor of A is 20 cents, whether or not A takes the discount.

5. Aggregate and average prices. The prices to be com-

pared in Robinson-Patman Act cases may be those of individual commodities, or of a group or "set," where different items are normally bought and sold as a "set," or a weighted average of the prices of a line of related products. Where differentials consist of percentage discounts or rebates uniform for all commodities, comparisons of "set" pricing or line pricing yield the same results, percentage-wise, as comparisons of the prices of individual commodities. Where price differentials on the different members of a "set" or line are not uniform percentage-wise, a weighted average produces results which may permit offsets of the individual item differentials.

The seller attempting to justify aggregate or average price differentials bears the added burden of establishing the reasonableness of that method of comparison. Among the criteria to be considered in such cases are the range of unit prices, the degree of similarity of use, the extent to which different customer classes do in fact purchase the items in the "set" or line in similar proportions, and the competitive significance, if any, of the lack of uniformity in the price spread on individual items.

6. Basic price comparisons. A special problem of price definition presents itself when two or more customers or customer classes are sold goods which differ in minor ways but which are nevertheless in essential respects "commodities of like grade and quality," the sales of which have the necessary relation to competition. Thus goods may be sold in individual packages to one customer and in bulk to another. Or, an item may be painted for one customer but not for another. If the addition to price for the added operation or material is specified in the sales contract or on the invoice, no problem arises—the prices to be compared are the stated prices of the basic commodity. If, however, prices to the two or more customers or customer classes are all-inclusive, without specification of the price of the basic commodity, it becomes necessary for price comparison purposes to compute a basic price. A [fol. 245] satisfactory approach to this problem is to compare the factory costs, either actual or standard, and to make the assumption that the same rate of gross margin applies to each dollar of cost, whether for the basic commodity or the added processing or packaging. By follow-

ing this principle prices to each customer for the basic commodity may be derived, and the price difference to be cost-justified will be the difference between these basic prices.

C. The meaning of "due allowance"

At the heart of the cost proviso is the phrase "due allowance." Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.

In view of the plus-or-minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), "due allowance" should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly, so as to require only "reasonable allowance" for cost differences based on sound accounting and pricing principles. For this reason the Committee approves the position taken by the Commission in applying a "de minimis" concept to cases where price differentials are not shown to be completely cost-justified but where circumstances minimize such failure to the extent that no corrective action is deemed necessary. In considering the applicability of the "de minimis" concept, a primary test to be applied is the relation of the unjustified portion to the differential itself, not to the higher unit price.

D. The meaning of "resulting from . . ."

The cost proviso permits price differentials based on manufacturing, selling, or delivery cost differences "resulting from the differing methods or quantities" in which goods are sold or delivered to different customers.

We think the legislative history of the Act clearly indicates that Congress intended the cost proviso to be interpreted broadly. As stated by Congressman Utterback, after citing examples of "differing methods or quantities" giving rise to cost differences under the proviso, such examples were "illustrative of the way in which the bill permits the translation of differences in cost into price differentials as between the customers concerned, *no matter*

where those differences arise." (Cong. Rec., June 15, 1936, p. 9415) (Italics supplied.)

There are many "differing methods or quantities" which may give rise to cost differences between customers or classes of customers. Such "differing methods or quantities" are generally ascertainable upon analysis of a seller's manufacturing and distribution system. Such analysis should interpret these terms in their broadest connotation, giving full effect to all items of cost difference. The term "resulting from" also should be given the same broad interpretation.

E. Delivery cost differences

The broad construction given the cost proviso by Congress is evident from the fact that Congressman Utterback interpreted it to include differences in delivery costs even [fol. 246] though no differences in method exist. As stated by him in explanation of the cost proviso, "Where the methods of delivery are the same, but the distance is different, price differences in such cases may of course be made to reflect those differences." This interpretation would apply with equal effect where no differences in quantities exist. Accordingly, we believe that price differentials may properly reflect differing costs of delivery of like items in the same quantity by the same method to different customers or groups of customers.

III. Accounting Proof and Procedures

A. Basic concepts

1. The nature of cost accounting. Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is

not warranted. With few exceptions, every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation. Standards of proof adopted by the Commission must take this fact into account.

2. A broad approach desirable. The Committee urges the adoption by the Commission of a broad approach in the evaluation of cost studies as indispensable to the equitable solution of questions which arise under the cost proviso. The adoption of such an approach is necessitated both because cost accounting entails judgment and opinion, and because of the inordinate cost of making the refinements of cost analysis which a more rigid approach would require.

B. General principles of proof

The Committee urges the Commission to endorse the following general principles concerning proof of an accounting nature to serve as guides in the preparation and consideration of cost-justification studies.

1. Anticipated costs. To the extent that costs are fundamental to determination of prices and sales policies, it is industrial practice to base decisions on anticipated costs. This requires assumptions as to basic operating conditions, e.g., rate of production, product mix, specifications, etc. When a seller is challenged under the Robinson-Patman Act to justify a price differential, the costs to be considered are historical, i.e., actual or retrospective, costs. This should not mean, however, that the studies of anticipated costs are of no value, provided the seller can show that actual costs which vary therefrom resulted from changes [fol. 247] in operating conditions beyond the control of the seller and not reasonably to be anticipated. The same conditions apply to any cost study made prior to the period under challenge.

2. "Good faith" cost studies. Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. "Great weight" should be interpreted as meaning that accounting princi-

ples relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound. A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent.

3. Areas of cost. Areas of cost demonstrably not pertinent to the issues should be excluded from consideration for cost-justification purposes.

4. Incurred costs. Robinson-Patman Act studies should be based on costs actually incurred; they should not be confined to costs as recorded. Many companies do not accrue all expenses during short periods. Recognition of transactions may be postponed until a convenient time; or costs capitalizable at the time of expenditure may be charged to operating expenses for convenience or for other reasons. The company making the cost analysis should rectify such departures from precise timing of expense recognition and, conversely, the Commission should insist upon such rectification where the result would be appreciably changed.

5. Source of cost data. It should be recognized that data required to prove cost justification cannot ordinarily be gathered solely from the books of account. Admissibility of pertinent cost information should not be prejudiced because it comes from sources not under continuous accounting control, such as special time studies, market surveys, and estimates and opinions of qualified experts in production and marketing functions.

6. Extent of cost surveys. The preparation of unnecessarily exhaustive, time-consuming, and expensive cost surveys should be avoided.

7. Classification of customers, orders, commodities and transactions. Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be

treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers.

At the same time, the privilege of classification is not a license to disregard sound business and accounting concepts. In order to become the basis for cost justification of price differentials, the classification should be logical [fol. 248] and should reflect actual differences in the manner or cost of dealing. Great care should be taken in establishing price classes to make sure that all members of the class are enough alike to make the averaging of their costs a sound procedure. Customer groupings may properly be based not only on quantities sold but also according to the way customers place their orders: whether for immediate delivery or later shipment on a fixed schedule; in large or small orders; placed directly at the factory or through a sales branch; for on-peak or off-peak manufacture, etc. These trade factors may all be reflected in cost and as criteria for customer classification.

8. Sampling. The use of sampling techniques is universal in statistics, business management and accounting. It is essential if the cost of cost analysis is to be kept within reason. Sampling is used in almost every phase of cost analysis. Shorter periods of time are used to represent longer periods; a few salesmen, warehousemen, or clerks are taken as representative of all; two or three sales offices or territories may be representative of a company's entire operations; and intensive study of the handling of a few orders may suffice to give a picture of the handling of all. No opportunity to make use of valid sampling techniques should be overlooked.

The basic requirement for valid sampling is that the sample be truly representative of the whole. Such sampling is given greater probative force if it is repeated from time to time with appropriate variations which will demonstrate its representative character. The type of sampling most likely to be used in Robinson-Patman Act cost studies is the so-called "judgmental" sampling, in which the data are carefully selected for their known representative char-

acter. The competence of the judgment must be established. The random, or statistical, sample should be used where feasible, however, because of its demonstrable lack of bias.

Where time studies are necessary because operations are not uniform, it is adequate to make them on a sampling basis. It is not usually necessary to obtain time reports or to make stop-watch studies over a lengthy period or of all persons involved in an operation. A representative period may be allowed to stand for a longer period, such as a week for a month, or a month for a year. The work of representative members of a group may be timed and the result allowed to stand for the entire group.

Where a complaint covers a period of several years a cost-justification study based upon a full accounting period (quarterly, semi-annual or annual), when accurate inventory adjustments and other "closing" data are readily available, should be acceptable as fairly representative of the entire period of the complaint in the absence of affirmative evidence of a substantial nature to the effect that earlier or later conditions were at variance with the period under study to an extent which would appreciably alter the results. Whatever time period is used in any cost study should be truly representative and free as far as possible from seasonal, cyclical, or accidental variances in volume of business, characteristics of sales transactions, or incidence of expenses.

The use of sampling is one of the many areas in which cooperation between personnel of the company making the study and the Commission accounting staff may be sought. Wherever sampling is contemplated in a study which the Federal Trade Commission accounting staff will ultimately [fol. 249] have to review, advance agreement on the validity and scope of the sample may be desirable. (See Section IV, B.)

9. Substitution for time studies. The element of time is of almost universal importance where human effort is involved. However, for cost-justification purposes, time does not always have to be actually measured. Instead, logical inferences concerning time may often be accepted in measuring cost. For example, under typical circumstances, it may be assumed that it takes a uniform amount of time to

prepare each invoice line, regardless of the article sold or the quantity of articles represented. Under such conditions, the invoice line becomes a valid unit of measure of human effort.

10. Incremental costs. Cost justification is sometimes claimed solely on the basis of a difference in cost in the seller's entire business with and without the purchases of a particular customer. Such showing should not be considered an appropriate cost-justification device. All customers are entitled to share in the benefits of such a reduction in unit costs, since all customers taking goods from a common source are logically responsible for the effect of volume on unit costs.

11. Cost variations. The costs applicable to cost justification are those which vary either directly or indirectly with the factor upon which the price differential is based. The measure of cost justification is the amount of the variance per unit of product. Costs should not be excluded from the cost-justification process merely because they are indirect or difficult to allocate.

C. Methods and procedures of cost analysis

1. General considerations. As stated before, the Robinson-Patman Act permits price differentials which "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which . . . commodities are . . . sold or delivered." Thus the measurement of cost differences becomes a key problem in connection with efforts to comply with the Act and in cases where noncompliance is alleged. The Act does not define the term "cost" or any of its modifiers. The determination of cost differences is therefore left entirely to administrative procedure, guided by accepted rules of cost accounting.

The infinite variations of internal organization, methods of doing business, availability of accounting and statistical data, and other important factors, preclude the possibility of developing uniform methods and procedures of cost accounting for Robinson-Patman Act purposes. It must be assumed that cost-justification studies will be entrusted to persons who have the intelligence, experience, and imagination to adapt sound accounting principles as

found in standard works on the subject and in the practices of business enterprises to the requirements of a particular problem.

The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to strait-jacket cost justification would be self-defeating. For this reason, it is the earnest hope of the Committee that the Federal Trade Commission, while approving or disapproving particular approaches in individual instances, will refrain as far as possible from adopting specific rules of accounting analysis exclusive of others and that it will encourage the application of ingenuity and [fol. 250] imagination in this complex area. Similarly, whatever this report may say in favor of particular methods should not be construed to exclude the use of other methods which, in the particular circumstances, may give more accurate results.

Although believing that the adoption of uniform accounting methods and procedures of universal applicability would be impracticable, the Committee recognizes the necessity for exploration and development concerning the techniques of cost analysis under the Act. Consideration, therefore, has been given to certain important aspects of this problem, namely, (a) record-keeping for Robinson-Patman Act purposes; (b) general principles of manufacturing and distribution cost allocation; and (c) special problems of cost analysis, as set forth below.

2. "Robinson-Patman Act" accounting. It has not been customary for business enterprises to calculate and record the costs of commodities and distribution services in the detail required for a Robinson-Patman Act determination. An approximate knowledge of costs by products and by customers may well be of value for management purposes, but the requirements of good management do not demand the extent of detail, or continuity of records, needed for an instantaneous solution of the problems presented under the Act.

The need for special studies in the event of a Commission investigation or complaint cannot be eliminated. There is, however, no basic incompatibility between accounting classifications and procedures which facilitate answers to price discrimination questions and those required for other

purposes. A well-designed system of expense classification suitable for cost control, and the routine recording of expense data and statistical information, can provide both adequate information for making operating decisions and the raw material for special cost studies on the occasion of considering alterations in pricing policy, the pricing of new lines, or pricing for new territories or customer classes. Also, in case pricing policies are questioned by the Federal Trade Commission, such a system furnishes the best foundation for an answer to the question as to whether cost differences justify price differentials. The required studies can be made much less painful and expensive by taking action in advance to have the records contain information that can readily be assembled when needed.

3. Methods of cost analysis. *(a) General principles.* Any inquiry into methods and procedures of cost analysis for Robinson-Patman Act purposes must be concerned with two distinct problems: first, what can be done within the normal scope of commercially feasible and economically justifiable cost accounting to provide current indications of the trends of cost differences and to facilitate day-to-day consideration of over-all price policies; second, what additional steps must be taken to provide a complete picture of cost difference among customer classes or between individual customers should occasion arise? No sharp line can be drawn between these two areas of inquiry. What is quite natural and feasible for one company may be entirely impracticable for another because of differences in internal organization, degree of integration, variety of products, complexity of trade channels, methods of sale and delivery, range of size and functional status of customers, competitive practices, and many other features of business operations. Each selling organization must determine for itself how far it can or must go toward pro- [fol. 251] viding current data and how much must be left for special and occasional studies.

(b) Costs of "manufacture, sale, or delivery". These broad categories comprehend almost the entire range of industrial and commercial operating costs, since few costs are not in one sense or another expended for the production of goods and services or their distribution. Section 2(a) contains, however, one important limitation on the type of

cost differences which may be relied on; namely, they must be those "resulting from differing methods or quantities" in which goods are sold or delivered. Cost differences, to be significant, therefore, must be related to "differing methods or quantities."

The distinctions between the three types of cost; namely, (1) manufacture, (2) sale, and (3) delivery are not sharp, uniform, or important. What are called manufacturing costs in one situation are classified as distribution costs in another. Final manufacturing processes, such as packaging, are sometimes carried on under the supervision of distribution personnel and may therefore be classified among selling costs. While it is convenient, therefore, to discuss cost of manufacture and costs of sale and delivery separately, the distinction is not controlling.

(c) Specific cost differences. It is well to note that in some circumstances a very simple cost analysis is the best one. If the price differential is based entirely on some characteristic of the transaction whose cost can be directly measured, attention may be directed at that item of cost and at no other. An obvious example is the distinction between carload and less-than-carload freight. If a seller's regular delivered price is based on the expectation that he will normally ship in full carloads and pay freight accordingly, and if his less-than-carload price reflects the freight differential only, attention may be concentrated on the freight factor, without regard to other manufacturing, selling, or delivery costs. Another example would be the case of advertised and unadvertised products, if the price differential does not exceed the unit advertising cost. In many cases, however, price differentials are related to a complex of circumstances and their cost justification requires consideration of many, if not all, of the costs involved.

(d) Direct and indirect costs. Costs separately incurred for any given product, customer, or group of customers are readily assigned. These are direct costs. On the other hand, indirect costs, which are jointly incurred for two or more products, customers, or groups of customers must be allocated before total costs for any given category can be ascertained.

The importance of sound methods and procedures for

assigning all costs is apparent. Although, for reasons stated heretofore, standardization is impracticable, the Committee believes a discussion of the problems involved, and some acceptable solutions thereof, may be beneficial. Basic principles, adaptable to all circumstances, are discussed in paragraphs (e), (f), and (g) below. For a more detailed discussion we attach Appendix A entitled, "Illustrative Methods and Procedures for Allocating Manufacturing and Distribution Costs." These illustrations are suggestions only, and are not intended to foreclose the use of entirely different approaches where suitable. In all cases, it is essential that the specific conditions and factors involved in the manufacturing and distribution process be [fol. 252] fully developed before selecting methods of cost analysis.

(e) Methods of determining amount of direct cost. The amount of direct cost variation per unit of product may be determined by the most applicable of the following methods:

(1) Count. To enumerate by mechanical or other means the number of units required for a given unit of product. This includes such devices as magnetic and electric eye counters, time clocks and such procedures as numbering each unit or physically counting the number of units passing a given point. This also includes such methods of counting as time studies, time analyses and time cards where the unit of work is counted and recorded.

(2) Measure. To gauge the dimensions, quantity or volume of units used.

(3) Weigh. To ascertain by balance or scale the quantity or weight of units used.

(4) Compute. To ascertain by calculation or mathematical relationship the units used; e.g., as numbers of parts and assemblies; as quantities available for use, used and remaining.

(f) Methods of determining amount of indirect cost. The amount of indirect cost variation per unit of product may

be determined by the most applicable of the following methods:

(1) Statistical Analysis. Analysis of past performance to develop apportionment basis.

(2) Sampling. Statistical technique of testing current performance to develop basis for apportionment.

(3) Standard Allowance for Related Items. Mutual dependence of cost items used as apportionment basis; e.g., apportioning cost of heat treating on the basis of standard allowance for weight of material in product.

(4) Compute. To ascertain by calculation or mathematical relationship the units used.

(g) Method of determining most applicable methods of determination of direct cost or of apportionment of indirect cost. The most applicable methods of determination of direct costs or of allocation of indirect costs should be in the order listed as follows:

(1) That method historically used by the company concerned, the result of which has periodically and routinely been evaluated and found reasonably accurate.

(2) That method historically used by the company concerned the result of which has been sporadically evaluated and found reasonably accurate.

(3) That method which theoretically appears to be the most logical and reasonable, or that which most closely approximates a satisfactory measure of benefit or activity in terms of rational analysis and can reasonably and practicably be used.

[fol. 253] 4. Special problems of cost analysis. In addition to the general principles of cost analysis discussed herein, consideration has also been given to special problems which may arise. The Committee is of the opinion that such problems can be resolved only in the light of the specific conditions and factors surrounding the particular expenses to be allocated. A method which may be sound under certain circumstances may be unsound under different conditions. Consequently, it would not only be impracticable, but wholly inadvisable, to recommend uniform

methods of allocation. However, following are some of the special problems, together with comments thereon.

(a) Direct costs varying with sales price. Direct costs which vary with sales price include such items as sales commissions, excise taxes, and royalties computed on selling price. The problem presented is whether cost differences derived from such items are acceptable under the Robinson-Patman Act. For example, a 10 per cent cost applied to a selling price of $1 per unit amounts to 10 cents per unit whereas the same cost percentage applied to a selling price of 50 cents amounts to only five cents per unit, with a resultant cost difference of five cents per unit. There is nothing inherently unacceptable in such cost differences. However, there may be exceptions. If, for example, the differing sales commission costs per unit could be shown not to be a proper reflection of the time and effort expended in selling to different customers and classes of customers, such cost differences would not be acceptable, and a more precise method of allocating sales commissions should be utilized.

It should be noted also that such cost differences become invalid for cost-justification purposes to the extent that price differences are not based on other provable cost differences. To hold otherwise would be to recognize a cost difference based solely on unjustified price differentials. To do so would be to recognize cost differences resulting from discriminatory prices and not from differing methods or quantities of sale or delivery. On the other hand, if the price differences in question are otherwise justified by other allowable cost differences, the differences in the direct costs under discussion may also be said to result from the differing methods or quantities of sale or delivery.

This discussion of direct costs the amount of which is dependent on sales prices does not apply to the use of sales dollars as an allocation factor in the allocation of indirect costs.

(b) Salesmen's "missionary" expense. In some industries it is a common practice for salesmen to contact those who do not purchase directly from the sellers whom the salesmen represent but who do buy from their customers, such as retailers who buy from wholesalers but not from

manufacturers. It then becomes necessary properly to allocate such "missionary" costs.

The treatment of these costs is essentially a problem of ascertaining fully the facts concerning the salesmen's activities. Upon analysis, such costs may be classified as those of promotional activity or of selling activity, or they may be segregated as between these two types of activities. Thereafter, the salesmen's compensation and expenses may be allocated to the proper customer classes in accordance with the nature of their duties.

The Federal Trade Commission has held under certain circumstances that "indirect" purchasers are "purchasers" within the meaning of the Act, and this factor must [fol. 254] also be considered in allocating salesmen's "missionary" costs when incurred in such a factual setting.

(c) Zone costing. The determination of cost differences between or within zones is basically a problem in classifying customers for costing purposes in accordance with sound principles of classification, as discussed elsewhere herein. Great care should be taken in grouping customers between or within geographical areas, or zones, to make the averaging of costs for such groups meaningful for Robinson-Patman Act purposes. Such groupings should be logical and should reflect actual differences in the manner or cost of dealing with each customer group.

(d) Multiple-plant costing. A single manufacturer may have several plants producing goods of like grade and quality located in various geographical areas. It becomes important for such a seller undertaking a cost-justification study to make certain basic decisions before proceeding with the study. Such decisions will primarily be concerned with whether costing should be based on the operations of a single plant or on the costs of two or more of them.

Once again, it is essential that careful analysis be made before proceeding with the study. Among pertinent considerations are the local or national scope of the price differentials; the competitive area likely to be affected by such price differentials; the variations of manufacturing and distribution costs between plants; the conditions under which buyers are supplied from the seller's various plants, and so forth. It is only in the light of such a factual analysis that a multiple-plant seller can proceed to a

proper determination of cost differences under the Robinson-Patman Act.

(e) Recommendation. The foregoing problems are typical of many which are peculiar to cost justification under the Robinson-Patman Act, for which there is a continuing need for developing sound methods and procedures of allocation. The Committee is of the opinion that the Commission can perform a laudable service by issuing a continuing series of accounting opinions on such matters. Such opinions would greatly facilitate compliance with, and administration of, the Act. (See also Section IV, F.)

IV. Federal Trade Commission Procedures and Organization

A. General

In addition to the recommendations proposed with respect to interpretations of the cost proviso and standards of accounting proof and procedures, the Committee is of the opinion that certain organizational and procedural changes by the Commission would facilitate and implement its administration of the cost proviso. We believe that such administrative changes will encourage voluntary compliance with the Act; will materially expedite formal hearings involving cost justification; and will provide ample opportunity in adversary proceedings for opposing counsel, the Hearing Examiner, and the Commission to develop and evaluate expert testimony concerning cost justification.

[fol. 255] B. Consultation facilities

There have been occasions in the past when the Commission's accounting staff has not been adequately available for consultation in connection with the preparation of cost analyses for Robinson-Patman Act purposes. We recognize that limitations on the time and energy of the Commission's accounting staff preclude extensive consultation of this sort. It is believed, however, that in the long run the time of the staff will be conserved by making its members available to respondents and other sellers at the initial stages of preparing a cost defense. Such contacts would, of course, be optional with respondents or other sellers.

Among matters which could profitably be discussed at such conferences would be the general plan and scope of projected cost studies; the propriety of proposed sampling techniques, and the suitability of certain measures of cost in the case of the more important elements. Discussion of such matters need not in any way commit the Commission, but it would be most helpful to respondents or other sellers in determining whether or not a cost defense could be successful; how long its preparation would take; and whether the expenditure involved would be justified. It would also forestall going down blind alleys and making costly and time-consuming mistakes.

The Commission's accounting staff might also be available for consultation on a strictly limited basis during preparation of cost studies in case major points of doubt or difficulty arose. Since the burden of proof is on respondents, the Commission's staff should not make or supervise the studies, even if it were large enough to do so. Carefully limited consultation, however, could in the long run save time of everyone concerned.

C. Accounting Adviser to the Commission

In an address on June 18, 1953, former Chairman Howrey called attention to the inability of the Commission or the Hearing Examiners, under the Administrative Procedure Act, to seek the advice of members of the economic staff of the Commission in adversary proceedings. This "serious defect" he would remedy "by attaching economic advisers directly to the Commission, and possibly to the Hearing Examiners, to perform economic functions in the same manner as the General Counsel performs legal functions."

The Committee recommends that the suggestion with respect to an economic adviser or advisers be extended to provide for an Accounting Adviser. Such an adviser could be useful in many ways. His precise status and method of operation would have to be determined by the Commission, but one of his functions would be to advise the Commission on accounting matters arising informally under the Robinson-Patman Act. As part of this function, the Accounting Adviser could prepare a continuing series of accounting opinions, subject to Commission approval, in-

terpreting the cost proviso of the Act. Such opinions would be an authoritative guide to industry and the accounting profession in this field. They would be an effective follow-up of the work of this Committee.

If it were thought desirable for the Accounting Adviser to participate in adversary proceedings, it is recommended that he be subject to call as an expert witness *by the* [fol. 256] *Hearing Examiner* on his own motion or on that of either party. Opposing counsel would be directed by the Hearing Examiner to submit hypothetical questions for study by the Accounting Adviser prior to his appearance on the stand. Upon testifying, he would be subject to cross-examination by opposing counsel. The Hearing Examiner would not be bound by the opinions of the Accounting Adviser but would reach an independent judgment on the accounting issues before him, just as on any other issuable matter. Likewise, the Commission would not be bound by the testimony of the Accounting Adviser. We believe this recommendation is consistent with the provisions of the Administrative Procedure Act. The Accounting Adviser would not consult with opposing counsel, the Hearing Examiner or the Commission in the adjudicatory phases of the proceeding. His role would be that of an expert accounting witness and his testimony would be adduced in conformity with the Administrative Procedure Act. His appearance would not, of course, affect in any way the use of expert witnesses by either party.

D. Pre-trial techniques

In the address previously cited, former Chairman Howrey made the following statement:

> "Surprise and tactical advantages should be frankly eliminated in all administrative hearings. Particularization in pleadings should be accompanied, in the big case at least, by pre-trial procedures involving the identification and authentication of exhibits, exchange of written drafts of the proposed testimony of experts, stipulations of fact not subject to dispute, and a detailed plan for the hearing."

The Committee applauds this statement of policy and urges that it be emphasized in connection with cost justification. Cost accounting issues are difficult enough without having them made more so by reliance on oral testimony which at best is not as clearly thought out and as carefully phrased as testimony should be in so complex an area. Procedures such as those outlined by Mr. Howrey result in narrowing the issues; in defining them in such a way that the Hearing Examiner and all parties may concentrate on matters of substance and not be led astray into matters of insignificance; in a more compact and informative record; and, most importantly, in a saving of time and money to all concerned.

The Committee recommends that particular consideration be given by the Federal Trade Commission to pre-trial techniques, under such rules as may be deemed necessary, in proceedings in which the cost proviso is invoked as a defense. A wholly reasonable prerequisite to the use of such pre-trial techniques would be a requirement that respondents give notice early in the proceedings that the cost defense is to be invoked.

E. Expert testimony

1. The role of the expert witness. The role of the expert witness in cost-justification matters is an exacting and difficult one. As stated earlier, the results of cost accounting cannot be tested by the methods of exact science. In all but the simplest cases the reliability of the evidence [fol. 257] must be tested not only against the accuracy and completeness of the data presented, fortified by proof that it is properly grounded in the facts of the particular business situation under review, but more largely upon the soundness of numerous subjective judgments of the expert witness as to the methods of allocation of expenses, known as "joint costs," common to several classes of products, processes or customers. Accordingly, we think that the following guiding principles should be of material importance in developing and evaluating expert accounting testimony in Robinson-Patman Act matters.

Counsel in support of a cost-justification presentation should be prepared to bring out in the direct examina-

tion of his witness each instance in which costs have been allocated among products, processes or customers. The full basis of each such determination should be made a part of the direct presentation. If alternative methods were available the considerations which dictated the ultimate choice should be stated. If there is reliance upon historical precedent in the particular business or trade the validity of the continued use of the precedent should be established. In other words, reliance upon historical precedent should be justified. The witness should be particularly well prepared to justify the selection of a method of allocation determined by others and adopted by him for the purpose of the study. To have probative force such an adoption by the witness must be his free choice and supported in full by his independent professional judgment. An affirmative assumption by counsel in support of the presentation of the full burden of proof would go far to provide the adjudicator with a sound basis upon which to appraise testimony.

On the part of the counsel in support of the complaint there should be a recognition of the fact that cost differences developed in such presentations are not, and never can be, mathematical exactitudes and that, depending upon the nature of the differing methods or quantities involved, varying degrees of tolerance are necessarily indicated. The emphasis in cross-examination should therefore be on a thorough testing of the bases of allocation.

To the hearing officers and the courts who are to pass upon the reliability, probative force and substance of the cost-justification presentations, an understanding of the nature of such evidence should do much to dispel the mystery and uncertainties that abound in a long and involved record of the testimony incident to such a presentation. The mechanical aspects of the study which relate to the completeness and accuracy of the data presented and the quality of the workmanship may readily be passed upon. In addition, much weight should be given to the caliber of the witness, his apparent professional skill, and his appreciation of the responsibility to deal fairly with the data before him. The soundness of his reasoning in explanation of his methods of allocation is an important consideration. The adjudicator should be mindful, also, that the products of cost accounting procedures are seldom,

if ever, mathematical certainties. The results are apt to represent a range of values within which "due allowance" may be held to obtain.

2. Written opinions. Where a respondent has presented a cost study in written form to the Commission's staff for appraisal, it is recommended that the report thereon by the Commission's accounting staff should also be in the form of a written memorandum, with necessary support-[fol. 258] ing exhibits, and that the report be made available to the respondent. As stated above, the Committee urges the Commission to adopt such rules as it may deem necessary to provide for the pretrial exchange of written drafts of the proposed testimony of accounting experts in cost-justification matters.

F. Continuing accounting opinions

The Committee's present inquiry manifests the desirability of a continuing series of Commission accounting opinions interpreting the cost proviso. Similar plans have been adopted in the public interest by the Treasury Department and Securities and Exchange Commission. As already stated, the proposed Accounting Adviser to the Commission could prepare such accounting opinions, subject to Commission approval. In addition to being an authoritative guide to industry and the accounting profession, such opinions would also serve as the medium through which the work of this Committee could be effectively implemented.

V. Conclusion

The Committee recognizes that the cost proviso of the Robinson-Patman Act operates in a complex area and that many of the problems to which it gives rise are not given to ready solution. Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role.

Additional accounting guides not appropriate for or possible in this report will be of help. It is the Committee's hope that this report will stimulate others, such as trade associations and professional groups, to contribute in this field, and that special attention may be focussed on the problems of compliance. Indeed, if the Committee's en-

deavors serve no other purpose, its time would be well spent.

While continued development and clarification is essential in this dynamic field, there is every reason to believe that the objectives of the cost proviso will ultimately be achieved through sound administration of its provisions in the light of accounting and economic realities. It is toward this end that the recommendations of the Committee are directed, and it is earnestly hoped that they will contribute materially to compliance with, and administration of, the cost proviso of the Robinson-Patman Act.

Dated February, 1956.

Respectfully submitted, C. R. Fay, Alvin R. Jennings, E. W. Kelley, H. T. McAnly, Albert E. Sawyer, Otto F. Taylor, Herbert F. Taggart, Chairman.

Released by the Federal Trade Commission, March 23, 1956.

[fol. 259] APPENDIX A

Illustrative Methods and Procedures for Allocating Manufacturing and Distribution Costs

I. Costs of Manufacture

A. In general

What are commonly designated as manufacturing costs (including product development and other prerequisite costs) are likely to be segregated to show cost differences resulting from differing methods and quantities of sale only where goods are made upon customer order. Manufacturing costs applicable for cost-justification purposes are those which vary either directly or indirectly with the factor on which the price differential is based. For example, if the price differential is based on the number of units of product per order, then all those manufacturing costs which vary per unit of product with the size of the order, either directly or indirectly, are generally applicable in the cost-justification process. The amount of the cost difference is equal to the amount of the variation in the per unit cost of the product.

B. Determination of manufacturing cost differences

In applying this general principle to a specific case, the first step is to divide the total expenses of manufacturing into groups, each group representing the total cost of some manufacturing activity or function; for example, product development and design, tooling, production, production control, purchasing, etc. Whether these functional expense groups will tend to vary per unit of product with the price-differentiating factor depends on the circumstances of the situation under review, and can be determined by the use of reason. Assume, for illustration, that all the expenses of the production control operation are considered as one functional group, that the price differential is based upon quantity per sales order, that all goods are manufactured for stock, that all orders are filled from this stock, and that all customers buy comparable assortments of goods. Under these circumstances, since pro-

duction control affects operations prior to finished goods storage, the size of the customer's order will have no direct effect on the production control operation, and it becomes difficult to measure the effect, if any, that production control expenses may have on any cost difference. However, if materials are scheduled into production only after receipt of an order, it is likely that production control cost per unit of product will vary with the size of the order. Certain of the expenses involved will be uniform per order, regardless of its size. Others may vary, but not proportionally. The cost per unit of product will therefore decrease as the size of the order increases, and vice versa.

Examples of other manufacturing cost differences to be recognized because of varying quantities of over-all or individual production orders, traceable directly or indirectly by relative contribution to classes of customers, include: product development and design, tooling, varying manu- [fol. 260] facturing methods, set-up and make-ready, fluctuation in efficiency due to interruptions of production flow, employee training costs, methods and standards development, product costing, and others.

Costs in the manufacturing area which do not directly vary with the price-determining factor, but which can be shown to vary with costs which do so vary, are also applicable to the cost-justification procedure. In many cases the best way to give recognition to this fact is to include a proper proportion of such indirectly varying costs among the costs of the operating functions. In other cases it is more convenient to deal with them separately.

An example of such indirectly varying costs may be vacation pay. If each employee is allowed a two-weeks vacation for which he receives four per cent of his annual wage, this expense varies, not with the size of individual orders, but with the number of payroll dollars. Applicable to each dollar of payroll included in the functional cost grouping, therefore, is an additional four cents for vacation pay. This item may be included among the costs of each separate function in the first instance, or it may be more convenient to compute vacation pay applicable to all payroll items and to add the resultant amount of variations to the answer otherwise obtained. The precise method of computation is unimportant: what is important is the recognition of the

principle, so that complete and accurate results may be obtained.

The preceding illustrations relate to a situation in which the price-differentiating factor is the number of units of product in the sales order. This is not the only possible source of manufacturing cost differences. For example, the timing of orders may be fully as important as their size, and may affect the costs of manufacture, sale, and delivery. If it can be shown, for instance, that orders properly timed with respect to production schedules have a normal cost resulting from orderly scheduling of production factors and processes, whereas ill-timed orders cause interruptions in production flow, require overtime labor, the utilization of abnormal sources of material, and similar excessive costs, cost differences may justify the offering of price inducements for orders placed reasonably in advance or penalties for orders placed on a spot basis.

The principle here is the same as in any other instance. Those functions, the costs of which vary with the price-differentiating factor, are the applicable functions, and the amount of the cost justification is measured by the variation in unit costs.

II. Distribution Costs

A. In general

The costs of sale and delivery are commonly known as distribution or marketing costs. The terms should be construed broadly. The costs of sale and delivery are, in general, the sum of the costs of obtaining sales orders and the costs which are incurred because sales orders have been received. Sometimes these costs are described as "order-getting" and "order-filling" costs. If these terms are understood broadly enough, they clearly describe the costs of sale and delivery. As noted before, the distinction between these costs and costs of manufacture is of [fol. 261] negligible significance for Robinson-Patman Act purposes, since the same rule applies to all.

As in the case of manufacturing costs, the costs which are applicable to the problem of cost justification are those which vary, directly or indirectly, with the factor on which the price differential is based. A wide variety of such

factors may give rise to variations in the costs of sale and delivery. The number of units per order, the total volume of purchases over a period of time, the timing of orders, the selection of modes of delivery or of channels of trade, and many other circumstances surrounding sales transactions may affect the unit costs of sale and delivery.

B. Functional method of distribution cost analysis

While in individual cases other approaches to the technique of cost analysis may be preferable, and should be acceptable to the Commission, the functional method has many advantages. This involves the collection of distribution costs by operations or functions. The term "function" in distribution cost accounting is comparable to "cost center" in manufacturing cost accounting. A distribution function may be defined as an operation or activity at the lowest practical level of supervision for which costs can be isolated and collected. Organization lines tend to follow functions performed. Thus the cost functions will tend to coincide with lines of authority and responsibility as established by management.

Among the considerations of importance in classifying distribution cost functions are the following:

1. Cost functions should include only similar operations. The commingling of unlike activities, with different rates of change relative to the price-differentiating factor, will be confusing, even though they may be under the same supervisor.

2. An organizational division or department may perform only one function, but it frequently embraces several.

3. The size of a specialized distribution operation has no necessary relationship to whether or not it shall be considered as a function for cost justification purposes. Such a function may be the aggregate of several accounting units established for internal control purposes.

Since methods of organization and operation differ among companies and industries, distribution cost functions also differ. The examples and definitions given be-

low, therefore, must be understood to be purely illustrative and not to be exhaustive, conclusive, or such as would fit any specific company. The illustrations are used merely to put into concrete terms the principles which the Committee has in mind.

The following might be the distribution cost functions of an integrated manufacturing company:

Transportation	Warehousing
Advertising	Operating Service
Sales Promotion	Sales Accounting and Credit
Selling and Technical Service	Sales Management.

The transportation function includes the cost of transporting the goods from the place of production to the market in which they are to be sold, and then to the cus- [fol. 262] tomer. Transportation may require one or more movements and involve several types of transportation facilities.

The advertising function is the cost of demand creation through non-personal presentation of goods or services. The usual means are newspapers, magazines, radio, television, outdoor signs, motion pictures, direct-mail, and catalogs.

The sales promotion function is similar to the advertising function in that its purpose is demand creation. This function differs from advertising only in the medium used. Mass circulation methods are not involved. Instead, the costs cover the display of the product itself, the use of point-of-sale material, the making of demonstrations, or the giving of premiums.

The selling functions involve those costs for the activities of personnel engaged in personal demand creation through direct contact with prospective buyers or their customers. They also include technical services performed for the purpose of aiding customers and prospective customers in the use of the products or service, giving technical advice and assistance in the operation of the customer's business.

Warehousing comprises the storing and handling of goods. The costs are primarily for space, stock handlers, and stock handling equipment.

The operating service function includes the cost of sales office clerical work and administration of the physical aspects of the distribution operations. Usually these activities are of greater cost importance when an organization is decentralized than when it is centralized.

The sales accounting and credit functions include the cost of billing, sales statistics, inventory accounting, accounts receivable and credit.

Sales management is a function which represents the responsibility for the entire marketing operation. Included in this function may be the determination of what to produce or purchase for resale, how much to make, when it should be procured or manufactured, where the products can be sold, and who will sell them.

It is to be noted that all of the functions thus described are subject to vertical subdivision for cost analysis purposes, the character and degree of such subdivision depending on the variety of tasks performed in each function, the specialization of supervision and personnel, and the purpose of the analysis. Such subdivisions are often called subfunctions, but their nature and significance are identical with the functions earlier described. The functions are also subject to horizontal subdivision in terms of geography, product lines, channels of trade, and the like. These subdivisions are apt to be very important for reduction of the scope of a cost study by elimination of costs not germane to the inquiry and by confining attention to an acceptable sample.

The costs of each distribution function consist of the familiar natural expense categories found in every classification of accounts, such as salaries, supplies, travel, communication, space costs, insurance, taxes, and so forth.

Having established satisfactory functional cost categories, it remains to determine costs by segments of the business, such as products or customers. For this purpose, costs may be roughly divided into two groups: those [fol. 263] which are direct as respects the business segments involved, and those which are not. Direct costs are those which can be readily identified with the segment being costed. The application of these direct costs to specific segments of the business can be definitely measured, and

no problems of proration or allocation exist. (It should be noted that costs which are direct as to certain segments, e. g., products, may be indirect as to other segments, e. g., customers, and vice versa.) Direct costs are usually identified with the units or segments to be costed at the time they are incurred—in other words, in the basic account classification and the original recording of expenses.

After ascertaining the direct costs, it remains to assign the indirect costs. These costs are collected as totals of functions not chargeable directly. Assignment of these indirect costs is done by measuring the activity or output of the function in terms of units of functional service which can be counted or measured, and then applying to each business segment the amount of the functional cost which is in proportion to its use of or responsibility for the units of functional service.

A simple example makes this process clear. If the function is personal selling, one possible unit of functional service in a customer analysis may be sales calls. If customers are divided into classes A, B, and C, and if 10 per cent of the calls are made on Class A, 30 per cent on Class B, and 60 per cent on Class C customers, then the three classes share the cost of personal selling in those proportions.

Procedure for other functions is similar. The steps are as follows:

1. Ascertain the total cost of the function.
2. Decide on an appropriate service unit by which the performance output of the function may be measured.
3. Measure the number of service units required by each segment to be costed—in the example above, by the three classes of customers.
4. Apply the costs of the function to the segments in proportion to the service units required.

Having measured or computed all direct and indirect functional costs, the total cost of each business segment is the total of the items so ascertained. Cost differences are then computed per unit of product, per dollar of actual or list sales, or in such other terms as may be appropriate.

C. Principles of functional costing

While it is not intended to list all conceivable functions with service units available for each, or otherwise to particularize, a few observations may be useful guides to functional costing.

At the outset, caution should be exercised with respect to overemphasis on the distinction between direct and indirect costs. This distinction should not be made for minor items of cost or for those where treatment of potentially direct items by a satisfactory application of the indirect procedure will produce completely reliable results. Substantial elements of direct costs are ordinarily so designated and recorded in the original bookkeeping process. Establishment and maintenance of the necessary bookkeeping routines for isolating all direct costs is burdensome and is justified only where amounts involved are appreci- [fol. 264] able and satisfactory results cannot be obtained by other and less expensive methods. In many cases the indirect functional approach, using an uncontroversial unit of functional service, will produce acceptable results.

Functions vary widely in their closeness to the business segments being costed. Some such relationships are very close and the appropriate measuring factor (the service unit) is easily identified and perhaps easily counted in total and in relation to the segments. The relationships of other functions to the costing segments are more remote, and the choice of a service unit which will adequately measure a given relationship is of greater difficulty. In many cases more than one service unit might be chosen. The precise choice will depend on two main considerations: (1) which service unit most closely approximates a satisfactory measure of benefit or activity in terms of rational analysis; (2) which service units can most readily and economically be counted both in total and in terms of the costing segments. Different service units will yields different dollars-and-cents results, and a particular service unit should not be chosen merely because it maximizes cost differences. Where the choice is otherwise a matter of indifference, however, there can be no objection to the choice of the method which produces the most desirable result.

The choice of both functions and service units must be in accordance with the circumstances of each case. To the extent that the functions listed heretofore cannot be assigned directly, the service units shown below have been found useful. Some of the units are more appropriate for commodity analysis than for customer analysis, and vice versa.

Transportation: the ton-mile, a weight unit not modified by distance, a bulk unit, a customer stop.

Advertising: square inches of advertising space, time of advertising personnel, number of pieces of advertising material furnished (direct mail and dealers' helps), number of commercials.

Sales promotion: number of promotional calls, time of sales promotion personnel, pieces of promotional literature.

Selling and technical service: number of calls, time spent in calls. Time spent in travel to and from territory and between customers is often handled on per-call basis, even though time with customers is used for direct selling.

Warehousing: space or volume units for storage; weight or volume units for receiving and shipping; time units, invoices, or invoice lines for order-filling costs.

Operating service: treated as overhead of selling and technical service function and allocated on same basis.

Sales accounting and credit: number of orders or invoices or invoice lines, number of transactions, number of accounts.

Sales management: treated as overhead of the functions managed, and allocated either on basis of all costs previously charged or on basis of payroll of persons supervised.

[fol. 265] Robinson-Patman Price Discrimination Act

(Act of June 19, 1936, Chap. 592, 49 Stat. 1526; 15 U. S. Code, Secs. 13, 13a, 13b, 21a.)

An Act to amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

[Amending Section 2 of Clayton Antitrust Act]

[Section 1.] That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows: [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526.]

[Price Discrimination and Quantity Discounts]

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission

may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Burden of Rebuttal—Meeting Competition]

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that [fol. 266] his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Brokerage Commissions]

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Payments for Services and Facilities Furnished by Customer—Advertising Allowances]

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Furnishing Additional Services or Facilities]

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on pro-

portionally equal terms. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Unlawful to Induce or Receive Discrimination]

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Pending Litigation as to Federal Trade Commission Orders]

Sec. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used, or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as [fol. 267] amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to

the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken. [June 19, 1936, Chap. 592, Sec. 2, 49 Stat. 1527; 15 U. S. Code, Sec. 21a.]

[Participation in Discrimination]

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. [June 19, 1936, Chap. 592, Sec. 3, 49 Stat. 1528; 15 U. S. Code, Sec. 13a.]

[Penalty for Violations]

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. [June 19, 1936, Chap. 592, Sec. 3, 49 Stat. 1528; 15 U. S. Code, Sec. 13a.]

[Cooperative Associations]

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association. [June 19, 1936, Chap. 592, Sec. 4, 49 Stat. 1528; 15 U. S. Code, Sec. 13b.]

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[fol. 269] TAGGART DEPOSITION EXHIBIT No. 2

UNITED STATES v. THE BORDEN COMPANY ET AL.,

Civil Action No. 51 C 947

DOCUMENTS FOR REVIEW BY EXPERT WITNESS

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II. Government's pre-trial orders for
    A. Bowman
    B. Borden
III. Bowman documents—cost defense
    A. Wholesale store accounts
        1. "Manual"
        2. Discount tests: March 1955, September 1955, and January 1956
        3. Government's cost analysis memos:
            (a) July 10, 1956
            (b) February 6, 1957 Revision
        4. Bergfield Deposition (Volumes I and II)
    B. Bulk wholesale accounts (restaurant)
        1. Bowman cost analysis—March 1956
        2. Government's memo: Analysis of cost and price differences based on Bowman data (January 18, 1957)
    C. Bowman proposed pre-trial order (subject to revision)
IV. Borden stores—cost defense
    A. Wholesale store accounts
        1. Cost defense brochure Borden's 1955
        2. Government's memo—Cost defense analysis September 25, 1956
        3. Malone deposition
        4. Borden abstract of Malone deposition for inclusion in proposed pre-trial order

Webster 9-2395—Mr. Earl A. Jinkinson, Esq., Chf. Midwest Office, Antitrust Div., U. S. Dept. of Justice, Room 404, Fed. Dist. Court House, Chicago, Ill.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendant.

Deposition of Albert E. Sawyer—Filed February 13, 1959

The deposition of Albert E. Sawyer, called by the defendants for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe a notary public within and for the County of Cook and State of Illinois, in Room 756, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Wednesday, April 16, 1958, at 1:30 o'clock, p.m.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

[fol. 2] Mr. Stuart S. Ball, Mr. H. Blair White, and Mr. Joseph Greaves, on behalf of defendants The Borden Company and Belmont Dairy Company;

Mr. Edward L. Hart, Jr., and Mr. John P. Stevens, on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

[fol. 3] Mr. Jinkinson: Let the record show, of course, that this is a discovery deposition, being taken by Borden and Bowman with reference to direct testimony proffered by Mr. Sawyer in both the Borden and the Bowman plaintiff's rebuttal pre-trial order as to both companies, in Civil No. 51 C 947.

ALBERT E. SAWYER, having been first duly sworn, was examined and testified as follows:

Cross-examination.

By Mr. Ball:

Q. Mr. Sawyer, have you got a copy before you of the Government's rebuttal pre-trial order as to the Borden Company, or, rather, a draft of such an order?

A. Yes, I have.

Q. Would you turn, please, to Page 17 and particularly to Paragraph 12?

A. Yes.

Q. And tell us whether you have either a list or any record of the documents of information that were furnished you by representatives of the plaintiff and used by you in the preparation of your testimony?

A. Such a list is available.

Mr. Ball: Have we got that, Mr. Jinkinson?

[fol. 4] Mr. Jinkinson: Yes. I might say for the record it is identical to that furnished to Professor Taggart which appears as——

Mr. Ball: As Taggart Deposition Exhibit No. 2?

Mr. Jinkinson: Yes.

[fol. 5] Mr. Jinkinson: Yes.

Q. Now, I hand you what has been previously marked as Taggart's Deposition Exhibit No. 2 and disregarding the handwriting at the bottom which I take it is that of Professor Taggart.

Mr. Jinkinson: No, that is Professor Woolley.

Mr. Ball: Mr. Woolley?

Mr. Jinkinson: Yes. I believe he put that on there.

By Mr. Ball:

Q. I will ask you is this a complete list of the documentary material that was furnished you in preparation for your testimony?

A. Yes. It is a complete list of such material.

Q. With which representative of the Government did you confer?

A. I conferred with Mr. Woolley on two or three occasions and on one occasion with Mr. Jinkinson.

Q. Well, will you identify, if you can, the dates of your conferences and inform us as to the amount of time that was spent in each of them?

A. The first one, I believe, occurred in May of 1957 and was merely a conference as to my availability.

Q. That conference was with whom?

[fol. 6] A. Mr. Woolley.

Q. Mr. Woolley?

A. Yes.

Q. Was that then preceded by any correspondence, Mr. Sawyer?

A. No. I think it was preceded only by long distance telephone call which my partner took because I was out of the city to determine if I would be available for the conference of the next day.

[fol. 7] Q. Do you recall how long that conference took?

A. Less than an hour.

Q. Do you recall what Mr. Woolley said to you about the case at that time?

A. Only a general description. No documents were exhibited, but a conference to determine my availability to undertake this assignment.

Q. Did Mr. Woolley recite to you any of the facts involved in the litigation?

A. No. It was a general discussion of the type of litigation of the type of subject matter.

Q. When was the next conference you had with a representative of the Government?

A. I am not just sure of the date. I think it was in July.

Q. Of 1957?

A. Yes.

Q. With whom was that conference held?

A. That was with Mr. Woolley and at that time he brought with him some—a substantial number of this list of documents.

Q. Can you identify which of the list of documents he submitted to you at that time?

[fol. 8] A. I know that the No. 1 and some of No. 3.

By Mr. Hart:

Q. Will you identify that for the record by name, Mr. Sawyer, a description of them?

By the Witness:

A. Roman numeral I, Transcript Volume 8 of Civil Trial 51 C 947 and some of the documents I would have to refer to, the correspondence in which this material was forwarded. And Roman numeral III, Bowman documents Cost Defense. I am not certain that everything under that caption was submitted at that time and some of the material under Roman numeral IV, the so-called Bergfeld deposition and the Malone deposition were not received by me until later. I think they have been submitted to Professor Taggart first and forwarded to me by Professor Taggart.

By Mr. Ball:

Q. Have you any correspondence that would fix the date or the approximate date on which you received these documents?

A. I don't have that correspondence with me.

Q. You have it available in your files?

A. Yes, I do.

Mr. Ball: I ask, Mr. Jinkinson, if you have it available [fol. 9] here would it be possible——

Mr. Jinkinson: We have copies.

Mr. Ball: Copies of it here from your file?

Mr. Jinkinson: Yes.

Mr. Ball: I wonder if we could refer to the correspondence between yourself and Mr. Sawyer for the purpose of this examination?

Mr. Jinkinson: The Government must respectfully decline to make public its files, having been told on many occasions by the Attorney General it is against the policy of the Department of Justice.

Mr. Ball: So your refusal to produce these papers for the purposes of this cross-examination extends to the correspondence transmitting the documents to Mr. Sawyer?

Mr. Jinkinson: That is right.

Mr. Ball: That includes, of course, the document described here as Government's Memorandum Analysis of Cost and Price Differences Based on Bowman Data and Government's Memorandum, Cost Defense Analysis of [fol. 10] September 25, 1956, relating to Borden's Source, Cost Defense?

Mr. Jinkinson: That is right.

Mr. Ball: Well, now, referring to this second conference which you had with Mr. Woolley which took place——

Mr. Hart: Could we find out whether the witness also refuses to produce his copies of that correspondence?

[fol. 11] Mr. Hart: Just for the sake of order, could we find out whether the witness also refuses to produce his copies of that information?

By Mr. Ball:

Q. Do you have any of the material listed on Taggart's Exhibit—Taggart's Deposition Exhibit No. 2 in your files at this time, or copies thereof.

A. No, I think, outside of these pretrial orders, I have none of the documents listed thereon.

Q. And, by pretrial orders you mean the two draft orders which contain the draft of your testimony?

A. That is correct.

Mr. Hart: I am talking about the correspondence Mr. Jinkinson refuses to supply.

Mr. Ball: Oh, yes.

By Mr. Ball:

Q. Do you refuse also to produce the correspondence you had with the Department of Justice as well?

A. I would have to respect the wishes of the Department in that regard, I think.

Q. Now, so the record may be clear, I now ask you to produce that correspondence subject to the physical getting of it here from your files, and I take it in response to this you refuse to produce it.

[fol. 12] A. Yes, I do.

Q. To whom did you return the documents that appear on Taggart Deposition Exhibit No. 2?

A. To Mr. Jinkinson.

Q. And that was in person?

A. Partly in person and partly by mail.

Q. In other words, at different times.

A. At different times, yes.

Q. Was there any one time when you had all of the documents listed in your possession at the same time?

A. I do not believe there was.

Q. Did you make any notes of the contents of these various documents?

A. Yes, I did.

Q. Do you have those notes with you?

A. I do have notes but I do not have those notes with me.

Q. Will you produce those notes?

A. I think they would come under the same category as the other material.

Q. I understand then that you refuse to produce the notes?

A. I refuse to produce them.

Q. Referring again to the second conference that you [fol. 13] had with Mr. Woolley, how long did that conference take place, or how much time did that conference consume?

A. As I recall, it was about a half day.

Q. And what was the nature of your conversation with Mr. Woolley?

A. Explanation of the various documents and an indication of the areas in which it was desired that I express my judgment.

[fol. 14] Q. Did Mr. Woolley state to you opinions he had formed with respect to various aspects of the cost studies?

A. No.

Q. Looking again at Taggart Deposition Exhibit No. 2, I call your attention here under III-B-2, Government's Memo, Analysis of Costs and Price Differences Based on Bowman Data, January 18, 1957, and also the item under IV-A-2, Government's Memo, Cost Defense Analysis,' September 25, 1956; I ask you if Mr. Woolley either gave you those documents at this time or had previously furnished you with them?

A. I think he had previously furnished them, as I remember.

Q. Will you describe how long these two documents were?

Mr. Jinkinson: Now, I am going to object to that question for the reason that it is irrelevant and immaterial, and I direct the witness not to answer it, because the question calls for consultation between the Government employee and Mr. Sawyer which was obviously on a confidential basis and privileged testimony.

[fol. 15] I direct the witness not to answer the question.

By Mr. Ball:

Q. Do you adhere to the direction of Mr. Jinkinson?

A. Yes, I do.

Q. Did these documents contain any statements of fact as to the operation of the dairy business by Bowman and Borden?

A. I believe there was material descriptive of those operations.

Q. What were the areas with reference to the two reports upon which Mr. Woolley asked for your opinion?

A. Well, those areas are set forth in this direct testimony starting out with a discussion of what I regarded as the basic principles.

Q. Yes; but I am asking you what areas of the Bowman and Borden reports did Mr. Woolley ask you to express your opinion about?

A. Well, I am trying to answer you completely on that. It was not so much the areas of the Bowman and Borden reports as the areas of the Robinson-Patman problem that is presented in this case.

Q. Did Mr. Woolley discuss with you any possible deficiencies in either of the two studies, other than those that [fol. 16] are covered by your testimony set forth in this draft order?

A. I do not know whether I am entirely clear as to the question.

Q. Did Mr. Woolley suggest the possibility of deficiencies in either the Bowman or the Borden report on matters that are not—on specific matters that are not discussed in your testimony in the draft order?

A. I do not believe he did. I think everything is presented here.

Q. In other words, did he talk with you about anything other than possible deficiencies in the central overhead, allocation of drivers' time to and from the route areas and the matter of compensation of the drivers?

A. Yes, those were the things that we discussed.

Q. And those were the only three subject matters that were specifically dealt with?

A. I do not recall any matters relating specifically to either Borden or Bowman.

Q. Now, during the conversation that you had with Mr. Woolley on the second meeting, did he give you any information in addition to the documents concerning the facts of the case or his views thereon?

A. I do not recall even much discussion on his views as [fol. 17] such. These documents came to me, they were for my review, and I think he understood, as I did, that I would take this material, study it and express my opinion as to the principles that should apply.

[fol. 18] Q. Prior to this—oh, excuse me.

A. (Continuing) That was not the time to discuss his particular views on the matter. I had not had the opportunity to discuss or to study the rather voluminous amount of material.

Q. You had not, therefore, I take it, made any study of that material prior to this second visit you had with Mr. Woolley.

A. I do not think I had. I do not recall now having received anything prior to that time.

Q. Then after this visit of Mr. Woolley you did proceed to study this material.

A. I did, yes.

Q. And will you tell us approximately how much time you spent on the study of this material and approximate the time in which you made this study.

A. I cannot recall now. I think somewhere in the neighborhood of forty or fifty hours' time, in the course of which I made certain notes.

Q. Now, did you furnish copies of your notes to Mr. Woolley?

A. No.

Q. Were those notes in pencil, or ——

A. Yes, they were in my handwriting.

[fol. 19] Q. They had not been typed out?

A. No.

Q. Now, did that estimate of time of forty or fifty hours include time with which you were meeting or a consultation with Mr. Woolley or Mr. Jinkinson?

A. No; I would say that over and above the forty to fifty hours I had, as I said, approximately a half a day with Mr. Woolley at the time the documents were delivered and one other conference at the time, when my studies had been completed.

Q. Can you fix an approximate date of that second conference?

A. I think it was in September, sometime.

Q. I gather in 1957?

A. That is correct.

Q. And that conference took place at your office in Washington?

A. Yes, it did.——

Mr. Jinkinson: In New York.

The Witness: In New York. Excuse me.

Mr. Ball: In New York.

By Mr. Ball:

Q. And how long did that conference take?

A. As I recall, the forenoon and perhaps about an hour [fol. 20] after lunch.

Q. Now, I take it you considered all the documents that are listed in Taggart Exhibit No. 2 for identification in formulating your conclusions and opinions, as set forth in the draft order?

A. Yes. I went through all of these documents and took note of those things that were relevant to, in my judgment, to an appraisal of the principles embodied in both studies.

Q. Now, I do not think I asked you how long the September conference with Mr. Woolley took place?

A. Well, that was my last answer. My last answer was intended to cover that. That was the forenoon and about an hour after lunch.

Q. Was Mr. Woolley the only one present at the conference, or——

A. Yes.

Q. Now, will you recall as best you can what Mr. Woolley said to you in the course of that meeting?

A. Well, he did not have too much to say. I did most of the talking.

Q. Did you at that time, or any time subsequent, furnish Mr. Woolley with a draft of what you would propose as your testimony in this matter?

[fol. 21] A. On the day following Mr. Woolley's visit to my office in September I wrote out substantially what appears in this document in this same form.

Q. And then did you send that to Mr. Woolley by mail?

A. No. As I recall, he spent that day in New York with another witness, Mr. Taylor, and he returned to my office either late on the day or the day following for just a few minutes, during which I delivered to him a transcript of what I had prepared.

Q. Where prior to that time had you seen any other documents or any other written material with reference to this matter, other than the correspondence you had had with Mr. Wool-ey and Mr. Jinkinson?

A. I think this embraced the total.

Q. Had you seen a draft of any proposed testimony by Professor Taggart?

A. No, I had not. My first acquaintance with that was this document, when this document was given to me.

Q. After it was prepared in its present form?

A. Yes, yes.

Q. Now, I notice a very interesting exact parallelism in wording, Mr. Sawyer, between the last sentence of Paragraph 12, which professes to be your testimony, and the last sentence of Paragraph 10, and I ask you if the [fol. 22] wording of that sentence is your wording?

Mr. Jinkinson: What page is that?

Mr. Ball: The two pages involved are page 6 and page 17.

Mr. Woolley: Page 6 and page 17?

Mr. Ball: Yes.

Mr. Hart: In other words, Taggart's is on 6 and Mr. Sawyer's is on 17.

Mr. Ball: That is right.

By Mr. Ball:

Q. I have reference to the sentence with regard to the principles underlying a properly conceived system of distribution, and so forth. I wanted to find out who was the author of those words.

A. Well, I must say that I wrote those that appeared on page 17.

Q. Are you confident that isn't Mr. Woolley's redraft of your material?

A. I would have had to say something like this and in about those words.

[fol. 23] Q. Well, now, had you before you at that time anything that amounted to a system of distribution cost accounting by Borden or Bowman?

A. Well, I was referring, I suppose, to what is called a manual. There were two or three documents.

Q. Now, will you identify what you have in mind?

A. Well, III-A-1, "Manual" and III B-1, Bowman Cost Analysis, March, 1956.

Then there is IV-A-1, Cost Defense Brochure, Borden's, 1955. And I would also have referred to some of the material in the Malone deposition and the Bergfield deposition. In each of those cases, as I recollect, there was a discussion of the accounting procedures.

Q. Well now, it is true, is it not, that the cost defense brochure of Borden's, 1955, was, and you saw it, was a draft of a pre-trial order?

A. I do not recollect clearly the exact form of some of these documents and I would not say.

Mr. Ball: Well, what was the brochure, gentlemen? I fail to identify it by its description. I cannot identify it right now. I have reference here, Mr. Woolley, to IV-A-1 [fol. 24] I assume that that was our first draft of the pre-trial order.

[fol. 25] Mr. Woolley: Containing this in here, you know

Mr. Ball: What I am trying to say is was it prepared as an initial draft of the pre-trial order, is all

Mr. Woolley: No, it was not in the pre-trial order in that form. It is this cost study that Mr. Malone prepared, containing all of those documents and information you have got in here. It was incorporated in the pre-trial order, but was not part of the pre-trial order at the time.

Mr. Ball: It was the black bound volume that had numbered paragraphs——

Mr. Woolley: Containing statistics.

Mr. Ball: —that were rewritten in part and added to and became the pre-trial order, am I correct?

Mr. Woolley: Yes, but there was nothing in a technical sense in the pre-trial order at the time.

Mr. Ball: No, but it was submitted, if I recall, as a draft of a possible pre-trial order to you. That is what [fol. 26] I had reference to.

Mr. Woolley: I don't know anything about that.

Mr. Long: I don't think at that time we so understood it. I think at a later pre-trial——

Mr. Jinkinson: We called it as we named it here. I don't know whether you put any name on, but this is the name we have (indicating).

Mr. Ball: What I am trying to do is to identify exactly what that is.

Mr. Jinkinson: Well, that is the name we gave to it.

Mr. Woolley: It is that cost study that you made and offered to us for review, and I called it "brochure" to identify it. There seemed to be no particular identification.

By Mr. Ball:

Q. Well now, what do you understand by "system of distribution cost accounting"? Doesn't that refer to a system of continuous accounting, Mr. Sawyer, as you would [fol. 27] normally intend the words?

A. No, it would include special studies of distribution costs which might be undertaken either for management purposes or matters of this kind. I might add that distribution studies are frequently not a part of the daily routine of accounting, in most instances.

[fol. 28] Q. That is especially true in the field of distribution costs?

A. It is especially true in the field of distribution costs, yes.

Q. Now, have you got in your files a copy of your draft of your proposed testimony that you submitted to Mr. Woolley?

A. I think I have.

Mr. Ball: I was going to ask first that that draft be produced from the files of the Government, if they have it available.

Mr. Jinkinson: The Government must respectfully decline for all of the reasons heretofore given.

By Mr. Ball:

Q. Now I ask you, Mr. Sawyer, if you will furnish your draft of that copy.

Mr. Jinkinson: I will direct the witness not to answer the question.

Mr. Ball: You will not even let him refuse to produce it, is that it?

Mr. Jinkinson: No, that is true. This is off the record.

(Discussion off the record.)

[fol. 29] By Mr. Ball:

Q. Now, at any time in the course of your study of this matter did you ask Mr. Woolley or anyone associated with him for additional facts and information?

A. I may have asked him as to the relevance or part certain of these documents played, and what some of the key issues were, not having read the full record of the proceeding.

Q. Now, having given this draft of your proposed testimony, what was the next discussion that you had with any representative of the Government, or the next communication?

A. I think there was a communication in which Mr. Jinkinson or Mr. Woolley asked me to amplify one particular paragraph.

Q. Do you recall what paragraph that was?

A. I don't offhand. It is along towards the end of my study.

Q. Will you glance at it and see if you can refresh your memory as to which paragraph that was?

(Discussion off the record.)

By Mr. Ball:

Q. (Continuing) Go ahead if you have got your answer, Mr. Sawyer.

[fol. 30] A. I am not entirely certain, and I believe it was on page 21, the paragraph marked "H". Perhaps Mr. Woolley can correct me if I am wrong.

Q. Did Mr. Woolley write you a letter about this subject at that time, or was this a telephone call?

A. This was, as I recall, a letter.

Q. Do you recall the length of the letter?

A. One page.

Q. Do you recall whether that contained any statements of fact that he thought you should take into consideration?

A. No, it contained no statements of fact, but my original wording did not—it was not entirely clear as to what I intended, and as I recall I added, I believe I added the sentence which begins in the middle of—"This includes a variety of activities" and so on. Those sentences explain in more detail——

Q. In other words, the last three sentences of Paragraph H that appears on page 21.

A. That is correct.

Q. At any time did you see the draft of the testimony of Mr. Taylor?

A. No, I did not.

Q. Did you at any time have any discussions with Mr. [fol. 31] Taylor?

A. No, I did not.

Q. Did Mr. Woolley at any time inform you of the positions taken either by Professor Taggart or Mr. Taylor on any of these matters?

A. No, it was understood that we would not consider or discuss one another's reactions.

Q. And what was the next step that occurred after you received this request for a redraft of your Paragraph H?

A. I believe that sometime later—I believe it was ap

proaching the end of the calendar year—I received a copy of the two documents I have here, Plaintiff's rebuttal, pretrial order, as to both Borden and Bowman.

Q. And you made no suggestions for changes of wording at that time?

A. No.

Q. Are there any changes of wording that you would make now if you had a chance to review it?

A. I reviewed this yesterday, and I find it expresses my opinion satisfactorily.

Q. Based on what information you have?

A. Yes, yes.

Q. Mr. Sawyer, in exactly what capacity are you ex- [fol. 32] pressing an expert opinion? Is it as a lawyer informed about the Robinson-Patman Act, as an accountant, or exactly in what field of expertize does this express your views?

A. I would classify this as being an accounting opinion.

Q. In other words, you intended to confine your expressions of opinions to those of an accountant upon the subject matter, rather than those of a lawyer?

A. To the extent that it is possible for one to exclude from one's own mind, one's expert views in a kindred discipline.

Q. You have, yourself, participated in the solution, as a lawyer, of Robinson-Patman Act questions, have you not?

A. Yes, I have.

Q. And you have given considerable study as a lawyer to the problems of the Robinson-Patman Act?

A. Yes, I have.

Q. And you have formulated certain opinions as a lawyer, both as to the meaning of the Act and as to the procedure that it best be followed by lawyers in the presenting of problems under the Act?

A. Yes.

Q. And it is very difficult to separate that kind of an [fol. 33] opinion from that which might be said to be purely the reaction of an accountant to the problems, is that correct?

A. Yes, I think that is fair to say.

[fol. 34] Q. Have you at any time had any personal familiarity with the dairy industry?

A. No, not the dairy industry in its strict sense.

Q. Well, what is the closest you have ever come to an acquaintance with the dairy industry?

A. The very similar techniques of distribution appear in, we will say, the distribution of baker's yeast, such as was undertaken, was the subject of the Trade Commission's case against the Standard Brands Company.

Q. Upon what facts do you base your conclusion that the distribution of baker's yeast is similar to the problem of distribution of fluid milk?

A. Well, the wagon distribution approach is very much the same mechanics involved.

Q. Well now, where have you any acquaintance with the mechanics involved in the distribution of fluid milk?

A. Well, I rode with a wagon salesman in selling and delivering and picking up aged products for the Fleischman Yeast of Standard Brands.

Q. That was in connection with the sale of baker's yeast?

A. Yes.

[fol. 35] Q. You have never had a similar experience, however, with respect to the fluid milk industry?

A. No, I have not ridden on wagons.

Q. And you have assumed, in the opinions you have expressed, that the methods, assignments, and techniques are comparable between the two industries, is that correct

A. Roughly so. I recognize some distinctions, but roughly it is the same general type of distribution.

Q. Well, I would say that your actual factual basis for that statement would be based solely upon information you derived from the documents listed in the Taggart Deposition No. 1, and your conversations with Mr. Woolley, is that correct?

A. Yes.

Q. I mean Deposition No. 2.

A. That is correct.

Q. Have you ever read any of the literature dealing with studies of distribution costs in the milk industry?

A. No.

May I go off the record at this point? I just want to interpose one fact which I think is——

Mr. Ball: It is all right with me.

Mr. Jinkinson: It is all right with me.

[fol. 36] Mr. Ball: Yes, go ahead.

(Discussion had off the record.)

By Mr. Ball:

Q. You are not familiar with any of the writings of the men at the University of Minnesota and at the University of California on the costs of distribution of fluid milk?

A. No, I am not.

Q. You were, I recall, a member of the so called Taggart Committee which in the years 1953 and 1956 made some numerous studies and published a report known as the Cost Justification Report which has been identified here as Taggart Deposition Exhibit No. 1?

A. Yes, I was a member of that Committee.

Q. Are you in agreement with the opinions expressed in this report?

A. Yes, I am.

Q. Are there any areas in which you are in dispute with the positions taken by the Committee on this report?

A. No; there were some things, as I think each member of the Committee would state, that would be worded differently if they were worded by the individual members, but I am in agreement with the substance of the report.

[fol. 37] Q. Well, putting it this way, your differences are differences of wording and not of principle, is that correct?

A. Yes, I think that is true.

Q. I would like to call particular attention to certain facets of this report and ask you if they express your considered present opinion.

A. Yes.

Q. I call your attention to Page 8 of the copy in front of you, to the paragraph numbered 5, which I would like to read:

> "The prices to be compared in Robinson-Patman Act cases may be those of the individual commodities, or of a group or 'set,' where different items are normally bought and sold as a 'set,' or a weighted average of the prices of a line of related products. Where differentials consist of percentage discounts or

rebates uniform for all commodities, comparisons of 'set' pricing or line pricing yield the same results, percentage-wise, as comparisons of the prices of individual commodities. Where price differentials on the [fol. 38] different members of a 'set' or line are not uniform percentage-wise, a weighted average produces results which may permit offsets of the individual item differentials."

Now, the position taken there, I take it, is a position with which you are completely in accord?

A. Yes, I am in accord with that position.

Q. Now, turning to the next page, Page 9, under the letter C, the second paragraph:

"In view of the Plus-or-Minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), 'due allowance' should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly, so as to require only 'reasonable allowance' for cost differences based on sound accounting and pricing principles. For this reason the Committee [fol. 39] approves the position taken by the Commission in applying a 'de minimis' concept to cases where price differentials are not shown to be completely cost-justified but where circumstances minimize such failure to the extent that no corrective action is deemed necessary. In considering the applicability of the 'de minimis' concept, a primary test to be applied is the relation of the unjustified portion to the differential itself, not to the higher unit price."

I take it you are also in accord with the position there?

A. Yes, I am.

Q. Now, the third paragraph in the next section which reads as follows:

"There are many 'differing methods or quantities' which may give rise to cost differences between customers or classes of customers. Such 'differing methods or quantities' are generally ascertainable upon analysis of a seller's manufacturing and distribu-

tion system. Such analysis should interpret the terms [fol. 40] in their broadest connotation, giving full effect to all items of cost difference. The term 'resulting from' also should be given the same broad interpretation."

Again I take it you are in agreement with that position.

A. Yes.

Q. Now, on page 10 of the report, the first numbered paragraph headed "the nature of cost accounting":——

"Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the description of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is not warranted. With a few exceptions every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally [fol. 41] recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation."

I take it again that you are in accord with the position there taken and that expresses your view.

A. Yes, it does.

Q. On the next page, page 11, a paragraph headed "'Good faith' cost studies."

"Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. 'Great weight' should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the

adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not found. A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent."

[fol. 42] You are in accord with that position, and that expresses your point of view?

A. Yes.

[fol. 43] Q. Turning down to Page 11, Paragraph 5, I call to your attention the second sentence:

"Admissibility of pertinent costs information should not be prejudiced because it comes from sources not under continuous accounting control, such as special time studies, market surveys, estimates and opinions of qualified experts and production and marketing functions."

I take it again that expresses your point of view?

A. Yes, that does; yes, indeed.

Q. In the next paragraph I call your attention to the first dull paragraph:

"Classification or grouping of customers' orders, commodities and transactions has reputedly been recognized by the Federal Trade Commission as the model business practice. What this means is it is not necessary to cost justify each sale transaction or sales to each individual customer. This is important for cost justification purposes since no transaction or custom could be treated as a member of a class or [fol. 44] group. The cost of making each individual sale would have to be ascertained. Such refinement would be outside of the realm of practicability and would tend to make price uniformity a necessity regardless of the economies of manufacture, sale or delivery in dealing with certain customers."

I take it that expresses your point of view?

A. Yes, it does.

Q. I call your attention next to Page 13 of Taggart Exhibit 1.

The last paragraph on the page, the first sentence:

> "The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to straight-jacket cost justification would be self-defeating."

I take it again that certainly expresses your point of view?

A. Yes, it does.

Q. Now, turning over to Page 15 I find under italicized (d):

> "Direct and indirect costs,"

[fol. 45] a definition distinguishing between direct on the one hand and join or indirect costs on the other. It reads:

> "Costs separately incurred for any given product, customer or group of customers are readily assigned. These are direct costs. On the other hand, indirect costs, which are jointly incurred for two or more products, customers, or groups of customers must be allocated before total costs for any given category can be ascertained."

Again, I take it that that definition expresses you opinion as to a proper classification of costs?

A. Yes.

Q. I call to your attention on Page 16 a section with an italicized (g): "Method of determining most applicable methods of determination of direct costs or of apportionment of indirect cost."

I will not take the time to read that into the record, but I take it that the material expressed under 1, 2 and 3, the sense of that paragraph also expresses your point of view? [fol. 46] A. Yes, it does.

Q. Now, the Committee also provided that in their report, an appendix, and I take it that you are also in agreement generally with the suggestions and decisions given in this appendix?

A. Yes. I might say they are illustrative but not exhaustive. They are in response to what seems to be a demand for some general guidance in that direction.

Q. May I call to your attention on Page 25, in the first paragraph under (b) the fourth sentence, for the sake of arriving at a definition which might have some bearing upon the text of your testimony, reads as follows:

> "A distribution function may be defined as an operational activity at the lowest practical level of supervision for which costs can be isolated and collected."

A. Yes.

Q. That is a definition which is consistent with what you have been saying in your testimony?

A. I think it is.

Q. Now, dropping down to the paragraph after some numbered sub-paragraphs, I call your attention to the following text:

> [fol. 47] "Since methods of organization and operation differ among companies and industries distribution of cost functions also differ. The example of a definition given below therefore must be understood as being purely illustrative and not to be exhaustive or conclusive or such as would fit any specific company."

I take it again that in referring to both the analysis or definition of functions and of the service units which might be used to allocate those functions, that those particular two sentences express the point of view that you hold?

A. Yes, it does. They do.

Q. Now, I take it also that on Page 26 where certain illustrative functions are defined in some detail that you are in general agreement with those as illustrative definitions and descriptions of functions?

A. I have not read this page recently but as I recall I have no exception to it.

Q. It speaks of such things as advertising function, sales promotion functions, selling functions, warehousing, operating service functions, sales accounting and credit function, sales management, all of possible function [fol. 48] divisions of the distribution business?

A. That is right.

Q. And the definitions there are in your opinion accurate?

A. Yes.

Q. As far as they are illustrative?

A. I have no exception to make.

Q. Now, I call to your attention on Page 27 the first full paragraph there:

> "After ascertaining the direct costs it remains to assign the indirect costs. These costs are collected as totals of functions not chargeable directly. Assignment of these indirect costs is done by measuring the activity or output of the function in terms of units of functional service which can be counted or measured, and then applying to each business segment the amount of functional cost which is in proportion to the use or responsibility for the units of functional service."

Then there is an illustration in the next paragraph which I should also like to read:

> "A simple example makes this process clear. If the [fol. 49] function is personal selling, one possible unit of functional service in a customer analysis may be sales calls. If customers are divided into classes A, B, and C, and if ten per cent of the calls are made on Class A, 30 per cent on Class B, and 60 per cent on Class C customers, then the three classes share the cost of personal selling in those proportions."

Now, the principles illustrated or set forth in the first paragraph and illustrated by an example in the second are principles with which you are in accord, as far as your present use?

A. Yes.

Q. Now, dropping down to the bottom of the page, I call to your attention the last paragraph, part of it:

> "At the outset caution should be exercised with respect to overemphasis on the distinction between direct and indirect costs. This distinction should not be made for minor items of cost or for those where

treatment of potentially direct items by a satisfactory [fol. 50] application of the indirect procedure will produce completely reliable results. Substantial elements of direct cost are ordinarily so designated and recorded in the original bookkeeping process. Establishment and maintenance of the necessary bookkeeping routine for isolating all direct costs is burdensome and is justified only when amounts involved are appreciable and satisfactory results cannot be obtained by other and less expensive methods. In many cases the indirect functional approach, using an uncontroversial unit of functional service will produce acceptable results."

Now, as to the method of procedure, that again accords with your concept of what is proper?

A. Yes, it does.

[fol. 51] Now again on page 28, I call your attention the following passage, in the next paragraph:

"Functions vary widely in their closeness to the business segment being costed. Some such relationships are very close and the approximate measuring factor (the service unit) is easily identified and perhaps easily counted in total and in relation to the segments. The relationships of other functions to the costing segments are more remote, and the choice of a service unit which will adequately measure a given relationship is of greater difficulty. In many cases more than one service unit might be chosen. The precise choice will depend on two main considerations: (1) Which service unit most closely approximates a satisfactory measure of benefit or activity in terms of rational analysis; (2) Which service unit can most readily and economically be counted both in total and in terms of the costing segment. Different service units will yield different dollars-and-cents results, and a particular service unit should not be chosen merely [fol. 52] because it maximizes cost differences. Where the choice is otherwise a matter of a difference, however, there could be no objection to the choice of the method which produces the most desirable result."

Now that general statement there again I take it is in accord with what, with the opinions you have expressed in the draft order?

A. Yes, it is.

Q. Now, I call your attention at the bottom of the page again the word "transportation" in a list of a number of functions which more or less are in agreement with the definitions appearing on page 26 and a number of suggestions are possible service units used in allocating those expenses.

A. Yes.

Q. I take it that you regard the service unit there set forth as illustrative of possible units to be used in connection with the functional costs that are described?

A. Yes, with emphasis upon the illustrative nature. The list isn't, by any means, complete nor does it prevent the use of others where they seem appropriate.

Q. In other words, the choice of the measure to be used depends upon the facts and circumstances of the individual [fol. 53] case?

A. Very much so.

Q. And if the facts there set forth, the facts themselves more or less indicate which is the proper service unit in most cases?

A. That is right in most cases.

Q. Now, Mr. Sawyer, you were the author a few years ago of an article that appeared in the Iowa Law Review, Volume 36, entitled "Accounting on Statistical Proof in Price Discrimination cases", were you not?

A. That is right.

Q. Beginning at page 244 of that volume?

A. Yes.

Q. Now, in the course of that discussion you made the following comment upon the phrase "Due Allowance".

> "The Congress might have used the words 'not to exceed differences in cost', etc., but had it done so, there would have been a strong implication that it contemplated an exacting cost accounting standard. The words 'Due Allowance' seem to anticipate the necessity of wider tolerance and reasonable approximation. The language used certainly gives to the Court a sound basis for the recognition of the many

practical difficulties in this field of cost work. These [fol. 54] difficulties would tend to make exactitudes and precisions impractical, and defeats the main purpose of the Act in justifying good faith and avoiding unfairness."

Now I take it what you said there still represents your considered opinion?

A. It does.

[fol. 55] Mr. Long: What is the year of that, Mr. Ball?

Mr. Hart: '51.

Mr. Ball: Yes, 1951.

By Mr. Ball:

Q. Now, in the same article on Page 247, you say, distinguishing cost analysis from profit accounting:

A. Yes.

Q. (Reading):

"Cost analysis, on the other hand, involves the process of segregating one part of the total operation from the whole and calculating a value or cost of it alone. Here, we are not concerned with mathematical balance. Our problem is one of evaluation. The sole reliance is not regular books of account, although a portion of such data may be utilized. Much of the results of cost analysis must rest upon special studies, calculations and estimates to be judged by some standard of fairness that is consistent with the purpose of the analysis."

That expresses your point of view?

[fol. 56] A. Yes.

Q. And I take it that is the principle that applies to all costs analyses for whatever managerial or legal purposes it may be especially prepared?

A. Yes, I think that is now.

Q. Now, on Page 248 of the same article you said:

"In determining production costs, there are a number of recognized procedures which simplify the problem of proof. There are few such procedures in

the field of distribution costs. Unhappily, it is in the area of distribution that the great hope of cost justification generally arises in price discrimination cases."

That distinction between the problems in manufacturing costs and distribution costs is one which I think you consistently recognize and emphasized and is still your point of view, is it not?

A. Yes, it is.

Q. Now, on Page 249 of this same article you made this statement:

"In attempts to delineate cost differentials which are believed to exist between two different methods of [fol. 57] manufacture, sale or delivery resulting from the differing methods or quantities in which a given product is sold or delivered, it is necessary first to isolate elements of cost for the one product from any other element of cost with which it may be related. Inasmuch as a company seldom markets just one product or just one service, there are bound to be many elements of cost which must be shared. Rent and maintenance of plant and machinery is a well-understood example. Even the raw material itself may involve a division of costs as between more than one product—waste or left-over of one product becoming the principal ingredient of another. Such situations are referred to as 'join costs.' Because they necessarily involve arbitrary 'allocations' to particular products there is room for much argument as to the proper division to be applied to the product under study, as against all others which jointly bear the [fol. 58] total cost of that element."

Now, that expresses a distinction, I believe, what you might call joint or indirect costs on the one hand and direct costs which represent your considered opinion of the importance of the distinction?

A. Yes.

[fol. 59] Q. And where you say one product that would be equally true if you substituted a set of products which are sold on the common pricing basis?

A. Yes, that is true.

Q. Now, I call your attention that on page 256 of the same article you had reference to the Bird & Son case.

A. Yes.

Q. And you referred to the fact that in that case a cost study was made which put in one class mail order houses, a single customer, Montgomery Ward Company.

A. Yes.

Q. And a study of the cost of distribution to that customer as against all of the independent retailers considered as a group?

A. Yes.

Q. Then you made this comment—incidentally, you did approve of the result reached in that case?

A. Yes, I did approve.

Q. Of the methods employed?

A. Yes.

> *Q.* "While few cases are as simple as this, it serves to illustrate the basic approach to such a problem. The reasonableness of the relationship between the [fol. 60] particular method of 'spreading' expense between various customer classes of products will vary from case to case so that too much importance should not be attached to the fact that these particular methods were accepted in this instance. Each situation must be judged upon its own merit and that is where the skill and good judgment of the accountant must come into play."

Q. Now, that again states a general position that you have consistently, Mr. Sawyer, held?

A. That is true.

Q. Every case has to turn upon the fact that shows the rational connection between the service unit chosen for purposes of allocation and the economic facts connected with the functional cost to be allocated?

A. Yes, that is true.

Q. Now, you also, I think, have distinguished among indirect costs certain that are more distant related than others to the problem such as general overhead costs, and I call your attention on page 255 of this article:

> "In all likelihood, the truly indirect distribution costs, such as sales management and office expense,

[fol. 61] will offer the greatest resistance to attempts to work them into proof of savable cost in the justification of quantity purchases. It is here that the far-sighted cost man will move with greatest caution, still I have a controversial nature of cost methods employed and the present inadequacy of available data." That expresses your present point of view?

A. Yes.

Q. That it is very difficult to say with dogmatic certainty that overhead costs should be allocated on one or another segment?

A. This is an area where dogmatic statements are dangerous.

(A recess taken.)

By Mr. Ball:

Q. Mr. Sawyer, you appeared before the Anti-Trust Law Section of the Illinois Bar Association together with Professor Taggart, I believe, sometime in '56, well, in '55 and you gave a talk on cost justification of quantity differentials which appeared in the Anti-Trust Bulletin of January 19, 1956.

A. Yes, I recall that.

Q. And it appeared beginning at page 573 of that pub-[fol. 62] lication. I call attention to a passage of what you said at that time which appears under page 579 of the Anti-Trust Bulletin which reads as follows:

"In all but the simplest cases the reliability of the evidence must be tested not against the accuracy and completeness of the data presented and more largely upon the soundness and numerous objective judgments of the witness as to the methods of allocation of various types of expenses common to several classes of products or classes of customers. These the accountants refer to as 'joint costs'. To segregate or allocate such costs to particular products or particular classes of customers requires the exercise of an informed judgment. There is usually a choice of alternative methods. Objective tests such as time and motion study of representative samples may fortify a par-

ticular selection. In many cases, however, such objective tests are impractical or unavailable within the reasonable bounds of time and cost. Reliance is then placed upon the judgment of the person directing the study."

Now, the point of view that you expressed there re-
[fol. 63] mains your point of view? Does it not?

A. Yes.

[fol. 64] Q. Now, in as early as 1938 you were quite interested in this subject, Mr. Sawyer, I recall, and you wrote an article entitled "Cost Accounting as Evidence in Cases Arising under the Robinson-Patman Act," which appeared in the National Association of Cost Accountants Bulletin No. 19, February 15, 1938.

A. Yes.

Q. Now, in that article you made the statement—that article appeared somewhere around Page 690 and thereafter—you made these statements:

"The most common device for this purpose is the quantity discount applied to each commodity. But as applied to a varied line of resale merchandise it is not easy to allocate cost savings to specific commodities.

"Especially is this true when the solicitation costs are analyzed. The selling is spread over the entire line, and is not centered upon individual items. The salesman makes regular calls upon his wholesaler and retailer customers for the purpose of replenishing their stocks.

"His calls are in the nature of service calls, and the [fol. 65] dealer depends very largely upon him to maintain his stock. Under these circumstances, there is likely to be less correlation between potential volume of business of the customer and the sales effort expended thereon.

"The number of items carried is a larger factor than the amount of each item purchased."

Now, that expresses your point of view?

A. Yes, I was thinking of that particular type of distribution problem.

Q. Well, I take it when we talk of any problem we are assuming a set of facts that make the comments that I quote from you relevant?

A. Yes.

Q. Now, in the same article you made this statement:

"It is not uncommon for such resale lines to contain hundreds or perhaps thousands of items, each distinctly separate commodities, but, nevertheless, inseparably priced in a common selling effort.

[fol. 66] "There are genuine difficulties in approaching the job of allocating solicitation costs to individual items in such a case. Under some circumstances, it may be possible to establish a pattern of sales performance as among the several items; that is, the sale of one hundred units of one commodity may be likely to indicate the sale of ten items of another commodity, and so on, through the list.

"If such a pattern emerges, it may form the basis for an expense allocation by individual commodities but more frequently such a pattern is not sufficiently distinct for such a purpose, and this approach, therefore, is not usually available.

"Furthermore, this type of selling develops a high correlation between the number of sales and calls and the number of orders. Mail orders from regular dealers tend to be a minor value factor, the bulk of the sales centering around the salesman's regular visits.

[fol. 67] "Therefore, the cost of selling a given account tends to be measured by the frequency of the salesman's calls."

Now, that assuming the facts described there, expresses in general your philosopy and point of view?

A. Yes, I think so.

Q. Again in the same article you said this:

"In approaching an analysis of solicitation cost savings, it is important to recognize that:

(a) The resale item salesman presents and sells a line of goods rather than an individual commodity;

(b) Presenting and selling (or presenting and not selling) any item is made possible only by the fact that many other items are carried;

(c) Many items are carried only to complete the line. Expenses of presentation must be borne by items when sold rather than when presented.

(d) It is impossible and impractical to measure the actual time spent on each commodity, and to [fol. 68] determine whether the commodity itself was the cause of the expense, or whether it was introductory to other items."

That illustrates an inter-relationship between commodities which expresses your general philosophy in this matter?

A. Yes.

Q. Now, you also made a talk which appears in the Year Book from the year 1938 of the National Association of Cost Accountants entitled the "Control of Distribution Costs"?

A. That is correct.

Q. Beginning at Page 189 of that Year Book. Now, I call your attention—and I think we can save time by calling your attention generally to a heading, a devision of that talk, which appears on Pages 190 up to the top of 199 and headed "The Problem of Distribution Cost Control," in which you spoke of the great difficulties of making a scientific or an intelligent analysis of distribution costs, and I take it again, with the qualification that some years have gone by and some techniques have been refined, that [fol. 69] in general that still represents your point of view?

A. Yes. I think we have to recognize that in the almost twenty years that have elapsed since this was spoken, great strides have been made in this area. It has been forced upon the attention of the accountants in every line of industry and in every phase of distribution.

I think we are much better off today than we were then.

Q. Yes; but, the problem is still one of a management control which is based upon more and more information upon distribution costs?

A. Yes, that is true.

Q. Well, on Page 192 of the same paper you said:

"In addition to the direct elements, there is a highly important group of supplemental elements:

(2) The maintenance of a balanced relationship between the individuals concerned and the trade or industry of which it is a part;

(3) The recognition of the public interest in the particular business venture:

[fol. 70] (a) As it is encouraged by advertising and other forms of sales promotion;

(b) As that interest is defined by law (Robinson-Patman Act, Anti-Trust laws, Food and Drug Acts, etcetera).

(4) Interrelated problems of price determination.

"These elements of the general control task, although collateral, are fundamental and likewise require a technique of measurement and appraisal, thus calling once again upon the skill and ingenuity of the cost man."

Now, I take it that in stating that you were recognizing the fact that the controller or analyst in the business had a need of ascertaining facts about distribution and administrative costs for a multiplicity of management and business purposes that are interrelated?

A. That is true, yes.

Q. And it is a matter of fact, is it not, that the studies that are made of distribution costs very often serve more [fol. 71] than one single purpose?

A. Yes, that is right, surely.

Q. And that there is hardly any study intelligently of the differential costs of a method of distribution or the handling of a class of customers or different commodities that do not have a potential reflection in management decisions?

A. That is correct.

Q. Now, you also made a talk to the Baltimore Chapter of the National Association of Cost Accountants, which appeared in the NACA Bulletin, February 15, 1938, at Page 681:

"Cost accounting is evidenced under cases arising from the Robinson-Patman Act."

from which you quoted in your same talk appearing in the Year Book of 1938, I believe, and in that talk at Baltimore repeated at Page 696 of the NACA Bulletin, repeated at Page 210 of the Year Book, you said this:

> "—essentially is a new field, and those who undertake work of this character must do so in the spirit of the pioneer. If approached in this spirit, the task will reveal itself as one that is not confined to compliance of the Robinson-Patman Act."
> [fol. 72] "The results achieved by clear-headed cost work in the field of solicitation in order handling cost may be as far reaching in their effect upon future merchandising policies as was the work of the cost accountant a generation ago in charting the course of production efficiency.
> "It may well be that the stimulus supplied by the interest in this Act may bring to the attention of management aspects of selling and handling costs which reveal the need for a substantial adjustment of distribution policies regardless of the terms of the Act itself."

A. That is correct, yes.

Q. And your experience has borne out the type of studies that are made for the purposes of Robinson-Patman Act do have and have had a very real influence on management selling and pricing policies?

A. Yes, I believe they have.

Q. Now, let us turn back to the draft of the pre-trial order, and I want to call your attention on Page 17 in Paragraph A, and I want to ask you whether—I hope you will appreciate the spirit in which I am asking the [fol. 73] question, whether what you say there is anything more than a lawyer's comment upon the purpose and meaning of the Robinson-Patman Act, and does it involve anything that is particularly expertized within the field of the accountant?

Mr. Hart: What is this reference?

Mr. Ball: It is subparagraph (a) beginning at the bottom of Page 17.

Mr. Jinkinson: Paragraph 12.

Mr. Ball: Yes, of Paragraph 12.

By the Witness:

A. I believe it goes a little further than what you suggest.

By Mr. Ball:

Q. Well, that is what I would like to separate from that, what it is you feel goes beyond the comment or the opinion expressed upon the purport and meaning of the Act.

A. I think I am trying here to set forth the frame of reference within which the accountant must work.

Q. And that frame of reference is dictated by your analysis of the meaning, bearing and purport of the Act itself?

[fol. 74] A. Yes, as it has been clarified by the Commission and the Courts.

Q. Putting it another way, what you are doing here is stating what you as a lawyer would summarize the frame of reference with which the accountant that you were employing to handle a particular case should work, is that correct?

A. Well, I would have to use much the same language even if I was wearing my accountant's wig, I think, in trying to define the outlines of a study.

Q. In other words, all we are saying here is that the study has to be within the confines of your understanding of the statute?

A. That is correct.

Q. Now, turning to Paragraph B, subparagraph B, on Page 18, you speak of Robinson-Patman accounting in parentheses. I take it you do not mean that what you call Robinson-Patman accounting involves any tests or techniques which do not have their utility from management purposes?

A. No. This is a phrase that developed in the course of the Committee's deliberation leading up to the publication of this report, and we wanted to eradicate certain misconceptions of Robinson-Patman accounting, as distin-[fol. 75] guished from ordinary everyday record keeping in business.

Q. Well, were you or does this imply anything more than this, Mr. Sawyer, that in preparing a cost defense

in a Robinson-Patman Act case you cannot rely upon the day-by-day accounting records kept in the ordinary course of business, but must go beyond that into special studies and analyses?

A. Yes.

[fol. 76] Q. It is also true that those same types of special studies and analyses equally serve management purposes and are often required to aid management decisions?

A. They may also serve management purposes, yes.

Q. And, in fact, the same type of studies often do lead to management determination of policies?

A. Yes, in setting up a management study, however, you may wish to bring in matters not relevant to a Robinson-Patman situation.

Q. But there is hardly anything relevant to a Robinson-Patman Act question that does not have some bearing upon a management problem?

A. I am inclined to think you are correct.

Q. Now, in one of your articles you made reference to the fact that ordinarily perhaps the ideal way to present a cost defense would be by stipulation, but that that was rarely stipulated?

A. I believe I was rash enough to make that suggestion.

Q. And then you commented that in the absence of the stipulation method ordinarily you had to put in the accountant to state his conclusory results and explain the methods by which he arrived at that?

A. Right, yes.

[fol. 77] Q. Now, you understand, do you not, in this particular case we have one of those rare situation where the entire data upon which the defendant is relying has been offered for stipulation, and that substantially has been stipulated?

A. I understood that.

Q. And you understood, did you not, that the basic data—I am speaking now of specifically the Borden order, that the basic data consisting of the original memoranda made by the time-study people and the summarizations that were made from those have been identified as group exhibits and made available to the inspection of the Government?

A. Yes.

Q. And you did understand, did you not, that the Borden order does not attempt to state conclusions at any point, but merely provided data and some computations on that data that were made in some cases upon certain methods of allocation?

A. Yes.

Q. And that the Borden order itself does not at any place state a conclusion or express a final opinion as to what the difference, justifiable or not, might be?

[fol. 78] Mr. Jinkinson: I am going to object to that question. It is assuming a state of facts not disclosed by the record. Mr. Ball says they do not state any conclusions, but I do not know whether they do or not.

Mr. Ball: Well, I am asking for the witness' understanding of whether that was his understanding from the data.

By the Witness:

A. I do not recall reading a conclusion stated as such. I think you can infer conclusions from it.

By Mr. Ball:

Q. Now, it is your opinion, is it not, that one of the ways of establishing the reasonableness of a cost justification is by testing an allocation by the use of perhaps one or two or more alternative service units as the measure of allocation?

A. I am not entirely certain I am clear as to your question.

Q. All right, put it this way: Let us assume that we have a functional cost ascertained.

A. Yes.

Q. That is, in the nature of a joint or indirect cost.

[fol. 79] A. Yes.

Q. Let us assume also that there may be a choice between more than one service unit to be used as the factor in determining the allocation of the functional cost.

A. Yes.

Q. I think you have stated on numerous occasions that the ability of making more than one computation from the data using different service units strengthens the valid-

ity of an overall judgment to be derived from the results of any one of them?

A. Certainly if there are alternative methods of calculation available, exploration of those would seem intended in my judgment to strengthen it.

Q. And, in fact, the ability to make those alternative measures of computation would of itself give a broader basis for judgment upon the validity of any conclusion to be drawn?

A. Yes, I think it would.

Q. Now, are you aware or was it your impression from the information which was submitted to you, that it was perfectly possible on the basis of the data submitted by the Borden Company to make alternative computations on various methods of allocation?

[fol. 80] A. I believe I noticed some points where there was a choice.

Q. Or, at least, where the data was available so that alternative methods could be chosen?

A. Could be used, yes.

Q. Now, I want to turn now to Page 18, Paragraph C, and I direct your particular attention to the first sentence:

> "Where alternative methods of allocation are available, the considerations which dictated the ultimate choice should be stated as part of the direct presentation of the justification."

Now, I ask you if that statement isn't made with particular reference to the kind of a defense that would be introduced by putting an expert witness on the stand to testify to a study he made and the conclusions he reached, rather than to one where no statement is made of an opinion but merely the mathematical facts and the basic facts are set forth?

A. I am not sure I can make that distinction. I do not believe that it is necessary to have a live witness on the stand to bring this into play. I think it is equally [fol. 81] applicable in stipulated material.

Q. Well, do you mean by that sentence, however, any more than that the relevant facts which bear upon the propriety of an allocation should be set forth?

A. Certainly not.

Q. And if that is done, doesn't that meet the point that you have in mind here?

A. There are various degrees of burden, shall I say, upon the proponent of one of these studies.

Q. Well now, may I interrupt? When you speak about burden, are you using this in the sense as a lawyer would use it of what you think the burden is of going ahead, or are we talking about expertizing an account?

A. Well, I am speaking in the sense of burden of proof.

Q. Which is more or less a legal concept?

A. Yes. The whole of that which makes for evidence of good faith in a presentation.

Q. Well, when you say here, "The considerations dictating ultimate choice of a method of allocation," you have in mind basically nothing more than the factual background which shows the lack or the presence of a rational connection between the service unit employed and the functional cost as the objective of the study?

[fol. 82] A. Yes. Let us not interpret that too narrowly. I have in mind this, that where you have a choice between using, we will say, a time measure as against some quantitative measure and one of those is strongly biased in favor of the contested discount, I think there is an added burden used in the legal sense.

Q. Well now, what do you mean by "strongly biased"? Do you mean merely because the result is more favorable, or do you mean that there is some element of irrationality about it?

A. Well, it may be a bit of both. Certainly, if it is favorable, one method is favorable and the other is not, it does not mean that the favorable method must of necessity be thrown out.

Q. Well, that is what I wanted to be sure of.

A. But I think you have got to state, and what I say here, "A part of the direct presentation," whether it is by stipulation or by oral testimony.

I think the proponent should bring out into the open the alternatives and provide his rationale for selecting the more favorable, if that is what it does.

Mr. Stevens: Just for the record, I would like to enter an objection here as to questioning Mr. Sawyer as to his

[fol. 83] legal opinion on these various subjects, and I move to strike all testimony which consists of his legal opinion on the ground it invades the province of the Court and is not competent evidence.

Mr. Ball: Well, may I state for the record that the reason I have been asking these questions is that in the order submitted, at least so far as the defendant Borden, I believe that of what the proposed testimony consists is in many, many instances nothing more than an ultimate opinion, 1, as to the effect of the Act, 2, as to the burden of proof, and 3, as to the evidentiary propriety, fourth, as to——

Mr. Jinkinson: Is this off the record?

Mr. Ball: Oh, no, this is on the record. I am laying the groundwork specifically, because I propose to object to a substantial number of these on the ground that it expresses an opinion.

I am not asking this with the idea of bringing forth or being bound by any expression on the law, but merely to [fol. 84] demonstrate that much of what is set forth in the direct testimony is subject to the objection of Mr. Jinkinson.

Mr. Jinkinson: Are you through?

Mr. Ball: Yes.

Mr. Jinkinson: Now, I move to strike all of the remarks of Mr. Ball on the ground it is, of course, cluttering the record with remarks about what he is attempting to do. What he is attempting to do ought to be apparent from the record.

I move to strike any statement of what he is attempting to do.

Mr. Long: Let me add to that that we consider this is proper in testimony by an expert here, and that wherever there is—there may be some commingling with legal problems, that they are necessary ones in this particular cost accounting field.

Now, I wonder if this wouldn't be a good time to take a little recess.

(A recess taken.)

[fol. 85] By Mr. Ball:

Q. Now, turn over to the top of Page 19 and look at the last sentence in Section C:

> "Experience has dictated that so-called normal and accepted accounting practices used for management purposes or other general everyday purposes are not necessarily applicable to the purposes dictated for the Robinson-Patman Act——"

Now, applying that sentence specifically to the Borden order, where does it apply or have any relevance at all to the Borden study as you saw it?

A. Well, I do not think it has any special relevance to that.

Q. What you were talking about here is general compliance, but it does not necessarily imply to any point in Paragraph C any criticism of the Borden study?

A. No; I am laying down here the foundations for accounting procedure. It may or may not.

Q. Well, offhand, I would like to have you look at all of your Paragraph C and ask you if there is anything in that paragraph which you intended to represent as a criticism of the cross study on behalf of Borden Company?

A. I think it has this relevance. There are some [fol. 86] alternatives which I felt in my review of the data had not been sufficiently explored.

Q. Well now, name one of those?

A. I think one had to do with the transportation, the allocation of the time of certain classifications of truck drivers.

Q. All right. Now, the time spent by the truck drivers to and from the routes——

A. Yes.

Q. (Continuing) and the time spent between stops were exactly computed in that case, were they not?

A. I think they were.

Q. And set forth in the study?

A. Yes.

Q. The number of stops made were also set forth in the study?

A. Yes.

Q. The sales by classes of customer were also set forth?

A. Yes.

Q. The time spent at these various stops themselves were also set forth in the order?

A. Yes.

Q. Now, with that basic data it becomes a matter of [fol. 87] mathematical computation whichever one of the four possible units were selected, is that correct?

A. Yes, I believe that is correct.

Q. So there is no exclusion of any particular method in the data set forth in the pre-trial order, is there?

A. No. I believe the facts were there for the computations to have been made.

Q. Well, was it your understanding that the order went beyond, or the draft of the order went beyond the presentation of the facts?

A. No. It was my understanding that there had been a choice, or, rather, a failure to recognize the services performed.

Q. Well, wherein laid the failure so long as those facts were set forth?

A. Well, I believe that the choice there should be at some point if you are going to add up the alleged savings that have been proved.

Q. But that was not done in any of the data that was submitted to you?

A. No, it was not.

Q. And the basic data was there by which any number of methods could have been employed?

A. Yes; well, I am pointing out here what I consider the [fol. 88] principles to be applied in that operation.

Q. Well now, if you implied criticism here you were assuming, were you not, that we were going to use a particular method rather than some other method of allocation?

A. Well, from the data I reviewed, it seemed to me that it was the intention to utilize the time factor alone.

Q. Well, do you recall what the specific item of data was that gave you that impression?

A. No, I do not, because I was not reviewing this with a view to detail as if I was actually performing the study myself. I was looking at the principles that had been applied and I was calling attention here to the necessity at

that particular point of giving full place to both alternatives.

Q. But if the basic data that I have described was set forth, that is, the time of each one of the operations, the time spent in the store as well as going to and from the stores, and to the route, the number of stops, the sales per customer, all the data was provided for which any one of the several alternatives could be computed as a pure mathematical matter, is that correct?

A. I presume that is true.

[fol. 89] Q. Well then, in what way was there any deficiency of the study?

A. Well, I saw no aggregations of these savings, and I am pointing out here the necessity in final appraisal of your cost justification of taking that into consideration.

Q. Well now, you see what I have asked you is this: Looking at Paragraph C, upon what basis do you imply in Paragraph C a criticism of what the material was that was before you?

Really, isn't your criticism based upon an assumption of the manner which we expect to use that material?

A. Well, what I must assume must eventually emerge from a study of this kind.

Q. Well, are you criticizing what that is going to be when you figure what it is?

A. At this point I have not specifically criticized. I am pointing out what the principles are that should be employed.

Q. Well then, we come back to my original point, there is nothing in Subparagraph C that implies or involves a criticism of the data that was before you.

A. It is a statement of principles which should be [fol. 90] applied to all of these matters.

Q. Now, looking again at D on Page 19 isn't it also true that the Borden study did make a functional analysis of the cost of functions?

A. Yes; again, this is a statement of principle.

Q. Yes; and there is nothing in D that was intended to imply the criticism of the cost study as submitted to you?

A. No; where I have criticized I think I have indicated specifically that that is what I am doing.

Q. Now, turning to Subparagraph E, again you are stating principles rather than implying a criticism of what was submitted to you in the Borden cost study?

A. Yes. All of this is a statement of principles which I think are applicable to such study.

Q. Now, turning to the top of Page 20, you use or you make this statement:

> "The two main considerations in making this choice are rationality and practicality of the selection."

A. That is correct.

Q. Well, by rationality you mean what follows from the specific facts showing the economic connection between the functional cost and the object?

[fol. 91] A. Yes.

Q. And rationality is determined upon the facts of this specific case?

A. That is true.

Q. And there are no dogmas or *ob*absolutes that stand in the way of a conclusion to be reached from the study of the facts?

A. No. There must be complete flexibility.

Q. And basically that conclusion is one of common sense and appreciating the closeness or lack of closeness of the relationship of one service unit to another?

A. That is true.

Q. Again in Paragraph F you were stating general principles, were you not, rather than a criticism of the particular Borden order?

A. Yes. That is also true, I think, in G. Now, looking at the last sentence in F, do you know of any particular method of allocation implicit in the Borden study that contains a bias in the sense that you defined it sometime ago?

A. I believe later on I do point rather specifically.

Q. Well, you know of nothing there other than may be implicit in some other later paragraphs?

A. That is right.

[fol. 92] Q. Which we can touch upon when we get to that. Now, you make a statement here in G on Page 20 where you speak of allocation of internal costs among

various classes of products and classes of customers. Now, you were aware, were you not, that there was no attempt in the Borden study to make any allocation or even to provide the basis of allocation between classes of products, other than as there might be between the ice cream business and the fluid milk business separately managed out of the same central division?

A. I believe that is the only instance of that kind which could occur.

[fol. 93] Q. Other than that you did not mean to imply that there should be any further breakdown as to internal costs as to classes of products?

A. No, as I recall I took no exception to that.

Q. Now, turning to the last sentence in Paragraph 20, the test as to the acceptability of the allocations again ultimately depends upon the facts set forth in the record, isn't that correct?

A. That is true.

Q. Now, turning to Paragraph (h) on Page 21, you make a statement in the second sentence,

> "In the performance of this function the routeman is a truck driver and time devoted to the performance of this function should be allocated as an element of the transportation costs."

Now, the use of the word should trouble me, Mr. Sawyer, because I thought there were no dogmas of a particular method by which a matter should be treated. Did you really intend to use the word "should" as an absolute in this sense?

A. No, but it did seem to me from a reading of the material before me that this would have been the rational [fol. 94] decision.

Q. Now, there was nothing that required the taking of drivers' time to the route and the drivers' time between stops, and requiring you to lump that with the cost of the trucks in a total of transportation costs, was there?

A. No, I wouldn't think there was.

Q. Nor is there any necessary reason why the two items would have to be allocated on exactly the same basis?

A. I was thinking here more of segregating that element of the cost from this second function.

Q. Well, all you had reference to is that there should be a segregation, is that it?

A. Yes, that is true.

Q. Well, as a matter of fact, the time was carefully segregated in the Borden study, was it not?

A. I believe the raw material was there from which the segregation could be made.

Q. Do you recall there was a separate analysis and computation of the time of the driver from the plant to the route, and the time between stops on the route?

A. Yes.

[fol. 95] Q. And that would be the kind of segregation that you have in mind?

A. Yes.

Q. Well, then again, you are merely announcing that there should be that segregation which actually did take place in the Borden study, is that correct?

A. Yes, I think that is true.

Q. Now, the last sentence again: "Time devoted to these service activities should be accounted for as an element of customer service costs, and taken into account in the determination of the aforesaid transportation costs."

You mean by that that there should, again that there should be sufficient data to permit the segregation of those costs?

A. Yes, I think that is true.

Q. And your recollection is that the Borden order did contain that basic information?

A. I believe it did, although I don't remember all of these data.

Q. Well, you have no recollection to the contrary, at least?

A. No, I do not.

[fol. 96] Q. Now, turning to paragraph (i) I call your particular attention to the second full sentence, "If this is the case then weight or bulk, whichever has the direct effect upon the cost, should become a factor in the allocation."

Now, you did not mean by that that there were not other possible methods of allocation, did you?

A. No.

Q. And other methods might be equally or more rational depending upon the particular circumstances in the case.

A. Yes, I am not passing upon that.

Q. And you at no time have seen the full pretrial record setting forth all of the facts?

A. No, I don't think I have. The last sentence I think is an important sentence, "Customers taking heavy weight or large bulk should bear proportionately heavier costs than those who take less." That is a statement of a principle.

Q. Is that, however, an invariable principle in your opinion?

A. I think there could be very strong reasons for not following that.

Q. Yes, but if those reasons exist, that isn't a dogmatic [fol. 97] principle?

A. No, that is not. That is true in all of this, but I am just pointing out it would have to be a pretty strong reason.

Q. Now, let's take the situation here. Put it this way: Do you know the manner in which routes are planned in the milk industry?

A. I can't say that I know exactly how they are planned. I know generally of the problem of planning a salesman's routes, whether they be the ordinary type of salesmen or salesmen from a wagon.

Q. Well, now, you understand do you not, that these drivers in the milk industry, do not solicit business.

A. It was my understanding that solicitation was not entirely out of the question.

Q. Well, we will come to that a little later on, but you understood that they had no privilege of adding a new customer on the route, or did you understand that?

A. I don't believe that that was particularly pointed out, but they could influence what a customer——

Q. I am going to come to whether there was any basis for that assumption a little later, but did you understand, or do you have any knowledge as to whether or not the trucks run full or empty, whether the customers added to [fol. 98] a route depend upon volume or upon the time taken to serve the customers, or any of the other factors that enter into the composition of a route?

A. Well, I can see the existence of numerous factors there, the hours a day which the milk must possibly be

delivered, the balance as between salesmen, truck drivers——

Q. And limitation on hours in which the union contract will permit the driver to work?

A. And health requirements and things of that kind.

Q. And health requirements, and distance of a particular route from an initial plant.

A. So I recognize it as a complex problem setting up a route.

Q. And so the allocation would have to depend upon a rational conclusion to be drawn from all of those kind of factors.

A. That is correct, yes.

Q. And there would be no dogmatic one way or the other it had to be?

A. No.

Q. Turning to paragraph (j) on the top of page 22, again I take it that here you were announcing a principle rather [fol. 99] than making a criticism of the Borden report.

A. Yes, that is perfectly true.

Q. And it is true that the Borden report did have a time study reporting of the route man's time devoted to the various activities, as you suggest?

A. Yes.

Q. And as far as you recall, the grouping of the results of this study in customer discount classes observed the rule of adopting homogenous classes?

A. Well, I can't say I characterized in laying down a principle that should be applied here, but you must understand that to be able to say that this classification measured up to the standard, I would have had to spend very much more time with these data than I have.

Q. Well, at least then you do not express an opinion one way or the other on that?

A. That is right.

[fol. 100] Q. Now, in your next paragraph, paragraph (k) refers to central overhead, and you define it as including billing, credits, collection, general accounting, general administrative staff, and executives' time.

You recognize in the third paragraph there that many of the costs involved in this heading may readily be classified as of proportionate application to all discount

classes, and therefore, outside of the scope of justification study.

That is a proper way of making a study?

A. Yes, that's right.

Q. And you can state that in another way, can't you, Mr. Sawyer, that if you understand that X dollars are involved here, and you do not make any special allocation of it, the effect is exactly the same as if they were allocated on a dollar of gross sales basis.

A. Yes, that is true.

Q. Now, I call your attention to your sentence, "It is incumbent upon the proponent of a cost justification to ascertain if there are indirect costs among the general overhead accounts."

Do you know whether or not that effort was made in the Borden study, or again is this a statement of principle?

[fol. 101] A. That is a statement of principle.

Q. Rather than a specific criticism?

A. Yes.

Q. Now I am looking at the rest of the paragraph—well, all of what you say, practically, on page 23 down to the last sentence that begins at the bottom of the page—you are speaking here, basing an opinion, upon matters that you obtained in your professional experience as a lawyer, is that correct?

A. No, no.

Q. When you say here, "In his professional capacity as adviser," were you a lawyer or an accountant in that capacity?

A. I am an accountant in that capacity. I might say for the record, to explain that point, I have been called in many times by corporations to review their discount structures, and to advise on studies which might be made to justify—these are cases which are not in litigation, cases where companies wished to have the satisfaction of knowing what their status is prior to any litigation or the possibility of it. And in that capacity I regard myself as a consultant. Usually I am retained by the corporation counsel, and in conjunction with whatever management or accounting [fol. 102] personnel might be involved.

Q. Yes, but as a consultant you are really a hydra headed

individual in a sense that you are both a lawyer and an accountant.

A. I have had a total experience in this area, and I am giving my client the benefit of that experience.

Q. And the fact is that in connection with that you would, if the question came up as to the matter of the information you acquired or the opinions you expressed, you would have no hesitation in claiming the privilege as advice of lawyer and client.

A. I think it is on that basis because, as I say, I am working with the lawyer for the corporation.

Q. Now, what you say on page 23 about what has happened in other corporations in your experience, does that mean that that necessarily occurred in some other corporation, does it?

A. No.

Q. And you have no facts that would indicate that the matters that you state, that you found in other corporations to be true, necessarily would be true in the Borden Company?

A. No, I haven't.

Q. Now, at the bottom of page 23 you say, "In Borden's [fol. 103] cost study, no attempt was made to allocate central office expenses as between chains and independent stores although the defendant conceded that the getting and holding of chain store business was the function of account management."

From what document did you gather that impression, and can you point to any aspect or anything in the papers presented to you that supports that?

A. I believe that I gathered that from the Malone deposition.

Q. Well, you were aware, were you not, that the so-called brochure that was in front of you contained an allocation of the substantial amount of central office expenses based on time studies?

A. Well, I was speaking here more of the——

Mr. Long: Don't continually misstate the record on that, Mr. Ball. Put it in general terms, and not put it like that.

Mr. Ball: Would you read the question and ask the witness whether he could answer it?

Mr. Long: I object to the question on the basis of a misstatement of the record.

(Question read.)

[fol. 104] By the Witness:

A. Well, that may have been. I don't recall definitely. That is not what I was referring to here.

By Mr. Ball:

Q. Well, what were you referring to?

A. The executive time.

[fol. 105] Q. Well, now, you understand that I am looking on page 22, where you referred to central overhead or general office expense and state that you will include billing, credits and collection, general accounting and general administrative staff and executives' time.

Do you mean now that you do not include all of those in the reference on top of page 24?

A. I am referring particularly to what was said in, I believe it was in the Malone deposition with respect to such expenses.

Q. Well now what are the expenses you have in mind? Do we mean billing? What I am trying to say is do you mean billing, credits, collection, general accounting, and general administrative staff, by "central office expenses"?

A. Well, I mean whatever Mr. Malone was referring to in something that he said.

Q. Will you read what he said?

A. This is page 84, paragraph marked "150MD".

Mr. Long: That is the Borden defensive pretrial order.

The Witness: Yes.

By the Witness:

A. (Reading) "No time studies were made of the time of the executive and administrative employees in contacting [fol. 106] the executive officers and other representatives of the chain stores. It would have been possible to have had such executives and administrative officers record time spent in telephone calls and personal contacts with chain

stores and independents. However, in the opinion of Mr. Malone, during the limited period of time covered by the survey, activities of such a type could be disproportionate to what actually takes place over the regular course of business during longer periods of time. A study lasting as long as a year would probably average out such inconsistencies."

And I think he goes on further in these other paragraphs.

Mr. Long: That is the Borden defensive pre-trial order as entered in this case.

Mr. Ball: What paragraph were you referring to?

Mr. Long: You started at 149, didn't you, Mr. Sawyer, and you were reading through?

The Witness: Yes.

Mr. Ball: I thought this was the brochure that you were handing me.

[fol. 107] Mr. Long: No, this was the deposition, a paragraph submitted by the Borden Company there.

By Mr. Ball:

Q. Well, then, to clarify this at the top of page 24, where you speak of "central office expenses", you mean all of the expense of the executive and administrative officers described in paragraphs 149MD and 150MD of the Malone deposition?

A. Yes, I was directing my remarks particularly to those. I am not sure that I knew exactly how far you had gone with some of those other expenses.

Q. And with reference to what is said on page 22 with respect to billing, credits, collection, general accounting and general administrative staff, as part of general office expense, you did not intend to infer that no distribution or time studies had been made of that expense?

A. It seems to me I read something that made some reference to that, that indicated to me that it had not received perhaps all of the attention—I may be wrong in my recollection of all of this material.

Mr. Long: I think that is state of the record that should be clarified, if you can, there.

[fol. 108] By Mr. Ball:

Q. I was going to ask you to read beginning there at page 152, paragraph 244, and now I ask you if that doesn't correct the impression that you stated.

A. Is that in this volume I have before me?

Q. Yes, the one you have.

A. What was the page, please?

Q. Start with page 152, paragraph 244. I might say that this type of study of central office expense continues through page 159 to 161, paragraph 261.

A. Yes. Well, I could see here, some of these items were studied, and I was laying down principles that would be applied. Now, to the extent that you have provided data of the kind I have described here, I would——

Q. Well, I am reading here the sentence that appears beginning at the bottom of page 23, "In Borden's cost study, no attempt was made to allocate central office expenses as between chains and independent stores—"

Now you refer specifically to that in that flat statement, only to executive time, is that correct?

A. Yes, I do.

Q. You can see why the definition previously becomes [fol. 109] inconsistent with that statement?

A. Yes. Well, I think it is defined in "although the defendant conceded that the getting and holding of chain store business was the function of top management."

Q. Yes, but "central office expenses is not relative to top management, is it?

A. No, it is part of that area of indirect costs, however, and I did not know and I could not determine from this data, just how far you had gone.

Q. Do you know of any facts, or was your attention called to any facts in the material submitted to you as to why the conclusions that you sought to draw from this instance, were incorrect—I withdraw that question, because I think I can make it more pointed.

Were you aware—you did not see the final pretrial order, did you?

A. I don't think I did. It is not listed, is it, in those items?

Mr. Long: Of course; he saw it—well——

By Mr. Ball:

Q. Were any facts brought to your attention as to testimony as to the relative time spent by account executive officials, top executives and officials of the Borden Company [fol. 110] with respect to chain and independent store business?

A. No, I saw no such data.

Q. Now I turn to paragraph (1). Now will you turn to where you say that there is an indication in paragraph 196MD that the drivers' activities were directly related to volume purchased by each customer.

I would like to have you explain what it is in 196MD that led you to that conclusion.

A. Well, I would say this sentence is highly suggestive of the fact that the drivers do influence volume, and I quote: "It is also the practice of the wholesale route man to anticipate the requirements of each individual store customer and, at the time of delivery, to leave quantities which, in the route man's opinion, are sufficient to supply the daily sales needs of the customer."

Q. Now, I am correct, then, in assuming that your assumption that the cost of the so-called drivers' commissions were related to volume, is based upon your assumption that the drivers have an influence on the volume of the sales made.

A. Yes, I believe the more fluid milk is sold, the better the salesman is off financially, and he does——

Q. Yes, but that in itself would not do it, unless a driver [fol. 111] had some control of the amount he was going to sell.

A. Well, in this statement "in the route man's opinion" is very suggestive to me that he was exercising a judgment.

Q. You did not answer my question, Mr. Sawyer. It is the assumption that you make that the driver does influence the amount of the sales in some way or another, that leads you to the conclusion that there is a connection?

A. Yes.

Q. Now are you aware, Mr. Sawyer, of the facts set forth in pretrial order at paragraph 112MD, that the sales promotion activities—that appears on page 70.

A. All right.

Q. —that the sales promotion activities are divorced from the responsibility of the drivers and based upon the solicitors who are entirely an independent group of people.

A. That is the function of developing new customers, isn't it?

Q. No, if you would read that carefully, you will find that is the function of promoting sales by existing customers as well.

[fol. 112] A. Yes, I see what you mean. Yes, I recall this now.

Q. Did you take that fact into account when you expressed your opinion?

A. I don't think that contradicts the opinion which I expressed, based upon the subject——

Q. Well, did you take that into account?

A. Yes, I did, yes.

Q. Now, were you aware of the facts set forth that —well, put it this way, are you aware generally of the way in which the assignments that are given to the route man, as to what their functions are?

A. Well, generally—not only physically to deliver the milk—but generally to give the service that is required by a customer in the placement of the milk in the customer's place of business, which I understand they did not do at the chain stores, and in some occasions to collect on a c.o.d. basis.

Q. Now, where did you derive that information?

A. I can't say specifically.

Q. Well, that is something that Mr. Woolley or Mr. Jinkinson had told you, or was that in your data?

A. I don't think they told me that. I read somewhere among those documents generally what they did.

Q. Did you find anything specifically that they did that [fol. 113] tended to increase the net sales upon which they were paid commissions?

A. I based my opinion which I expressed here on the particular statement which I think was made by Mr. Malone.

Q. Well, were you aware in drawing that inference that if a driver estimates the next day's sales of his store customer in excess of what they are, that he then takes the

milk back under the city ordinance, and that that is netted against the sales upon which he receives commissions?

A. Yes, I understood that also.

Q. Well now, in what possible way would estimating the amount of milk to be left with a particular store, influence the sales of that store to its customers?

A. Well, I would think that the fact that the salesmen profited financially in building up the volume to the utmost extent possible, even considering this return situation, would have an influence upon total volume.

Q. Well, that is a surmise not based upon any facts, is it, on your part?

A. Yes, I think it must be, having read the contract, the later contract, and seeing how it worked.

Q. Well, what provision in the contract suggests that?

[fol. 114] A. The commission provision, how it steps up with the total number of points sold in the week or months; I forget what unit.

Q. Well now, Mr. Sawyer, how is it that a driver can influence the amount of milk that the customers at the store buy the next day, in the next twenty-four hour period?

A. I don't know whether I can answer that question on a factual basis. I see here a set of conditions which I would interpret as tending to maximize the volume.

Q. But as a matter of fact you do not know of any way in which any action of the driver in delivering so much milk in one day is going to increase the sales of the customers in that store for the next twenty-four or forty-eight hour period?

A. No, I merely say that under the conditions, there is a reasonable expectancy that that would happen.

Mr. Ball: I am just wondering if this would be a good time to break off?

Mr. Long: Are you through?

Mr. Ball: I am substantially through, and yet I may have some more questions. I would like to ask to be excused anyway.

(Discussion off the record.)

[fol. 115] Mr. Stevens: May I ask just one question then to shorten it?

By Mr. Stevens:

Q. Mr. Sawyer, there are a number of paragraphs in the proposed testimony as to Bowman Company which are word for word the same as paragraphs which appear in the Borden Dairy Company closed testimony.

A. Yes, I testified that is true.

Q. And which in effect do not refer specifically to either Dairy?

A. That's right.

Q. I think with respect to several such paragraphs you have indicated in response to questions by Mr. Ball that those were intended to be statements of general principles and not specific criticisms of a cost method.

A. That is right.

Q. And I say would you give the same answers to the same questions if I went through the paragraph with respect to Bowman?

A. That is true.

Mr. Stevens: Then that will save some time for tomorrow.

Mr. Ball: I want to reserve the right to ask a few more [fols. 116-117] questions tonight, but I think I would say that we can adjourn until 9:30.

(Whereupon an adjournment was taken until 9:30 o'clock a.m. Thursday, April 17, 1958.)

[fol. 118] April 17, 1958

Mr. Ball: May I state on the record that on reviewing the matter over the evening we have concluded we have no further questions to ask of Mr. Sawyer in connection with this part of the examination. We, however, again wish to make the reservation that the deposition be not closed until, or subject to any action that may be taken with respect to going before Judge Campbell on the request for production of documents that might be used for further cross-examination.

ALBERT E. SAWYER, a witness having been heretofore duly sworn, further deposeth and saith as follows:

Cross-examination. (Continued)

By Mr. Stevens:

Q. You met Mr. Woolley in May of last year, is that correct?

A. That is correct, yes.

Q. Was that in Washington or New York?

A. That was in New York.

Q. In the offices of what organization?

A. The Albert E. Sawyer Company.

Q. What is that company?

A. That is an accounting firm.

Q. How many partners does it have?

[fol. 119] A. It has two partners.

Q. Does it have a staff of employees?

A. Yes, it does.

Q. How large a staff?

A. Ranging from fifteen to thirty, depending upon the activity that is going on.

Q. Has that organization been engaged to perform cost analyses for various corporations?

A. Yes, it has.

Q. And in such work from time to time have you found it advisable to use a rather large staff performing your work?

A. Yes. The staff has to be augmented for some assignments.

Q. Do you frequently use at least some of your employees on your assignments?

A. Yes. Sometimes just—I am just a consultant and in that capacity only my own time is involved.

Q. On some of your more important assignments, that is by you, I mean the Albert E. Sawyer Company?

A. Yes.

Q. Could you give me some notion of how many man hours may have been devoted to the work involved?

A. I assume you are referring to a Robinson-Patman [fol. 120] assignment?

Q. Yes.

A. I would want to distinguish that because a very large part of our work is in connection with anti-trust matters arising under the Sherman Act.

Q. Conspiracy matters?

A. Conspiracy matters, where a price behavior is important and of course studies of that kind run into tens of thousands of hours at times. On Robinson-Patman matters it would not be unusual for a study to involve several thousand hours.

Q. Several thousand hours?

A. Yes.

Q. I believe you testified yesterday that you spent forty to fifty hours on this matter?

A. Yes.

Q. Was that entirely your personal time?

A. That was all my personal time.

Q. You did not have anyone else connected with the Albert E. Sawyer Company do any of that work?

A. No.

Q. Were you compensated on a professional basis for your work in this case?

A. Yes, I was.

[fol. 121] Q. What was the amount of your compensation?

A. The same per diem that I charge: namely, $35 an hour.

Q. What was the gross amount of the compensation?

A. I can't recollect.

Mr. Jinkinson: I can't recollect, either. I would have to look at the record.

By Mr. Stevens:

Q. I take it it would be forty or fifty times thirty-five?

A. Yes, something like that.

[fol. 122] Q. Was the arrangement for your employment in this matter made by Mr. Woolley on behalf of the plaintiff with you?

A. Yes, it was.

Q. At the time of making that arrangement, did he indicate to you that there was any limit on the amount of funds available for your employment?

A. No, he did not.

Q. Did he tell you to spend as much time as you needed, or did he impose some kind of a restriction?

A. I cannot recall any statement by Mr. Woolley as to—he certainly put no limitation on it, let me put it that way.

Q. Did he in any respect define the area of investigation which you were being asked to make?

A. Yes, he did. He pointed out areas in which there was a division of opinion among counsel and a brief statement of the nature of that difference of opinion.

Q. Did that brief statement indicate, shall we say, the pros and cons on the issues that he described to you?

A. Yes, I think they were fairly stated. He did not just state his own opinion. I inquired as to——

Q. He summarized the reasons for the opposite position [fol. 123] as well?

A. Yes, I think he did.

Q. And it was that summary, together with these various documents described on the list we looked at yesterday, that provided the written material that you used in coming to your conclusions.

A. Yes.

Q. I understood that you had some connection with the Standard Brands case, is that correct?

A. That is correct, yes.

Q. What work did you do in connection with the Standard Brands case?

A. I was brought into the case after the Commission had issued its cease and desist order.

Q. Which was at what time?

A. I think it was sometime in 1938 or early '39. I was approached, as I recall, toward the end of 1939 by house counsel for the company.

My function was to try to assist the counsel for the company and for the Commission, assist them in arriving at some form of compliance report, and in that case it was necessary for me to spend a large amount of time, time running over two or three months, in a detailed review, which was a more detailed review than I have undertaken [fol. 124] here, which resulted in a recommendation by me to counsel for both sides that certain additional studies be

taken, particularly to overcome the Commission's objection to the use of historical allocations as between various products which seemed to be the chief stumbling block there. [fol. 125] Q. Had there been made in that case, prior to your entry into the subject matter, any study of the Central Office Overhead of Standard Brands?

A. At this moment I could not tell. That is twenty years ago.

Q. You do not presently recall any?

A. I don't recall that.

Q. Do you recall whether your recommendation to the Commission and the company included a recommendation that there be an analysis of the Central Office Overhead of Standard Brands and its possible allocation among different customer groups?

A. I do not recall that being isolated as a particular study. We did have to find some way, as I remember it, to set apart bakery products from other products where they were combined in the same route trucks, and that was one of the major issues of the case.

Q. I take it from your proposed direct testimony, Mr. Sawyer, that you would not consider the omission of a study of Central Office Overhead a significant defect in a study if the omission were adequately explained?

A. That is true.

Q. That your objection in part was predicated on the lack of adequate explanation?

[fol. 126] A. Yes.

Q. In the last paragraph on Page 19 of the proposed testimony as to Bowman——

A. Where?

Q. Page 19.

A. Yes.

Q. (Continuing) ——in which the subject of Central Office Overhead is being discussed, toward the middle of the paragraph a sentence appears:

> "The witness considers the failure to make these allocations and the further failure to explain such omissions, other than to cite the fact that such allocations are difficult to make, constitutes a significant weakness in Bowman's cost study."

A. Yes.

Q. And I take it that the failure to explain is one of the conditions of your criticism?

A. Yes, a most important one.

Q. You did note that there had been a citing, c-i-t-i-n-g, of the fact that such allocations are difficult to make?

A. Yes.

Q. And that you considered an inadequate explanation?

[fol. 127] A. Yes, I do.

Q. And you were there referring, I take it, to the references at Page 4, and I believe they may continue on to Page 5, of what is sometimes referred to as the basic manual, as has been identified as Bowman Exhibit 4 in the matter?

A. I think this is the document, plus another which I believe is referred to as the Bergfield deposition. I believe there is some discussion in that also.

Q. That was the only explanation of the omission of Central Office Overhead of which you were aware at the time this proposed direct testimony was prepared, is that correct?

A. Yes, I think so.

[fol. 128] Q. You had not seen the final pretrial order entered on behalf of the Bowman Dairy Company which contained a several page written statement of the reasons why central office overhead was omitted, had you?

A. I do not believe that was among the documents that I reviewed.

Q. And without having read that material, without knowing whether or not the explanation for the omission of central office overhead contained in that material was adequate, it would not be possible for you to express an opinion as to whether or not the omission of central office overhead was or was not a significant defect in the Bowman study, is that not correct?

A. I suppose it would be correct to say that.

Q. It might or might not be, depending on what was said?

A. Depending on what was said.

Q. Now, Mr. Sawyer, on the subject of the com-issions, I think you have indicated in your testimony yesterday that your opinion that commissions should be cnarged on a

volume basis was predicated on your understanding that the method of payment was designed to provide an incentive to increase the volume on each individual route from which both the Dairy and employee would mutually [fol. 129] benefit?

A. Yes, that is true.

Q. And, of course, if the pay plan was such that the increase in volume resulted in a penalty rather than an incentive, your opinion might well be different, is that not correct?

A. Well, if volume affected it either way it seems to me that it is relevant.

Q. Even though the pay plan were not designed to provide an incentive to increase volume?

A. Well, the reading of the union agreement, I think, leaves the clear implication that it is an incentive.

Q. I understand that is your view.

A. Yes.

Q. But what I am trying to understand is that if the contrary were the fact, that it were not an incentive, then your opinion on the method of allocation of those cost elements might well be different?

A. Well, if it were shown that in fact volume was not the controlling condition here, that would be true.

Q. Now, Mr. Sawyer, I notice in your proposed direct testimony that you make reference to some of your more important assignments, and specifically I notice the Graphic Arts vs. Converted Paper Products, wage rate conflict in [fol. 130] NRA code.

A. Yes.

Q. Now, you have had some experience in connection with wage plans and pay plans of one kind or another, I take it.

A. Yes. In those early days I was interested in that. I have not been in recent years.

Q. Has it been your experience that a piece work type of pay plan is designed to provide an incentive for each individual employee to maximize his own output?

A. I would think that was one of the elements of such a plan.

Q. Has it been your experience that labor unions generally favor that type of plan?

A. I know that some are strongly opposed to it.

Q. Some unions are strongly opposed to that?

A. Yes.

Q. Has it been your experience that labor unions generally are opposed to pay plans which are designed to provide incentive for increasing the output and income of individual workers over and above those of the group as a whole?

A. I know that is the opinion of some labor leaders. [fol. 131] It is a point of controversy, shall I say.

Q. Have you had some familiarity with problems created by payment of additional compensation for work beyond a certain number of hours a day, either under statute or agreement with unions?

A. No. I have had very little experience in labor negotiations, as such.

Q. Have you had experience in cost accounting in connection with the allocation of premiums paid to wage-earners?

A. Yes. That is a matter which comes up from time to time.

Q. In such work have you followed the practice of considering time and a half or overtime pay as pay which is incentive pay designed to encourage the employee to work longer hours?

A. I do not recall a specific instance in which I have dealt with that. It does arise as a problem.

Q. Is it your understanding that the extra compensation in such agreements is designed to provide the individual employee with an incentive to work additional hours each day?

A. Yes, I think there is an incentive there.

Q. Is it your understanding that that is the purpose [fol. 132] of that kind of a pay plan?

A. Well, I think it has a dual purpose. One is a brake upon management. There is a penalty to management that insists on too much overtime.

In other words, there is a balance of two forces inherent in such plan.

[fol. 133] Q. Well, have you had any work under the Fair Labor Standards Act?

A. No, not since the Act itself became organized. I did some work—by that I mean the provisions of the Act,

as you may recall, set out a system of industry committees. When the rates were being raised from the initial 25 cents an hour, then to 40 cents, then to higher amounts, industry committees would be convened.

Those committees were made up of representatives of management and labor and the Government, and my work with the Bureau was limited to guidance to industries in participating in that committee plan.

Q. Have you understood that the overtime provisions of that statute—and by that I mean the provisions of higher rates of pay shall apply for additional hours of work—were designed to encourage employees to work additional hours?

A. As I said, I think the same consideration applies, that there is a balance between proper compensation for overtime on the part of the employee and a brake upon management in the abuse of overtime assignments.

Q. Did I understand you to say that you have not been presented with the problem in your own personal work of selecting a proper method of allocation of premium [fol. 134] compensation, that is, overtime compensation of wage earners?

A. Well, that usually comes up in most of these cases. I do not recall a specific instance in which I personally participated.

Q. Do you recall any instances in which such premium compensation was treated any differently than the wages as a whole?

A. I do not think I can recall.

Q. Now, on Page 18 of the proposed testimony in Paragraph I, there is a discussion of the allocation of transportation costs to customers, and you indicate that a choice of methods is presented; is that correct?

A. That is true.

Q. Will you tell me what factors would govern the exercise of that choice?

A. Well, where you have a situation, as in the case of transportation, where the bulk and the weight of the load have a direct bearing upon the costs, it seems to me that there is important obligation to explain why that is not used if other methods are adopted.

Q. Is that principle predicated on your belief that the bulk or the weight have an important effect on the cost of [fol. 135] operating?

A. Yes, where you have a close logical connection it should prevent it.

Q. Are you familiar with the Accountants' Hand Book?

A. Yes, I am.

Q. Are you aware of what I learned the other day, namely, that Professor Taggart apparently wrote the distribution section in at least the Third Edition of the Accountants' Hand Book?

A. I did not know that. I knew that his associate, Professor Paton, wrote the distribution section of an earlier edition.

Q. Well, in any event, I would like to read a paragraph from Page 337 of the Third Edition of the Accountants' Hand Book and ask you if the opinion expressed in that paragraph accords with your professional experience and views. It is the paragraph entitled, "Fixed and Variable Costs":

> "A factor which limits the practical utility of distribution cost analysis is the large proportion of relatively fixed items among distribution costs. These [fol. 136] fixed items comprehend more than those elements of cost which are commonly called fixed, such as depreciation, insurance and property taxes.
>
> "They frequently cover entire distributive functions. An example is truck deliveries.
>
> "If regular truck delivery service is maintained over certain routes, the total cost of operating the trucks is a relatively fixed amount, including gasoline, wages of drivers, and all other items. Comparatively little difference is caused by weight or bulk of goods carried, or the size of individual orders, although the number of delivery stops has some influence on the time required and may affect certain cost elements."

[fol. 137] There is more which you are welcome to read, if you like. I would like to ask if that statement is in accord with your experience and your views?

A. I would make this reservation on a statement of that kind. Where you are applying this to a Robinson-Patman

question, I do not think that would be controlling. I think it would be incumbent upon the proponent of a justification to make a determination as to whether, in fact, these differences were, as indicated here, negligible.

[fol. 138] Q. Mr. Sawyer, I do not believe you have answered the question. The question is now what bearing this statement has on this case or on Robinson-Patman. The question is merely whether you agree with the statement and whether your experience accords with the factual statement there.

A. I would want to make qualifications on the illustration of the truck. There are many situations where that would not apply. And I don't think the author of the paragraph intended to overlook that. It depends on what you are carrying and the character of the whole trucking operation.

Q. Well, let's take it part by part. The sentence, "If regular truck delivery service is maintained over certain routes"—that is the type of situation we are dealing with in this case, I take it?

A. Yes.

Q. "The total cost of operating the trucks is a relatively fixed amount." Now, that is the entire conclusion as to which you may wish to make reservations?

A. Yes, because——

Q. Let's take the separate items, including gasoline. Now, would there be much change in the cost of gasoline [fol. 139] depending on the load of the truck?

A. I am not an engineer. I would assume there would be. The heavier the load the more gasoline would be consumed.

Q. You would assume there would be a substantial difference in the amount of gasoline consumed by a milk truck driving on its route as the size of its load varied?

A. I would assume there would be a difference. Whether substantial or not would depend on the facts, I assume.

Q. Do you think variation in the load of the truck would have as much effect on the amount of gasoline consumed as the variations in distance driven?

A. I suppose distance would have its effect, too. I am not prepared to say in any quantitative—or let me put it

this way. I am not prepared to make a quantitative evaluation of these things, because I simply do not know.

Q. You don't have the facts?

A. No.

Q. Well, would that be a consideration which would be of importance to you?

A. Oh, yes, very much so.

[fol. 140] Q. And if you found that the gasoline had a more—excuse me—that if the distance traveled had a more direct effect on the cost of gasoline, than the variation in the load carried by the truck, what effect would that have on your choice of methods for analyzing transportation costs?

A. Well, I would say that one would have to look into all of those facts and make his choice in accordance with what they show. It is rather hard to just theorize about it.

Q. Well, now, as per this statement, "Comparative little difference"—I am reading from the book again—"is caused by weight or bulk of goods carried."

This is, of course, assuming a fixed route, same distance, traveled every day. I take it you do not necessarily agree with that statement?

A. No, I would not want to accept that as a flat statement of cost procedure.

Q. Well, is your assumption that transportation costs should be allocated on a volume or weight basis predicated on your disagreement with this statement?

A. I am disagreeing with the way you are using it. That statement is for general accounting use. In a Robinson-Patman situation you are distinguishing between certain [fol. 141] customers and other customers, all customers being on the same route. And it requires a somewhat different approach to make that distinction costwise than it does to account for the cost of the route as a whole. That is my disagreement.

Q. This is merely a statement of fact in here: "Comparative little difference is caused by weight or bulk of goods carried," and has no reference to any type of proceeding as I read the Handbook.

A. No, but as an accountant I would interpret that to refer to the total cost of a route. And what I am referring to here in the proposed testimony is a distinction between

certain elements of the route. I am not concerned with the total cost. I think that makes a—leaves you with a different problem of evaluation.

Q. You think each element on the route should be evaluated separately?

A. Your routes, as I understand it, serve two classes of customers, one class receiving a larger discount than the others; that is my assumption. And the purpose of the cost inquiry is to properly allocate the cost load to those two classes of customers. And it seems to me that involves a somewhat different technique than merely the ascertainment of the total cost of the route as a whole. We are not [fol. 142] interested in the breaking down as between the customers on the right side of the street and the customers on the left.

Q. But in doing this job, is it your opinion that each cost element should be analyzed separately?

A. Yes, I think it should.

Q. And would each one then be allocated as among customers on the basis of a service unit which had the most direct relationship to that particular cost element?

A. Yes, I think that is so.

Q. Then, would you say that if the facts could be shown that gasoline usage was most directly affected by distance, that the gasoline cost should be allocated on some sort of a distance formula?

A. Yes, I suppose that is correct. Again keeping in mind that you are segregating two classes of customers.

Q. Yes. And if, for example, it would be shown that a dairy, say, had half a dozen routes with a chain store on each route and by reason of a contract with the chain or any other provision that perhaps required delivery during a rush hour or some particularly difficult time to make [fol. 143] delivery, that the dairy was compelled to keep its trucks parked in front of the chain store on each route for half of a working day, and this was a condition that pertained every day for every chain store, would it not then be reasonable to say that half of the item of depreciation of those trucks should be charged against the chain, since half of the truck time was spent at the premise of the chain?

A. Those are certainly pertinent costs.

Q. On such facts and for particular certainty of cost, it would be proper to use time as a method of allocating that cost?

A. Yes, I would think there would be a strong indication that that would be proper.

Q. That would be proper; and I take it the same reasoning would apply to the item of insurance costs, which are renewed periodically over a period of time?

A. Yes, I think so.

Q. And to license fees?

A. Yes.

Q. And if drivers were paid on an hourly basis, I take it you would make the same analysis as to the hourly wage of the driver?

[fol. 144] A. Yes, I suppose that is true.

Q. Now, have you formed an opinion as to which is a preferable method as between bulk and weight for purposes of analyzing, say, maintenance costs on a vehicle or other types of operating costs?

A. Again, I think it would depend upon the particular facts of a situation.

Q. And would one significant fact be that—let's assume that a truck has a certain capacity in terms of pounds; that when the truck reaches a load of that weight you have to buy another truck and incur the additional expenses that go with maintaining another truck; that, then, the weight of the load might be perhaps the more appropriate factor to use?

A. Yes, I can conceive of situations where the weight of the load would be an important consideration.

Q. Where that were, you might say, the limiting factor of the load?

A. Yes.

Q. And I suppose if on the other hand the cubic content of the truck provided the limiting factor, then you might select volume?

A. Right.

[fol. 145] Q. And I wonder what your reaction would be if there were provision in the union contract that imposed a limitation on the number of points which could be delivered? Would it be permissible to allocate costs of this nature on a point basis, on the theory that once the limita-

tion on points is reached it is necessary to purchase an additional vehicle and put another route on the street?

A. I suppose if those were the facts that would be an important consideration.

Q. Do you know whether there is such a limitation in the union contract?

A. I don't believe I can say that I do, no.

Q. But if the union contract did provide a limitation on the size of the route in such terms, or in some other terms, perhaps dollar volume or cubic content, then the limitation imposed by the union contract might well be a relevant consideration in selecting the appropriate service unit for allocating your transportation cost and your truck costs.

A. Yes, it certainly would be a consideration.

[fol. 146] Q. Mr. Sawyer, you have done a great deal of work in the paper industry, I believe?

A. Oh, I suppose I have done more work in that industry than most of the others.

Q. I take it your work in the industry has included the Robinson-Patman work as well as other type of accounting?

A. Yes, it has.

Q. And have you had occasion in analyzing companies? I might just preface this by saying I do not mean to invade any privilege. You tell me if any of my questions go beyond what is proper. Analyzing problems to allocate costs among different customer groups?

A. Yes.

Q. Are they problems of allocating as between independently operated customers and large buying groups, similar to chain versus independents?

A. That is a frequent occurrence.

Q. And in reviewing the problems of that industry, have you found then that there are differences in methods of selling or delivering to different customer classes which give rise to cost differences?

A. Yes. There are many such differences.

Q. That give rise to significant cost differences?

[fol. 147] A. Yes.

Q. Have you found that there are areas of cost analysis which you have made which have led you to the conclusion that they do not produce significant cost differences as between different customer groups?

A. Yes, that is true.

Q. So that on the basis of studies which have been made by you of different companies and different segments of this industry, you are prepared, in effect have a head start, when you make another study in that industry and know where you are apt to find the most significant cost differences and where you are apt to find no such significant cost differences?

A. Yes, that is true. A pattern tends to develop.

Q. And as an expert in the paper industry you become familiar with that pattern?

A. That is true.

Q. So that if you are called upon to make a new analysis in that industry, you may on the basis of your own professional judgment leave out certain areas which you know by your own experience do not produce such cost differences?

A. Well, I am not sure that I would just leave it out. I would make an adequate study to be sure that the pattern [fol. 148] was being followed in this particular instance.

Q. But you would think that your professional experience and judgment on the basis of your past studies would lend peculiar weight to the judgment which you might make on the basis of a more abbreviated analysis than you might have made at the first time around?

A. That is true. If the pattern was not being followed I would dig to find out why.

Q. I think I forgot to ask you. In the Standard Brands case which you referred to before, did you work, did you argue the appeal of that case in the Second Circuit?

A. No. I functioned there just as a consultant. I did not have the status of counsel.

Q. Have you had the status of attorney, as counsel, in any judicial proceedings in which you attacked the validity of a cost defense?

A. I don't believe I have. I would have to check back.

Q. Do you recall any instance where you had the status of counsel in a judicial proceeding, a court proceeding, in which you were presenting a cost defense?

A. No.

Q. Have you testified as an expert witness in judicial [fol. 149] proceedings in which the validity of a cost

defense was an issue in the litigation other than in this case?

A. Yes, I have.

Q. Would you name that case or those cases for us?

A. I would have to check my memory on that. The treble damage action which arose out of the Hartford Empire case, I was called upon there to undertake extensive studies and the judicial proceedings were limited to a consideration of my figures for the purpose of settlement.

Q. Was that a Robinson-Patman Act case?

A. Yes. There were two or three of them.

Q. I am not sure I understood correctly. Your participation was in connection with developing the settlement? [fol. 150] A. Yes.

In other words, it wasn't quite the same as taking the witness stand in open Court and so many of those cases terminate in that fashion.

Q. Do you recall any Robinson-Patman Act cases, and I am referring to judicial proceedings, in which you have taken the witness stand in open Court as an expert on cost defense matters?

A. I have a recollection and I would like to correct my earlier testimony, if I may. It has slipped my mind that I was of counsel for the Zellerbach Paper in a Section 2-F case.

Q. Is that a Federal Trade Commission case?

A. That was a Federal Trade Commission case, yes. It was my task in that case to interrogate numerous experts in the field of purchasing, field of cost. Professor Taggart was one of my witnesses.

Q. I take it, Mr. Sawyer, you have done very extensive work in connection with assembling of statistical data and statistical evidence in connection with the defense of conspiracy cases of one kind or another?

A. Yes, I have.

Q. And would it be true that your work involving Robin- [fol. 151] son-Patman has primarily been of an advisory character rather than in connection with litigation?

A. I would say there is an even balance. Now, the litigation, as I pointed out earlier, in that area, frequently never reaches the courtroom, although a great deal of time and

effort is expended in either supporting the charge or otherwise.

For instance, my work for Remington Rand in their ninety million dollar suit against IBM is very extensive but never reached the courtroom.

Q. You were working for the plaintiff in that case?

A. In that case, yes.

Q. Mr. Sawyer, there is at pages 8 through 15 of your proposed testimony, there is a rather extensive description of your background.

Is that something that you prepared especially for this proceeding or is that some material which had been prepared for other purposes and was just supplied to the Government?

A. It was prepared for general use to permit counsel to select such as they wished for their purpose.

Q. I gather then—I do not mean to be facetious—you refer first to he and his, that if you were testifying you would not speak of yourself in the third person, I don't [fol. 152] suppose.

A. No. I think that was redrafted with a view to using it in this particular document.

Q. I see on page 10 you list certain cases: FTC vs. Book Papers Association, that should be Book Paper Manufacturers Association?

A. That is true, that is an error.

Q. Is that the same case that on appeal was the Allied Paper Mills case?

A. Yes.

Q. That was a conspiracy case?

A. That is right.

Q. And the Tag Manufacturers case, that is listed below, that is also a conspiracy case, is it not?

A. Yes. That was a conspiracy case.

Q. Going back to the Allied Paper Mills case, when was it that you worked on that case?

A. I think the complaint was issued in 1938 and I began working on it immediately.

Q. Did you handle the appeal in that case?

A. I was not of counsel then. I was responsible for the preparation of the statistical material under the direction of Mr. Acheson who was the coordinating counsel.

Q. Of the Government?

[fol. 153] A. No, of the respondents.

Q. Your work at that time was at the commission level of the proceeding?

A. That is correct, yes.

Q. Do you recall the date of the cease and desist order?

A. No, I don't.

Q. Wasn't it about 1939 or '40?

A. No. It came later than that because the trial extended on into the early '40s. I think I testified in the case either in '40 or '41, and my assignment was then completed and I have no distinct recollection of just when the order was issued.

Q. Were you an independent practitioner at the time of your work in that case?

A. I don't think I was a member of the Bar when the case began. I was admitted to the Bar in 1939.

Q. In Washington, D. C.?

A. In Washington, D. C., yes.

Q. Well, were you an independent business man at that time?

A. No. I was on the staff of the law firm in New York, Weis, Co-lett and Canfield who were counsel for the American Paper and Pulp Manufacturers Association and [fol. 154] also counsel for the Book Paper Manufacturers Association.

Q. Those are associations which you now represent, I take it?

A. I don't represent either of those at the present time.

Q. Oh! Now, turning to page 16, paragraph A of your proposed direct testimony, is it not true, Mr. Sawyer, that that paragraph is almost a verbatim excerpt from pages 576 and 577 in the Anti-Trust Bulletin of January, 1956, which reprinted your speech to the Illinois Bar Association?

A. Yes, I think that is a fair statement.

[fol. 155] Q. That you drew on this article to make this statement?

A. Well, I wouldn't say necessarily that article. I have used language of that kind a number of times. I don't know just when it first appeared.

Q. Is it not also true, Mr. Sawyer, that Paragraph B

of your proposed direct testimony, consists of almost a verbatim statement of one paragraph that is found on page 577 of the same article in the Anti-Trust Bulletin, and then the latter half of Paragraph B consists of an almost verbatim statement of another paragraph on page 578 of the Anti-Trust Bulletin. I will refer you to the bulletin I have indicated——

A. Yes, I drew upon the work that I have done over the years in the preparation of this document.

Q. Now, is it not true that at those stages of your article in the Anti-Trust Bulletin which was a reprint of your speech to the Illinois State Bar Association, you were in effect giving lawyers advice as to the proper method of presenting a cost defense in a litigated matter?

A. I have used the same words before accountants.

Q. Well, I didn't mean to emphasize the "lawyer" aspect of it, but rather you were describing the method which [fol. 156] you think would be appropriate in making the most effective presentation of a cost defense in a contested matter.

A. Yes, I made the statements before accountant groups as I have before groups of lawyers.

Q. In other words, you were in effect dealing with a problem of persuasion, that is the problem that the cost accountant and the lawyer jointly face in trying to persuade the tryer of facts that his attempt would be valid.

A. Yes.

Q. And that is the context in which the statements which now appear in Paragraph B of your proposed testimony were originally drafted?

A. Yes, I think that is a fair statement.

Q. Now, is it not also true, Mr. Sawyer, that subparagraph (c) of your proposed testimony, is also substantially drawn from pages 579 to 580 of the article in the Anti-Trust Bulletin?

A. Yes, all of this material which is here for the purpose of laying down the basic principles which apply to the problem of this kind.

Q. Is it not true, Mr. Sawyer, that at the bottom of page 579, introducing the general discussion of which this Para- [fol. 157] graph (c) forms a part, you did express the condition, "Unless the entire study can be put into the

record by stipulation, and this is seldom possible"—and then the text continues.

A. Yes.

Q. So that the context in which the language which now appears in Paragraph (e) was originally drafted, was a context in which you were assuming that the record would not be stipulated?

A. Yes, I think that is true.

Q. I think you have indicated you were advised by Mr. Woolley that the procedure in this matter was largely being handled by stipulation and informal inspection of records by both parties.

A. I was informed that this was a unique procedure, and I doubt whether that procedure was in my mind at all at the time I produced the articles from which you read. As we struggled with these problems new methods of dealing with them were coming into being, and we have that before us now.

Q. Did Mr. Woolley indicate to you at any time what efforts he had made to obtain additional information from the Bowman Dairy Company, or to verify underlying data of the type of material which was shown to you?

[fol. 158] A. I don't recall an extended discussion of that. I believe I was shown some material which was received later than other material, but no special significance was attached to it.

Q. Of course, as a lawyer, Mr. Sawyer, you are familiar with the Federal Rules of Civil Procedure, and the discovery provisions of it?

A. That's right.

Q. And did you have any feeling at any time in making your analysis of the Bowman material, that any factual information was either not available or would not be forthcoming upon demand?

A. I don't think I gave consideration to that, because my assignment here was one of review of the basic principles applicable, rather than a detailed check-up and appraisal, a substantive appraisal of the——

Q. Would it be correct to say, Mr. Sawyer, that you were asked for an opinion upon the limited body of material that was supplied to you, and you did not understand it to be part of your assignment to request such ad-

ditional information as might be necessary in order to enable you to form valid judgments as to this particular problem?

[fol. 159] A. No, I was not given the assignment to reconstruct the studies or to supplement them in any way; otherwise I would contrast my assignment here to that which I had with Standard Brands which embraced the complete detail of review and calling for additional studies of considerable magnitude.

Q. Just to make sure that the record is clear, Mr. Sawyer, did I correctly summarize your understanding of your assignment?

A. Yes, I think so.

Q. And that, of course, would be a radically different type of assignment than the one you performed at Standard Brands, or one where you might feel free to spend hundreds of man hours of your staff time giving you the data that you might desire?

A. Yes, that is true.

Q. In Paragraph F on page 17 of your——

[fol. 160] Mr. Haskins: Before you go into the substantive, let's take a few minutes recess.

(Whereupon a short recess was taken.)

By Mr. Stevens:

Q. I had just directed your attention to Paragraph F, Mr. Sawyer, on Page 17, in which you refer to a special obligation upon the proponent, toward the bottom of the paragraph.

A. Yes.

Q. I believe you testified yesterday that you considered that a legal opinion that you were giving there?

A. No, I hope the record shows that I used the word "burden," and I did state that I used that in its legal sense.

Q. I didn't mean to say that you were speaking as a lawyer, but, rather, that in your combined capacity, that was your understanding of what the statute required.

A. But I did not intend to state that this entire sentence is a legal opinion.

Q. Well, now, this special obligation that you referred

to, do you find anything in the Robinson-Patman Act that describes any such special obligation?

[fol. 161] A. I think you have to deduce that from the nature of the proviso itself.

Q. Do you know of any judicial decision in which a Court has described this special obligation that you were referring to in this paragraph?

A. I think you will find a number of references to the fact that the use of that defense imposes an obligation.

Q. Oh, yes, Mr. Sawyer, but my specific question is whether, when you are presented with a choice of methods of allocation, one of which is more favorable to the justification, and one of which is less favorable, do you know of any judicial decision indicating that you are under any duty to make any particular choice as between the two alternatives?

A. No, I don't think I can point to any exact language in a decision on that point.

Q. Do you know of any case which even hints in that direction?

A. I don't believe I do.

Q. Now, Mr. Sawyer, in Paragraph K on Page 19, the last paragraph on the page, the second sentence states, "However, Bowman did charge their independent stores [fol. 162] with a cost of solicitation, but did not make an equivalent charge to the chains."

Is that something that Mr. Woolley told you?

A. I don't know whether it was something Mr. Woolley told me or whether it appeared in the documents.

[fol. 163] Q. Well, in your oral discussions with Mr. Woolley did that seem to be a matter of fact as to which the two of you were in agreement?

A. Yes, I think so.

Q. Do you know by what method the cost of solicitation was charged against the independent stores in the Bowman study?

A. I do not recollect now.

Q. Do you recollect how any costs were charged against independent stores in the Bowman study?

A. I think for details of that kind I would probably view a large mass of material dealing with the two dif-

ferent companies, and precisely how one detail was handled, I would not now recollect.

Q. It would be difficult to keep it all straight, in view of the volume of material you had to go over, and the short time you had to devote to it?

A. That's right.

Q. Let me see if I can refresh your recollection briefly: Do you recall that there were various cost elements that were included in a cost-per-route day in the Bowman study, and eventually brought down to a cost-per-route minute, and allocated among customers on the basis of drivers' time?

[fol. 164] A. Yes. You do recall to my mind that there were rather elaborate techniques employed.

Q. And that that total cost was apportioned among the customers served on the basis of the driver's time?

A. Yes.

Q. And do you now recall that the solicitors' costs were included in that total cost?

A. I believe they were.

Q. And therefore they were included among the costs that were apportioned as between chains and independents on the basis of drivers' time?

A. I think that was the basis used; I am not quite sure.

Q. And if I am correct in my statement—I am not intentionally misleading you—if I am correct in my statement that would, in turn, mean that a portion of the cost of solicitation was thereby charged against chain stores?

A. Would you mind repeating that?

(Question read)

By the Witness:

A. To get the import of what you were trying to say, I would have to go back a little bit further.

Q. Let's go back this way: Is it not correct that the various items of cost which went into the operation of [fol. 165] a route, went into this total cost-per-route day, and then into the cost-per-route minute, and then those costs were allocated as between various customer classes on the basis of the driver's time?

A. Yes.

Q. And that since the time was partly charged against chains, and partly charged against independents, that would have the effect of charging the various cost items that went into that calculation against both customers——

A. That is true. Anything that was in that minute would, of course, be applied.

Q. And of course if the costs of solicitation went into that minute, they would, of course, also be charged partly against chains and partly against independents?

A. Yes.

Q. So that if the costs of solicitation were really costs which were primarily incurred for the purpose of maintaining independent business, this would be a procedure which would have the effect of making a charge against the chains which, if anything, was prejudicial to the study, [fol. 166] rather than favorable to the study?

A. That is true, yes.

Q. So you would not consider that a weakness in the study?

A. Well, it might be.

Q. A weakness only in the sense that there may have been a failure to justify as much as could have been justified if there had been a different presentation?

A. Yes, I think that these things have to be taken into account. If the technique used does not result in a proper division of such costs, then one wonders how sound it is, how many other things might be involved.

In other words, it might cause you to be more concerned with the validity of the particular procedure being employed.

Q. I have before me a copy of an article written by Professor Taggart on the Standard Brands case which I presume you have seen at one time or another?

A. Yes.

Q. And in the interest of brevity I will just read a portion of it, and then I will let you look at the whole thing, if you desire.

At Page 249 in the section on Summaries and Conclu- [fol. 167] sions on cost justification, it is discussing about

one criticism made by the Commission, and I will just read the one part:

> "The Commission reasons that if 40.13 per cent of total indirect costs were applicable to baker's yeast, then 40.13 per cent of each individual item of indirect cost was so applied. This is a fallacy. The fact is, of course, that the 40.13 per cent is an average, and that as a matter of fact some items of the indirect cost are applicable 100 per cent to pound yeast, others are applicable not at all to pound yeast, and still others at varying percentages ranging between zero and one hundred. It is impossible to prove the correctness of the average except by proving the propriety of the pre-determined percentage factors, since the 40.13 per cent results from their application. However, it is thoroughly unreasonable to try to show that the 40.13 per cent is wrong merely by demonstrating that this average percentage cannot be applied to each indi- [fol. 168] vidual item of indirect cost."

I would just like to ask you if you would agree with the reasoning of Professor Taggart in that statement.

A. Well, I think I would agree, but I want to make a lit-le reservation on the last sentence. This is written in a rather complex context, and when you pick an item of this kind out of a matter as voluminous and intricate as that, it is rather hard to say, "Yes, I agree."

Q. I appreciate that.

A. And I don't know just how he intended this last sentence to be understood.

[fol. 169] Q. Now, in the same paragraph on Page 19 towards the end of the first sentence in that paragraph there is a statement:

> "The defendant conceded that the getting and holding of chain store business was the function of top management."

A. May I ask——

Q. I am sorry, that is on Page 19.

A. I had the wrong page. I am sorry. Yes.

Q. What representative—strike that. I will put it this way.

Is that something Mr. Woolley told you?

A. No, I think I gathered that from something that was recorded as having been stated by Mr. Bergfield.

Q. Did you read some of the testimony by a man named Eggleston in connection with the review of the documents?

A. Yes, I did.

Q. Now, could it have been in his testimony?

A. I was just thinking it could have been in his testimony.

Q. I do not have that, but I have Mr. Bergfield's testimony; do you think you would be able to find it in Mr. Bergfield's testimony?

[fol. 170] A. I believe it was Eggleston's.

Q. You are quite sure it was Eggleston?

A. Because the Eggleston testimony, as I recall it, dealt at some length with negotiations with the A&P.

Q. So when you refer to the defendant conceding something, you are perhaps more precisely referring to the witness Eggleston testifying to that effect?

A. Yes, I think that is a correct statement.

Q. And I take it you must have been under the impression at the time of his testimony he was an employee of the Bowman Dairy Company?

A. I am not sure how that read.

Q. Did anyone on behalf of the plaintiff ever tell you that Mr. Eggleston was subsequently indicted for perjury?

Mr. Jinkinson: Now, I object to this question. It is irrevelant, immaterial and incompetent, having no bearing on the issues in this case.

Mr. Stevens: I think it is appropriate to ask what the witness knows about the source of a statement made in his proposed direct testimony.

Mr. Long: I object to it on the further grounds this is part of a record of the 1953 case and had been given and [fol. 171] will be given such weight as Judge Campbell wants to give to it.

By Mr. Stevens:

Q. Well, I will ask you if you want to answer my question, Mr. Sawyer.

A. I did not know the fact you stated.

Q. And I take it you do not know of your own knowledge that the defendant Bowman made any kind of concessions such as is described in this paragraph?

A. No. Whatever I know about this has been derived from either the Eggleston or the Bergfield material.

Q. Mr. Sawyer, just to save time, I have the cost section of the Attorney General's Committee's Report, and I take it if I read various provisions from the cost section, that you would not differ with them, or do you feel you have some important differences with the work of the Committee?

A. I have no differences.

Q. With the cost section?

A. With the cost section. I had considerable to do with it, in its preparation.

Q. Yes, I understood that you did, so I will just save [fol. 172] the time and we can always refer to that later.

Does the underlining in your proposed testimony have any particular significance as a description of oral testimony?

A. The usual manner of emphasis.

Q. I suppose if given orally you would speak that part in a louder voice?

A. With vigor.

Q. And with vigor. Well, in one of the underlined passages on Page 19, referring to the very last sentence in the paragraph which carries over, "Experience indicates that this element of cost is not de minimis," and so forth.

What do you mean by de minimis?

A. That it is too small to produce an injury to competition.

Q. But do you have any measurement of the size of the effect which an allocation of this item expense must have in order to be large enough not to be de minimis?

A. There is a considerable discussion of that point in the Commission's opinion in the United States Rubber case. I think there was more than one United States

Rubber case. The one I refer to is that which deals with [fol. 173] certain types of women's shoes or shoes for chain distribution.

Q. Have you in your professional experience in some instances found that this element of cost is de minimis and in other instances found that it is not de minimis?

A. Yes. It can go either way dependent upon the circumstances.

Q. And is it also true of your professional experience that in the cases where it is not de minimis but rather is significant, that sometimes a consideration of this cost will have the effect of justifying a wider cost difference and at other times will have the effect of justifying a less wide cost difference?

A. Yes, that is true.

Q. Now, I believe you have testified that you have never made a cost study in the dairy industry?

A. That is true.

Q. And that would include advisory work of dairies as well as testimony in litigated matters?

A. Yes, that is true.

Q. You have not been retained in a professional capacity by any dairy?

A. That is correct.

[fol. 174] Q. Are you familiar with any literature in the field of distribution costs in the dairy industry?

A. No.

Q. You would not consider yourself an expert on dairy distribution costs?

A. No, I would not.

Q. Now, Mr. Sawyer, going to Paragraph H of your proposed direct testimony, which begins on the bottom of Page 17, in which you are discussing transportation costs and the dual functions performed by the route drivers, when the driver is engaged in the physical movement of milk from the dairy to the customer, would you consider him engaged in the transportation function?

A. When the driver—will you restate that, please? I was trying to find something here that I thought you were reading.

Mr. Stevens: Read him the question, please.

(Question read by the reporter.)

By the Witness:

A. Yes, a certain element of that is necessarily, it seems to me, a part of transportation.

[fol. 175] Q. The first physical movement of fluid milk products from the platform to the customer, and that is part of the transportation function?

A. Yes, it is.

Q. Now, when the driver takes a case of milk from his truck and transports it to a store, is he still engaged in the transportation function?

A. There is an instance, and a rather good example, I think, of where you might take one view if you were making a decision regarding the distribution cost elements in ordinary accounting procedure, and another view if you were drawing a distinction between cost bearing upon one class of customer and another, and that is an important distinction in these Robinson-Patman approaches.

It appears that one of the distinguishing features between these two classes of customers is the fact that in one case he goes into the store and in another case he does not, so that I think you would have to draw a different conclusion.

That distinction would have no significance if you were computing all of the costs of the entire route and not try-[fol. 176] ing to split as between the two classes of customers.

Q. Well, let us approach it this way, Mr. Sawyer. Let's assume that we had no chain store customers and we were only considering the problem of making a cost analysis among various sized independent store customers, and so that in all instances we might assume for purposes of our discussion that the driver would be carrying the case of dairy products into the store;

On such an assumption would it be proper to treat this additional movement as part of the transportation function?

A. That additional movement under that assumption of facts would draw no distinction as between these customers.

Q. As between the chains and independents?

A. Well, you were saying when we were dealing with various classes of independents.

Q. Right.

A. Assuming you had a price differential between the various sizes and if the sale function was the same for all of those classes, then there would be no particular point in dealing with it separately.

Q. There would then be no particular point in dividing [fol. 177] between the transportation function and this other function—I think you call it the service function?

A. Yes. You do not chop up something you do not need to chop up.

Q. So that if we were dealing with a class of customers where it was the regular practice to carry the milk into the store and go back for an additional load, and so forth, you would think it would be proper to treat it, the entire activity of the driver, as one function?

A. Yes. It would not make much difference what you called it.

Q. The only time in which you feel it is proper to make an objection to that approach is where you have a class of customers where the milk is left at the back door instead of brought inside?

A. Well, first of all, you have got to have a price distinction between those.

Q. Yes, of course.

A. Then you move in to find out what procedures, or "methods," as the Act described them are employed.

Q. But then confining ourselves again to the situation where we do not have chains and we have in-store delivery [fol. 178] for all customers and in-store services for all customers, in that situation do you think it would be appropriate to treat the entire activities of the driver as a single function?

A. If there is no difference.

Q. Well, there might be differences among the independent stores?

A. Yes.

Q. But as a regular matter, perhaps not invariably, but as a company practice, the milk would be delivered into the store for substantially everyone in that class?

A. Yes, yes.

Q. So that insofar as your development of a distinction between a transportation function and a service function in this material is concerned, you were intending that to have particular reference to a distinction between method of serving chains and method of serving independents?

A. Yes.

Q. You were not intending that to be a criticism of a costing approach which would be designed merely to analyze differences among independent customers?

[fol. 179] A. No, I do not think so.

Q. To the extent that the approach in the Bowman Dairy Company study has been used as analysis of cost among independent customers, as distinguised from independents versus chains, did you not intend any criticism of the study?

A. No.

Q. Now, going to the problem where we do have both independents and chains, and assume that the driver still has to move his merchandise from the truck, at least, to the back door of the chain, he has to lift it out of the truck, would you say he is still then engaged in the transportation function?

A. I suppose the point of difference, where the point of difference emerges as between the chain and——

Q. And the independents.

A. (Continuing)—and the chains, that is what the whole approach is for, it does not matter what you call it.

Q. In other words, your division into two functions is merely intended to be defined by the point at which there is a difference in the method of service to chains and the method of service to independents?

[fol. 180] A. Yes, that is where the different method of delivery stems from.

[fol. 181] Q. Well, now, supposing that even in case of a chain it is necessary to unload the truck and carry the case of milk to the back door, a few yards. I take it, then, that is still part of the transportation function?

A. Yes, I suppose it is.

Q. And if several cases are carried at one time on a dolly, for example, you would then say that the use of the

dolly and the cost of carrying a dolly on the truck would be part of the transportation cost?

A. I suppose it would. If that would be common to both classes.

Q. That would be common to both classes, that's right. Now, supposing in case of an independent, large independent, the dolly is used to haul the merchandise right into the store, bringing empty cases back out, so that the dolly would be, in addition, used for some functions which were not common to both classes, then how would you consider the charge of using the dolly?

A. Well, it illustrates one of the difficulties of a situation of this kind. First, you must determine that you are up against a distinction in methods of delivery that gives rise [fol. 182] to some cost differences, and then you work out a reasonable method of allocation, where you are going to cut off.

Q. And your problem, I take it, is to find some kind of a common denominator that will enable you to proportion these costs?

A. Yes, it is illustrative of numerous rather annoying problems that you run up against in making these classifications.

Q. I suppose you find the problem of proportioning the cost of laundering the uniform of the driver, who supposedly must maintain proper appearance in both kinds of stores, and particularly in the store of the independent, a cost which would be particularly difficult to apportion without reducing it to some common denominator?

A. Whether that would contribute to the distinction—I would think that would be the same regardless of the store.

Q. Now, in Paragraph J, again on page 18, you refer to the grouping of the results of time studies in the customer or discount classes, the usual rules relating to proper averaging should be observed; that is of homogeneous classes. What classes would you use in grouping these cost elements in the Bowman discount schedule?

[fol. 183] A. Well, I don't know as I am classifying here. I am merely stating a general principle. I am not criticizing your classification. I am referring indirectly to those standards which have been observed by the Commission,

I think expressed by Commissioner Freer in detail form; that the Commission itself in its orders has followed that fairly consistently.

Q. And I take it the different classes that you are referring to are the different classes that would appear on the discount schedule?

A. Yes, there must be a price difference to have any significance.

Q. Would you consider a discount schedule which had a very large number of brackets, each slightly graduated to the next, a more equitable discount schedule than one which had a smaller number of more sharply graded brackets?

A. There again you must of necessity look at the facts. I recall one schedule which I was examining some years ago, in a totally different industry in an effort to see what distinction I had a tabulation run of all of their customers, ranging from those who purchased, we will say, two million dollars worth of goods per year, down to those in the five hundred dollar class. This is the only example in my [fol. 184] experience that I have seen come out this particular way. But from five hundred dollars to two hundred fifty thousand dollars there was not a fifty dollar difference between one customer and the next one. Above two hundred and fifty thousand dollars and one million dollars there was not more than ten thousand dollars difference. With a situation like that it is virtually impossible to set up a graduated scale. It is a continuous——

Q. Yes.

A. All the way through, and it is something between that and the situation that is confronted in, we will say, the can cases, where they had just the opposite. They only had three customers in one bracket and thousands of customers in the other bracket, so it is a compromise between those two situations. It depends on just what the facts are in a particular situation. You are going to have a closely knit set of brackets or one which spreads. You have got to make your customer analysis; you have got to see where these breaks are.

Q. Of course, assuming that you followed the cost curve, of course using the example you gave in analyzing it out, I take it you would consider it would tend to be preferable [fol. 185] to add additional brackets?

A. Yes; well, you don't even consider cost up there. You are considering what the amounts of purchases are.

Q. Now, on page 18, in Paragraph K towards the middle of the paragraph, there is a discussion of the central office problem again, and you say, "Many of the cost involved under this heading may readily be classified as of proportionate application to all discount classes and therefore outside of the scope of the justification study."

Do you have in mind any costs which could be so classified in the dairy industry?

A. Well, it would depend upon the facts. It might be, and I don't know what the situation is in the dairy industry or why it should be any different than any other, but it might be that making invoices, for instance, would be the same for all classes of customers. And, therefore, no real differential as between them. You have got to look at each one of these; there is no set of rules regarding this.

Q. Supposing you had the salary of the president, who might devote himself to work in connection with all classes. I suppose you might find a basis for allocating his salary? [fol. 186] A. Under some circumstances, yes. You would have to look into it. You couldn't just dismiss it because he was president.

Q. Now, if you were to include the salary of the president, how would you do it?

A. Not necessarily by any time study method.

Q. Well, I wonder if you would agree with a statement which Mr. Bergfeld has made in the paragraph on page 29 of the Bowman pretrial order, in which he is referring to this general system and he states:

Mr. Long: May I see that, John?

By Mr. Stevens:

Q. "In allocation of time spent by all central office personnel on transactions of chain stores and of independent stores would be arbitrary and could result in inequitable costs even if each person was questioned individually, say."

That the nature of your reluctance to use time as a method of allocating the central office salaries?

A. Yes, because I don't think time is the measure of it in most instances where you are dealing with that classification of employee.

Q. What are the various measures which you think might [fol. 187] appropriately be used in this category?

A. If we can say, this officer is an employee, I think we are—I can make it more concrete. One important measure is the calibre of the man employed. Let me illustrate: If the president or manager of a division has among his duties the obligation to obtain and to maintain a large customer—you don't have to designate it as a chain, but if there is a large customer or a group of large customers constituting two-thirds of the total business of the division, it should be examined, as a matter of fact, as to what effect that has, that obligation has, upon the compensation paid that person. If he hired merely to manage a group of salesmen, or if two-thirds of his obligation to maintain two or three customers; and in order to carry that on you have to reach out and pay that man a substantial additional salary to get the caliber of man you need.

[fol. 188] Q. In that type of situation if the additional compensation—I phrased that poorly.

If there were no additional compensation or special compensation dependent upon any such special duties with respect to large customers——

A. Yes.

Q. —then your reasoning would not be the same, I take it?

A. That is, of course, as part of your appraisal of the situation, but I feel strongly that where those facts exist where two-thirds of the division's or company's business comes from a small group of large customers who purchase at a differential, that there should be an affirmative showing that there is no effect upon the compensation but otherwise there is a void in your justification.

Q. That would become less important as the proportion of this type of business became smaller?

A. That is true, of course.

Q. So that if larger and larger proportions of the time were devoted to selling milk to restaurants or to retail customers on home delivery routes or selling ice cream and

that sort of thing, that would all tend to minimize the [fol. 189] significance of this factor?

A. Yes, although the distribution of time is not as important.

Q. As responsibility?

A. As responsibility, right.

Q. Mr. Sawyer, in this approach who is it that is to make the appraisal of this division of responsibility of the executive?

A. In one case in which this problem is of prime importance the decision would be made, will be made by the executive committee of the corporation after I have laid before the committee what I regard as my findings of fact.

Q. Have you by any chance read the proposed testimony of Professor Taggart in this matter?

A. Not until it arrived on my desk in this form.

Q. I understand. I direct your attention to Paragraph C of his testimony, beginning on the bottom of Page 6 and carrying over to the top of Page 7. I would suggest that Professor Taggart apparently feels that the apportionment of executive time from among customer groups would be a possible method of allocating this element of cost?

[fol. 190] A. Yes. I don't rule that out where those are the facts.

Q. You did not mean to rule out time as a method?

A. No.

Q. You were merely indicating that there are reasons why time may prove to be unreliable?

A. Yes.

Q. Therefore, while you personally might not select time in a particular case?

A. I was emphatic on that because I had experience with it in a number of situations where that was most important.

Q. Now, if you did have a case, or I should say a situation in which for one reason or another time did seem to be the best you could do under all the facts and circumstances, would you also apportion the costs of maintaining the executive's office, his stenographer's salary, his furniture and the rent for his office on a similar basis?

A. All of those things would have to be taken into consideration.

Q. That would be on the theory that the facilities and

other elements which are necessary to provide the environ-
[fol. 191] ment in which the executive could perform his job should be allocated on the same basis as his own salary should be?

A. Travel, entertainment costs and things of that kind.

Q. Your answer is yes?

A. Yes.

Mr. Stevens: I have very little more, and if you would prefer to stop, I do not care. I think fifteen or twenty minutes, and I will be through.

Mr. Long: We can make a break at the end.

Mr. White: I am going to ask my questions after he gets done.

Mr. Stevens: I am very nearly done. Maybe we can finish and save Mr. Sawyer the afternoon.

(A recess taken.)

[fol. 192] Mr. Stevens: Mr. Reporter, will you mark this as Sawyer Exhibit No. 1 for identification, it being a typewritten excerpt which I made from an article entitled "sacred cows in accounting" by Herbert F. Taggart in the Accounting Review Volume 28, No. 3, July, 1953. Of course we can verify it later; rather than reading it into the record I will ask Mr. Sawyer to look at it and ask if he will agree that in the hypothetical example presented by Professor Taggart in that article that the commission should not be charged directly to the customers.

(The document was marked as requested.)

By the Witness:

A. I have read this during the intermission and I assume you refer to the example on the ——

By Mr. Stevens:

Q. Universal Coffee Company.

A. Universal Coffee Company which appears on the, I think it is the sixth page.

Q. That is what I intended to say.

You would agree that in that type of a situation that the commission should not be charged directly to the customers?

[fol. 193] A. That illustrates very well how the necessity of examining these situations and reacting to the reality of what you see and I would agree with the result which Professor Taggart indicates.

Q. And is it true, Mr. Sawyer, that in your experience with private business of the various kinds that it is not unusual for companies to allocate certain very profitable elements of business to a salesman and impose on him the duty of also calling on less profitable accounts so that in effect the higher earnings he gets from some business is counterbalanced in part by the low earnings he gets from other business? The over-all picture is fair and equitable?

A. Yes. If a salesman is given a territory or a route, something of that kind, it is not uncommon to have it include accounts of varying magnitude.

Q. And if he is paid on a commission basis accounts from which he will in effect be overpaid and other accounts from which he would in effect be underpaid?

A. Yes. That is inherent in the nature of that form of compensation.

Q. The form of compensation, of course, is the commission type of payment?

A. Yes, that is true.

[fol. 194] Q. Oh, yes, on page 20, Paragraph L at the top of the page, you indicate that on certain assumptions which we have previously covered and I won't review those, that it might be proper, the commission costs might be allocated to each customer on a volume basis unless it could be demonstrated to be unfair or inequitable.

I wanted to understand the method of allocation which you were suggesting there on the assumptions which have previously been identified.

Are you saying that each route should bear the commission cost of the driver of that particular route?

A. I don't know whether I am dealing with routes here or with a part of the branch or division, whatever it is called.

Q. You did not intend to make a choice between those two approaches?

A. I am thinking here of using the word volume, the volume purchased by one class of customers as against another. I don't know whether you pick up that commis-

sion of cost on a route basis or not right now. It would not seem to me to be too important. Ultimately you arrive at the volume purchased by customer class A and the volume purchased by customer class B and you distribute on that basis.

[fol. 195] Q. Then you did not intend to refer to volume purchased by each customer but rather volume purchased by each customer class?

A. Each customer class I think would be a better wording.

[fol. 196] Q. Are you able now, on the basis of what you recall of these documents and material which you examined before preparing this proposed testimony, to tell me what are the other respects that you are referring to in the first three words of Paragraph M on page 20?

A. Well, I have pointed out one or two specific things in previous paragraphs.

Q. I am thinking about if there is anything else that you had in mind that you can now recall that should be brought to our attention?

A. From all of the documents that I examined relating to Bowman, I gathered from what I read that elements of the study were originally designed for purposes of personnel control and other management uses not solely for the purpose of a cost justification study.

The language did not read that way. Maybe I am making an unfair criticism, but that is the way the language used reacted upon me.

I am trying to say here that while Robinson-Patman's study may serve in part the purposes of management study, I do not think the reverse is true. Usually management study has quite a distinct difference.

Q. I take it that what you are saying is that it may have been adequate for management purposes but——

A. But not for an adversary proceeding.

[fol. 197] Q. May I summarize it this way, that you were not intending to criticize it insofar as it may have been used for management purposes?

A. No, I am certainly not doing that, but when you have adversary proceedings you have, I think, different standards of proof, and these did not ring along those lines.

Q. They rather rang along the management lines?

A. Management lines.

Q. Then in the very last sentence of Paragraph M, it is rather carefully worded, that the, "Data seems to indicate results which are inconsistent."

A. Yes, because I did not want to put myself in a position of having carefully evaluated these things. That would have taken many months' study.

Q. You would not be in a position to say categorically that there were definite inconsistent results?

A. No. Again, it is something that I gather from the reading of this material.

Q. More in the nature of an impression on the basis of the limited time you had to review the material, rather than a firm opinion after the length of time you would usually devote to this kind of problem?

[fol. 198] A. Yes, I think you put it correctly.

Q. Well now, I have just one more short sentence to read from Professor Taggart's Standard Brands article because I have a feeling that you may be able to pick up the context, but if you can't, I will give you the publication.

One sentence from the article on Page 250 after a discussion of the method of proportioning transportation costs that was followed, he states:

> "Standard Brands' accountants could easily have found authority in Government publications and elsewhere for charging all route selling and delivery costs to customer brackets on the basis of stop time."

That is the whole quote. Would that approach be one which would be not unfamiliar to you, Mr. Sawyer?

A. Using the——

Q. Stop time?

A. Stop time; that is appropriate under some circumstances, yes.

Mr. Stevens: That is all I have.

[fol. 199] Cross-examination.

By Mr. White:

Q. As we noted yesterday, there is a great deal of similarity between your proposed testimony with respect to Borden and Bowman, and am I correct that if I were to ask

you the same questions that Mr. Stevens has this morning, that insofar as they are applicable to your direct testimony as to the Borden Company, that you would give the same answers?

A. Yes, I would.

Q. I wish you would please turn to Page 16 of the proposed Borden order, rebuttal order.

A. Yes.

Q. Which is part of the list of periodicals that you have written for.

A. Yes.

Q. You notice the top one—referring to a round table discussion of the Robinson-Patman Act found in the Year Book of the National Association of Cost Accountants for 1939.

A. Yes.

Q. I hand you that publication for the year 1938, Mr. Sawyer, and ask you if that isn't a mistake and actually you are referring to the discussion that appears beginning [fol. 200] on Page 217 of the Year Book of the National Association of Cost Accountants for 1938?

A. I think that is a typographical error. The year should be 1938 and not 1939.

Mr. White: Thank you. That is all.

Mr. Hart: How long have you got, Bert?

Mr. Long: I have got about five or ten minutes.

Mr. Hart: Well, let's finish it up.

Mr. Jinkinson: Then we won't have to come back.

Redirect examination.

By Mr. Long:

Q. Mr. Sawyer, I think you have clarified this matter of generally your discussions with Mr. Woolley in the examination by Mr. Stevens, but I wonder if in reference to your answers to Mr. Ball yesterday if it is your recollection that you may have received as a part of the handing over of the data and the formulation of the issues here, some expressions of viewpoint from Mr. Woolley at the times he called on you?

A. Yes, I did. I think it would be difficult to explain the [fol. 201] issues in a matter of this kind without revealing some of the opinions that might have been formed by Mr. Woolley.

Q. And did Mr. Woolley make any attempt to influence your opinions?

A. None whatever. Whatever impressions I got as to what his feelings would be one way or the other on this was merely inferred from his descriptions of the material and the issues in the case.

[fol. 202] Q. And the proposed direct testimony contained in the Borden rebuttal order which is before you which you propose to give is your own independent opinion with reference to this case?

A. Entirely so.

Q. Do you have any personal interest in how this lawsuit turns out?

A. I have none whatever.

Q. Now, as you were read excerpts and passages from Taggart Exhibit 1, which is the cost justification report of the Taggart committee, speeches, articles, expressions of your views with respect to other cases, did you note anything inconsistent therein with your proposed testimony here with respect to the Bowman and Borden case?

A. No, I did not.

Q. I wonder if you would also tell us again—I think you have done it, but maybe again for the record, what was the general purpose of Taggart Exhibit 1, the Taggart report?

A. The general purpose of that report, as the committee understood it, at least as I as a member of the committee understood it, was to provide the Commission itself and the accountants and lawyers with a set of principles [fol. 203] which might assist them in meeting the requirements of the proviso of Section 2-A.

It was not to be regarded as a manual of practice because of the great diversity of business organizations and business methods and business situations which become involved in the Robinson-Patman Act. We tried to evolve a statement which could be easily read and brief and yet sufficiently well rounded as to give accountants and at-

torneys on the Commission itself a starting point in the analysis of these situations.

Q. Do I understand, too, from your testimony that there is enough flexibility in here so that it can be applied to many factual situations?

A. Yes, necessarily so. You cannot have rigidity in a matter of this kind.

Q. Now, is it your opinion, Mr. Sawyer, that in making any preliminary considerations as to what method of allocation of cost factors should be made, that all the relevant cost elements must be factually found?

A. That is true.

Q. And after they are all found, what would probably be the next step of the cost accountant preparing a Robinson-Patman cost study?

A. Well, these findings certainly must be integrated [fol. 204] and brought together so there can be a final comparison between the magnitude of the discount and the magnitude of the savings.

Q. Now, do I also understand from your answers to counsel for Bowman and Borden that an essential step that a cost accountant would want to take here after he has found the cost factor would be to adequately analyze them with reference to the distribution system that is in question?

A. Yes, they should analyze the presentation so that they are understood by whoever is going to make the final appraisal of the effort of that justification.

Q. Should they be in such a form that they could be reconstituted or rearranged, depending on whether there might be alternative methods of distribution costs?

Mr. Hart: Oh, I object to that. I think that is going beyond the scope of the examination of this witness on his proposed testimony.

[fol. 205] Mr. Long: Well, I think the record may show the witness has testified with respect to a duty incumbent upon the proponent of these Robinson-Patman cost studies to have all the facts found, the data assembled in such a way that an expert could rearrange and reconstitute the matter following an alternative service unit, if one is appropriate.

Mr. Hart: That is a point with which Mr. Ball made a rather extended objection and I just am renewing it. If the witness would like to answer it, I would be very happy to have it.

The Witness: Would you like me to answer?

Mr. Long: Yes, if you would answer it, please.

The Witness:

A. Well, I have a feeling that the proviso imposes the obligation of presenting the matter fairly so that it can be adjudicated properly. The fairness includes a consideration of alternatives, or some indication of what the result might be if the alternative had been followed.

[fol. 206] By Mr. Long:

Q. Now, do I take it too along that same line that unless the alternative cost factors were developed and available for examination, that in this particular case both as to Bowman and Borden you would prefer that the commission of drivers be allocated on a volume basis?

A. Well, I think I covered that fairly well in my earlier testimony, that based on the facts I have seen, that it would seem to be logical, and I think if that was not used, there should be an explanation of the reason.

I think I indicated the circumstances could be such that that method might not be the most desirable.

Q. Now, if the commission is not a volume incentive payment and is something else, is it not incumbent upon the proponent of this Robinson-Patman Act to develop those facts to show it is not a volume incentive basis?

A. Yes.

Mr. Hart: Well, there I want to make the objection that you are asking him a purely legal opinion.

[fol. 207] Mr. Stevens: Let's add to the objection he is also leading his own witness.

Mr. Long: Well, I am referring to the cross-examination testimony.

By Mr. Long:

Q. Would you answer now?
A. I thought I answered.
Q. Did you? Oh.

Mr. Hart: He did say, as a matter of fact.

By Mr. Long:

Q. Would your answer, with the objection of counsel, be the same to a question as to the duty of the proponent here of these cost justification studies to develop the facts, if they are facts, having a bearing on this problem of the volume incentive payment in commissions with respect to the composition and planning of routes?

Mr. Hart: If you are asking me if my objection will be the same, it will be.

By Mr. Long:

Q. Or the limitation on the maximum number of points that a driver on one of these milk routes can handle; would your answer be the same?
[fol. 208] A. Yes.
Q. Now, I think it is quite clear as to what your principles are with respect to the consideration of the costs of the executive officers of the Bowman and Borden Company, their soliciting, maintaining and obtaining chain store accounts. In your answers to Mr. Ball yesterday I took it that it was not too clear about the general office expenses, including billing, credits and checks with respect to your decision as to whether those ought to be allocated along with the time of the executive officers obtaining or maintaining chain store accounts.
Would you comment on that?
A. Yes. I think that area of expenses should be examined. It is possible that they fall into the category of those things which I mentioned that create no distinctive costs as between the two classes of customers.
[fol. 209] On the other hand, I think anyone who has worked in this area knows that a large volume of either chains or independents, particularly chains, impose upon

sellers obligations in the form of special billing, special statistical reports as to the purchases of their own branches in the various parts of the United States, and whatever the market area is that is involved, and other obligations that call upon the central office clerical force to exert special efforts in that regard.

I think it was incumbent upon the proponent of a cost justification study in the area particularly to ascertain whether such additional costs are involved and to state clearly that that study has been made and that no such burdens are assumed if that be the situation. In other words, an affirmative explanation rather than just an omission of that is required.

Q. You just testified on cross-examination in response to questions by Mr. Stevens with respect to subparagraph M here of your testimony on page 20 of the Bowman rebuttal testimony.

A. Yes.

Q. Would you say that the same principles are involved in your opinion of the Borden cost study?

[fol. 210] Mr. Stevens: This I object to as being beyond the scope of the cross-examination.

Mr. Havemeyer: Yes, it is beyond his examination on the trial order.

By the Witness:

A. Well, I will answer in this way, that Paragraph M represents particularly my impression gathered from the Bowman material; I did not have similar impressions with the Borden material.

Q. Now, if the record does show that Borden also made use of a management cost survey, in the formulation of their cost justification defense, would the same principles be applied to that?

Mr. Stevens: Same objection.

By the Witness:

A. Whatever I said with respect to the use of management studies would apply, yes.

By Mr. Long:

Q. Now, I wonder, Mr. Sawyer, here in response to the question of Mr. Stevens in which he hypothesized with respect to the milk wagon driver carrying the milk into the store, I wonder, would you say categorically that that could only be allocated as a part of the transportation function of the driver?

[fol. 211] A. This is an area where it is difficult to be categorical. I think you would have to have a fair reaction to whatever the facts were, and just where you would cut off, as I think I said in response to Mr. Steven's question, would be a question to be decided on the basis of the particular facts.

Q. But, if——

A. It might be either way, you see.

[fol. 212] Q. But if the record did show that such a cost factor was optional to the store customer and that the stores themselves might come out and carry the milk in, would that have a part in your judgment as to whether that is a part of the transportation function of the driver?

A. Yes; in a complex state of facts as you are dealing with here, you would have to take into consideration all of those things.

Q. I wonder if you would for the record again state the import or part that your direct testimony you think played as to the analysis of the cost justification defenses of Bowman and Borden?

Mr. Stevens: May I have that question read?

(Question read by the reporter.)

Mr. Stevens: I will object to that on the ground it is asking the witness to state what he thinks the effect of this will be upon the Court, which is clearly invading the province of the Court.

By Mr. Long:

Q. Let me ask you for expedition, did you intend this [fol. 213] to be just principles that might be applied to these two cost studies, the Borden and the Bowman?

A. Yes, I did.

Q. And you adopt them as your testimony, whether they might have appeared earlier in an article that you wrote or speech that you made?

A. Yes, I do.

Q. Now, I am not clear, but I think it was in response to a question by Mr. Stevens in respect to the Standard Brands case, referring to Page 16 of your proposed testimony, I believe it was 16-C that Mr. Stevens was inquiring about.

What would be the effect on 16-C exerted by the fact that this case is being handled through pre-trial conferences and stipulation of facts?

A. I do not think you can classify this particular method as the normal method of stipulation. What I had had in mind was what sometimes happens where there is no contest as to the contents of the justification study. That has happened in, oh, a number of occasions in connection with cases brought before the Commission where the proponent has brought a study in and the Commission accountants have raised no objection.

The matter has gone into the record then without any [fol. 214] consideration, both sides accepting what was shown, and I do not think that is quite the situation here. This is more in the nature of a courtroom approach to the problem.

Q. Now, no matter which way it is tried, in your opinion a cost study should contain a consideration of all relevant elements?

A. That is right.

Q. Well, is it also important in your judgment that the relevant cost factors be correctly stated and rectified?

A. I think that is axiomatic.

Q. Now, if, for instance, the solicitors here in both the Borden and Bowman situation have little if any duties in connection with chain stores, would you consider it proper that the time of the solicitor who performs virtually no duties or time with respect to chain stores also be allocated to the chains?

A. I think I indicated earlier in my testimony that every effort should be made to allocate items of that kind correctly, unless it is shown to be a completely unreasonable task.

[fol. 215] Q. Mr. Ball yesterday read, among other things, from the Taggart Exhibit 1, Item 7 on page 11 in the first paragraph, but did not read the second paragraph. If I may, I am going to read that to you now:

> "At the same time—" this was the classification of customers, orders, commodities and transactions.
>
> "At the same time the privilege of classification is not a license to disregard sound business and accounting concepts. In order to become the basis for cost justification of price differentials, the classification should be logical and should reflect actual differences in the manner or cost of dealing.
>
> "Great care should be taken in establishing price classes to make sure that all members of the class are enough alike to make the averaging of their costs a sound procedure."

I gather you agree with that?

A. Yes, I agree with that.

Q. Now, on page 12 of Taggart's Exhibit 1 under the title of "Sampling," subsection 8, there is in the second paragraph of 8 this sentence:

> "The basic requirement for valid sampling is that [fol. 216] the sample be truly representative of the whole."

You are in accord with that?

A. Yes, I am.

Mr. Long: That is all I have.

Mr. Stevens: Recross.

Recross-examination.

By Mr. Stevens:

Q. In response to Mr. Long's redirect examination, Mr. Sawyer, you indicated that you felt that the reasons for not charging commissions directly against customers should have been set forth.

A. Yes.

Q. Now, would you feel that there was any obligation upon a defendant in a case such as this to set forth such

reasons if the plaintiff has stipulated that it was not questioning that item of cost?

Mr. Long: We object to that. If I understand your question, you are misstating the record.

Mr. White: That is a hypothetical question.

By the Witness:

A. If that was the situation there would be no particular point.

Q. There would be no point setting them forth if they [fol. 217] indicated they were not challenging them?

A. No.

Q. You realize now, do you not, the commissions are part of the drivers' compensation?

A. Separate compensation.

Q. Yes, but part of the drivers' compensation. Now, I take it the Government at no time read to you the portion of the record which appears in Paragraph 28, page 20 of the Bowman defense pretrial order, which reads as follows—this is part of the stipulated record, and I did not misstate the record:

> "Plaintiff would accept an apportionment of drivers' compensation among different customers on the basis of drivers' time."

I show it to you and ask if I read it correctly?

Mr. Long: I think the record ought to show that is an item we took up in a conference with Judge Campbell and that matter was left open. It is true there was a tentative agreement on that, but later on we brought that up and I had consultations with Bowman's counsel and we brought it up before the Judge and he left that open to make a distinction between the basic wage and compensation.

You are misstating the record.

[fol. 218] Mr. Stevens: But that was done after Mr. Sawyer was asked for his opinion, and Mr. Sawyer was not shown this statement and he should have been if he was going to express himself intelligently on this subject.

Mr. Hart: Let's leave it that after all Judge Campbell is going to have to decide that.

The Witness: I was thinking the same thing.

By Mr. Stevens:

Q. Well, I just want to be clear on this, Mr. Sawyer, that at the time your opinion was being asked if the defendant was under the impression that no question was being raised as to the apportionment of commission expense, you would not say that at such time there was any duty to come forward with an explanation for the omission of that item, would you?

A. No, I think if both parties were agreed as to the acceptability of a particular thing, I would not have regarded it within the scope of my examination.

Q. Mr. Sawyer, the fact that a particular item of service may be optional in a legal sense or may in some instances not be performed would not be a reason for disregarding it if upon inspection you found that that item of service was [fol. 219] generally and customarily performed for a given class of customers?

Mr. Long: Well, now, of course, we object to that, because I do not think the record is straight on that, clear on that. If you want to make it hypothetical it is all right, but——

Mr. Stevens: I do not think it is hypothetical.

By the Witness:

A. Now, see if I understand this.

Mr. Stevens: Read him the question, please.

(Question read by the reporter.)

By the Witness:

A. That is true.

By Mr. Stevens:

Q. Then one further question. Referring to Paragraph C on Page 16, I think you indicated that you would agree that that paragraph would not be applicable to the type

of Federal Trade Commission proceeding in which the cost study was stipulated in the manner in which you indicated on redirect examination, is that correct?

[fol. 220] A. Yes, where there is complete agreement between the parties, no contest.

Q. Now, when you say complete agreement between the parties in the FTC proceedings which you refer to, do you mean complete agreement as to the admissibility of the study or do you mean complete agreement as to the validity of the study?

A. Agreement as to the validity of the study.

Q. In other words, that there were cases where the Federal Trade Commission was conceding that the cost defense was a valid defense?

A. Yes, they have done that in a good many cases.

Q. And then on the item of collection expense which Mr. Long asked you about, if it could be shown that that item is offset by another cost, such as the cost of sending rebate checks to independents, which would be solely applicable to independents, would it in your opinion be proper to eliminate both items if the objective of the study was to justify a chain discount?

A. Yes, or another thing, and perhaps preferable, is to put both in, one plus, one minus.

Mr. Stevens: That is all.

[fol. 221] By Mr. Hart:

Q. Mr. Sawyer, you appreciate in this case, it being stipulated in the pretrial order, that all of the work papers of Stevenson, Jordan & Harrison, who made up the cost study for Bowman Dairy Company, all of the Bowman accounting records, and so on, for the period of time covered in this cost study, have been available to the Government or anybody they chose to have look at them at any time?

A. Yes.

Q. There has been no reservation on our part as to any of Stevenson, Jordan & Harrison studies such as may have been expressed by the Government in reference to Mr. Woolley's portion of it?

A. No.

Q. Do you also appreciate that these cost studies on behalf of both companies were instituted from 1948 on and that they have been under constant indictment or suit under portions of the Robinson-Patman Act ever since that time?

A. I gather that there was some such history from some of this material.

Q. And knowing that to be a fact, would that somewhat temper your impressions that you expressed in Paragraph [fol. 222] M on page 20 of the proposed testimony in the Bowman rebuttal order, that they were management studies?

A. Well, I still stand by this. I have no other basis upon which to stand, what I have expressed in Paragraph M, as I think I made clear to Mr. Stevens and, it is an impression which I gathered from the reading and I did not intend it to be anything else.

Mr. Hart: That is all.

Recross-examination.

By Mr. White:

Q. You did not mean to suggest, Mr. Sawyer, that it was impossible for a management study to comply with the requirements of the Robinson-Patman Act accounting-wise?

A. No, I did not.

Q. You would have to examine the particular management study in order to see whether in your view it complied with the Robinson-Patman accounting principles?

A. Yes. You have to define first what the management objective is in setting up a management study. It may or may not serve the purposes.

Q. That is right, you would have to examine the study [fol. 223] itself to see whether it adequately reflected the costs involved?

A. Yes.

Mr. White: That is all.

Mr. Long: I have nothing further.

Mr. Stevens: That is all.

Further Deponent Saith Not

[fols. 224-225] Notary Public Certificate (omitted in printing).

[fol. 225a] Stipulation as to signing depositions (omitted in printing).

[fol. 226] SAWYER DEPOSITION EXHIBIT NO. 1

Excerpts from Article: "Sacred Cows in Accounting"

By Herbert F. Taggart

The Accounting Review, Volume 28, No. 3, July 1953

[fol. 227] At page 313, Professor Taggart states:

"The sacred cow in accounting is a belief or doctrine which is accepted without critical analysis and which, like the Indian cow, it is sacrilege to destroy. It is based, not on logic or on any necessity of record keeping or financial presentation, but merely on tradition or blind acceptance of what has been.

"Unlike the universal (among Hindus) acceptance of bovine sacredness, no accounting sacred cow is the subject of universal acceptance among accountants. Each accountant has his own collection of such irrational beliefs. Some are more widely held than others. Since the assortment of such doctrine is so heterogenous and so personal, perhaps the best definition of the sacred cow in accounting is a purely personal one: It is what you believe and I don't, or vice versa."

[fol. 228] At page 314, Professor Taggart states:

"Accounting textbook writers are as apt to own a herd of sacred cows as are other accountants. No one is immune. Among the illogical aspects of textbooks, none is more irritating to the conscientous teacher than the two extremes of attitudes toward the multiplicity of solutions to nearly every accounting problem. Some textbooks blandly ignore the fact that there are nearly always several approaches to any given accounting situation."

[fol. 229] At pages 314-315, Professor Taggart states:

"A sacred cow which leads us all astray from time to time may be designated as the belief in objectivity as an infallible accounting guide. The motto is: 'things are what they seem to be.' Followers of this doctrine perform accounting operations in accordance with outward appearances, with little or no inquiry into inner truths. Familiar examples of accounting practices based on this tenet are the evaluation of assets acquired through security issues at the par or stated value of securities, and the treatment of treasury stock as an asset.

"The area of cost accounting is peculiarly subject to this approach. Cost assignments and allocations are all too often made on the basis of obvious factors, easily noted and measured, without an examination of the truly relevant facts.

* * * * * * *

"So important is this point that another example seems desirable. In the field of distribution cost analysis are found some of the most perplexing of cost accounting situations. Joint costs are particularly prevalent. In the allocation of salesmen's compensation among products and customers it is generally agreed that time spent, if ascertainable, is an important factor. The measurement of time of salesmen is a matter of no small difficulty, and resort is therefore had to other expedients, such as the unweighted number of calls in the case of customer analysis or gross margin in the case of product analysis. Where salesmen are paid on a commission basis, almost all writers on the subject seize upon the commissions as the ideal basis for cost allocations. It is assumed that outward appearances furnish an entirely adequate basis for solving a complex problem.

[fol. 230] "Assume, however, that the Universal Coffee Company, which pays its salesmen a flat 5% commission on all sales, follows the policy of requiring them to call on all grocers, however large or small, and wherever they may be found, in order to get truly universal distribution for its 'Universal' brand of coffee. Salesman A calls on Joe's Supermarket, located in the middle of town. Joe is an old customer. He does not need to be educated in the merits of

Universal, and needs no merchandising assistance. He buys 1,000 pounds a week at 50¢ a pound, and A's commission is $25. His weekly call takes 15 minutes, including travel time. The Hayseed Corners Grocery, on the other hand, is located ten miles outside of town, and five miles off the main road. Its capacity to sell coffee is limited and the proprieter is indifferent to the advantages of Universal. After A has driven out to this store and has spent a full half hour showing the storekeeper how to display Universal Coffee to better advantage, the weekly order is ten pounds, and the commission is 25¢. Query: Does it really cost 100 times as much to obtain the business from Joe's Supermarket as that from Hayseed Corners? The answer clearly is in the negative, and yet this is the result which is produced when the salesman's compensation is allocated by the obvious method."

[fol. 231] At page 319, Professor Taggart states:

"The final sacred cow here to be discussed is the aura of infallibility which sometimes, intentionally or otherwise, surrounds the accountant and his works. The notion is that accounting figures represent the ultimate in truth and reliability, that since accounting statements always balance to the penny they must be right, that 'actual cost' is really 'actual cost', and not merely an informed guess. Probably most accountants themselves would disclaim any such belief, but they are sometimes guilty of a pontifical attitude toward their work which encourages the spread of this opinion among the laity. They often talk and act as if they believed in the concept of infallibility."

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendant

Deposition of Otto F. Taylor—Filed February 13, 1959

The deposition of Otto F. Taylor, called by the defendants for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe, a notary public within and for the County of Cook and State of Illinois, in Room 257, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Monday, April 28, 1958, at 2:00 o'clock, p.m.

PRESENT:

Mr. Bertram Long, and Mr. Elliott Woolley, on behalf [fol. 2] of the Government; Mr. Stuart S. Ball, and Mr. H. Blair White, on behalf of defendants The Borden Company and Belmont Dairy Company;

Mr. Edward L. Hart, Jr., Mr. John P. Stevens, and Mr. Robert Havemeyer, on behalf of defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

[fol. 3] Mr. Long: I think in the beginning let the record show that this is a discovery deposition being taken by Borden Company and Bowman Dairy Company in United States of America against the Borden Company, et al, Civil Action No. 51 C 947.

The proposed direct testimony of the witness, Mr. Taylor, is contained in the proposed plaintiffs' rebuttal as to Bowman Dairy Company and The Borden Company.

OTTO F. TAYLOR, having been first duly sworn, deposeth and saith as follows:

Cross-examination.

By Mr. Ball:

Q. Mr. Taylor, you have with you, I take it, the draft of the rebuttal pre-trial order prepared with respect to The Borden Company by the Government?

A. Yes.

Q. Have you read over the draft of that stating what you would testify beginning with Paragraph 14 on Page 26?

A. Yes.

Q. Now, in preparation for the testimony that is set forth in this draft of a pre-trial order and testimony you are about to give, by whom were you reached with refer-

[fol. 4] ence to your testimony here in this case?

A. Well, the first person I talked to was Mr. Woolley.

Q. Can you fix the date of that conversation?

A. Sometime about a year ago.

Q. Can you be any more definite than that?

A. Sometime in May of 1957.

Q. Had you had any previous correspondence with Mr. Woolley or anyone else for the United States?

A. Yes, I think correspondence setting up an appointment, I think, for some day.

Q. That letter was over whose hand?

A. Well, I do not think I recall that.

Q. Whether it was Mr. Jinkinson's or Mr. Woolley's?

A. I do not recall.

Mr. Stevens: Mr. Taylor, could you speak a little louder, please?

By the Witness:

A. I do not recall whose signature it was.

By Mr. Ball:

Q. Do you recall what the letter said about the nature of the problem that was confronting the Government?

A. No.

Q. Where did Mr. Woolley see you?

A. In my office in New York.

Q. In New York City?

[fol. 5] A. Yes.

Q. And how long a visit did you have with Mr. Woolley?

A. About an hour.

Q. Did he discuss with you your appearance as a witness in this case?

A. Yes.

Q. And you agreed at that time to become a witness?

A. At the end of the conversation I agreed.

Q. What did Mr. Woolley say to you about the case at that time?

A. Well, he told me in general that it was a case that had involved issues other than Robinson-Patman issues and that at the present time the issues were Robinson-Patman issues. He told me also that there were problems connected with the cost of serving different store customers of The Borden Company and The Bowman Company, different types of customers, and it had to do with different elements of cost, particularly the compensation of drivers, and other costs connected with the delivery of milk to stores in the Chicago area.

Q. Did he indicate to you that he questioned the allocation of costs with respect to the compensation of drivers?

[fol. 6] A. Yes. He told me that he disagreed with the defendants' calculations of cost differences and the bases of those calculations.

Q. And what did he explain the reason for his difference was?

A. Well, he spoke of more than one difference. He spoke of a difference in Borden's case and the case of The Bowman Company, and he also explained the difference in the cost of transporting the goods, and also differences in the costs of serving the customer after the goods had been transported.

I believe those were the categories.

Q. Did he express to you his criticisms of the Borden cost studies and of the Bowman cost studies at that time?

A. Yes, yes, I think he did.

Q. Did he tell you something of the facts of the case?

A. Yes.

Q. And do you recall what he said as to the facts of the case?

A. Well, he explained to me in general and also submitted to me certain papers that he had.

Q. He submitted to you at that first meeting certain papers?

A. I assume at that first meeting. Then I saw him at [fol. 7] another meeting not so long ago. I am not certain whether it was at that meeting or a meeting in the early fall, in September, I think, that he turned over to me certain papers that would give me a view of the problem.

Q. Do you recall what those papers were?

A. The titles of them I do not recall. I do not recall the exact titles.

Q. Well, describe the papers as best you can. Put it this way; first, do you have any list or record of the papers that were furnished you?

A. No.

Q. Well, then, will you describe what it was that he gave to you?

A. I had a deposition of Mr. Bergfield, who I think was an expert testifying for the Bowman Company. Then there was an exhibit having to do with the method of cost calculations for the Bowman Company.

There was a transcript of testimony by a Borden employee by the name of Malone, M-a-l-o-n-e.

There was a description of costing methods, including time study that was made by the Borden Company.

Q. Do you recall the physical appearance of that particular report?

[fol. 8] A. I believe that that report was a photo offset report.

Q. Do you recall what kind of a cover it had?

A. No, I don't.

Q. Did it have a black cover?

A. I don't recall that. I think I would know it if I saw it.

Q. Do you recall if it had numbered paragraphs in it?

A. Yes, yes, I believe it did.

Q. Did it have any exhibits with it, documents?

A. Documents? No, I do not recall that.

Q. You were not furnished any of the reports made by the time study engineers?

A. No.

Q. Or any of the basic reports which were summarized in the documents handed to you?

A. No.

Q. Did you at any time ask to see that basic data?

A. No.

Q. Did Mr. Woolley give you any reports or comments of his own in writing?

A. Yes.

Q. In what form were those?

A. That was a carbon copy of a memorandum of Mr. [fol. 9] Woolley's in yellow paper, thin yellow paper, regarding his analysis of these cost studies, either both of them or one of them, I do not recall now which.

Q. Did that contain statements as to his knowledge or understanding of the facts?

A. Yes, yes, his view of them, I think.

Q. Well, did it contain statements of fact or only expressions of opinion, do you recall?

A. I think that was statements of opinion, a summary of his reaction to these cost exhibits.

Q. What did he ask you to do with reference to that report?

A. To read it.

Q. How big a report was that?

A. Oh, several pages.

Q. Twenty pages?

A. I should think less than that.

Q. Fifteen?

A. No, more than that.

Q. Single spaced?

A. Single spaced. That is just a recollection. It might have been different.

Q. Do you recall what was said in that memorandum?

A. Not specifically, no.

[fol. 10] Q. Well, to the best of your recollection, what did it say?

A. I have very little recollection, Mr. Ball, about that. It has been so long since I read it. It would be difficult for me to put into words.

Q. Now, do you recall——

A. I think I ought to answer your question.

Q. Yes.

A. (Continuing) I really ought to. I recall that Mr. Woolley was of the opinion that in separating costs of transportation between customers it was his opinion that using vehicle stops as a method of allocation was not the best method.

At another point he was of the opinion that summing up commissions paid on volume with compensation to drivers paid on time and dividing the whole on the basis of time was not the best method of dividing compensation of drivers, and that the two should be separated.

He also was of the opinion that the compensation of the drivers should be considered under two heads, one the service function and the other transportation function. That is as definite as I can be.

[fol. 11] Q. Did he raise any question about the classification of customers?

A. I do not recall that that was in there.

Q. Did he raise any question about the allocation of costs as between classes of customers, other than the ones you have mentioned?

A. Those are the only ones I recall now at this instance.

Q. Did he give you any documents purporting to be analyses of the drivers' functions?

A. Yes, yes, there was one that I believe was titled Bergfield Exhibit No. 1, there was a list of functions, a series of, oh, I think maybe twenty or twenty-two functions, all but two of which were common to all classes of customers, and two of which were applicable only to certain customers, classes of customers.

Q. You do not recall whether that was prepared by Mr. Woolley or whether that was——

A. No. That was a document with respect to which no one was able to discover who prepared it or when.

Q. Who prepared it or when?

A. That is right.

Q. Did he show you any computations or exhibits that he himself had prepared?

[fol. 12] A. Yes.

Q. He did?

A. Yes.

Q. Did he leave copies of those with you?

A. Yes, temporarily. I had them for a short period.

Q. Do you recall what those documents were?

A. Yes, they were three each; one supplemental schedule of Bowman's exhibits and three supplemental to Borden, and they were in heavy brown board covers showing certain schedules and calculations applying costs which had been introduced to evidence a result, and more than one result—different alternative results.

Q. Now, what other documents did he submit to you for your review in connection with your testimony?

A. I think that covers the lot.

Q. Now, all of these were given to you prior to the preparation of the testimony that appears in this draft of a rebuttal pre-trial order?

A. Not all of them. The later ones that we have just been discussing I saw later.

Q. When did you see those?

A. Oh, fairly recently. This year, in this present year. [fol. 13] Q. Now, did you prepare this draft of your testimony that appears beginning at Page 26 on the Borden order?

A. Oh, yes.

Q. Going back to this second visit you had with Mr. Woolley, that also took place in New York, did it?

A. Yes.

Q. And how long a visit was it?

A. Well, it extended over lunch. I know we had lunch together. Including lunch, it must have been a couple of hours.

Q. What other meetings did you have?

A. None.

Q. You had only two meetings, one of which took place in May of 1957, and the other sometime in the fall of——

A. September, I think.

Q. (Continuing)—September of 1957? The first one lasted three or four hours, is that it?

A. No, I do not think so.

Q. Or about an hour?

A. About an hour.

Q. And the second meeting lasted about two hours?

A. I should think so.

Q. Now, you do not recall when it was, whether it was

the first or second meeting that these documents were [fol. 14] given you?

A. I do not think they were given to me—which documents?

Q. The ones you have described, the various documents.

A. Well, they were at different times. They were documents given to me in the beginning.

Q. At the very first meeting?

A. In May.

Q. Which ones were those, if you can identify them?

A. Well, they would be, I think, the Malone testimony, the Bergfield testimony, and the Woolley opinions or memorandum.

Q. Yes.

A. I think that is about all.

Q. They were separate? There were separate memoranda, were there not, from Mr. Woolley, in respect to Bowman and Borden?

A. Yes, I think they were. Then these later exhibits, detailed calculations with figures and so on, came along sometime in 1958, which I had just temporarily. I did not have time to look them over carefully.

Q. Had you previously returned the other documents, or are they still in your files?

A. No, they were all returned.

[fol. 15] Q. It may have been possible even then that you may have had some of those documents other than these calculations at different times and not had them all together at the same time?

A. That is right, yes, because I was instructed to pass them on to other witnesses for their examination.

Q. Did you have any conferences with the other witnesses?

A. No—well, I had no conferences with them; there were questions about dates, and so on, but not discussions of issues.

Q. And who were the other witnesses that you understood?

A. Taggart—Dr. Taggart and Mr. Sawyer.

Q. Were there other witnesses tentatively suggested to you, if you recall?

A. No.

Q. Now, turning to the testimony as it appears at the beginning of Page 26 of the Borden order, when was this first drafted?

A. Well, I cannot be exact about that, but I should have to say that it was between late in 1957 and——

Q. It was after your second conference with Mr. Woolley? [fol. 16] A. Yes.

Q. Had you prepared any analysis for Mr. Woolley at the time of your second conference in September of '57?

A. Will you ask that again, please?

Mr. Ball: I think we had better read it.

(Question read by the reporter.)

By the Witness:

A. Well, while he was there he asked me if I would not just dictate something I had said. He liked the way I said it. I dictated it at that time and wrote it out for him at that time.

By Mr. Ball:

Q. Do you have a copy of that document in your files?

A. No. I believe it is incorporated in here. It is in here (indicating). I do not think I have the original draft of it, no. It was drafted and then changed for grammar and punctuation and incorporated in here.

Q. Well, now, what was the next step then to the drafting of this testimony, as best you recall?

A. Well, I think that was just about in this form finally.

Q. In other words, it started with this memorandum that [fol. 17] you dictated?

A. Well, with that, oh, yes, and then I had other materials, as I said, before me at that time, these exhibits which I drew up, Mr. Woolley's memorandum and——

Q. Well, if you will look at Pages 26 up through 32 in the Borden order I want to find out the sequence of the drafting of that material, the selection of the wording, and what was included, and the rest of it.

A. Oh, yes, there was an original draft which I sent out to Chicago.

Q. Can you remember——

A. (Continuing) And some correspondence regarding it, and then a redraft, that is correct, there was.

Q. You have that correspondence in your file, I assume?

A. I believe so. It would be in New York. I have it in my file anyway, I think.

Q. Yes.

A. Yes; oh, yes, I would have that in the file.

Q. And did Mr. Woolley make suggestions in that correspondence about the drafting of the testimony?

A. Oh, yes, we had some discussions and some disagreement about wording.

Q. Well, in the case of the disagreement, did you [fol. 18] finally agree with Mr. Woolley?

A. Yes, yes, we finally came to an understanding. Finally I was able to say it my way.

Q. Now, looking at Page 26, the paragraph that is numbered 14, especially at the second sentence; is that your wording in that second sentence?

A. You mean starting in "In regard to"?

Q. Yes.

A. "Regarding the principles underlying——"

Q. I am calling attention to that phrase like, "——properly conceived system of distribution allocation."

A. It does not sound like me. I probably lifted that some place.

Q. Or it may have been suggested from Mr. Woolley?

A. It could have been.

Q. As a matter of fact, the problem that confronted you wasn't a system of distribution accounting at all, was it? It was just an analysis made on a single time basis, is that correct? I am speaking of the Borden order.

A. Well, yes, I think so. I know what this intended to mean. Originally, if I started off cold I would not have said it that way.

[fol. 19] Q. Well, how would you have said it?

A. In the making of a Robinson-Patman cost analysis.

Q. You are testifying——

A. Instead of all those others words I would have said in a Robinson-Patman action. I would have used fewer words but it would mean the same.

Q. Did you at any time in your correspondence or dis-

cussions with Mr. Woolley ask him to provide you with further facts?

A. No.

Q. Did you point out any fields in which further facts would be helpful?

A. No.

Q. Did you know that all of the basic data behind the Borden cost study, the reports of the time study engineers, and all the rest of it was available to the Government?

A. I know nothing—I knew nothing about it at all.

Q. Have you at any time been shown the proposed testimony of Professor Taggart and Mr. Sawyer?

A. Only recently in connection with this particular proceeding.

Q. That was after your testimony was drafted, is that [fol. 20] correct?

A. Yes—well, I mean this whole thing came to me in one bundle.

Q. You wrote an article, did you not, in the June, 1957 copy of what is entitled The New York Certified Public Accountant, the article being entitled, "Cost Accounting Under the Robinson-Patman Act"?

A. Yes.

Q. Now, in that you stated on Page 387 in Volume XVII, Issue No. 6, and I quote:

> "An accountant as a fact-finder and an analyst may find himself involved in almost any anti-trust proceeding. He is more likely to be concerned with the application of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, than with any other subject in this field."

You said that, didn't you?

A. That sounds familiar.

Q. And I am interested in the words "fact-finder." Really the function of an accountant in making an analysis is primarily to be a fact-finder of the relevant facts, isn't it?

A. Yes.

[fol. 21] Q. And the answers that he comes up with depend upon the facts of each particular case?

A. Yes.

Q. Now, over on Page 389 you stated, I believe, and I quote:

> "Where prices differ according to the class of trade to which the buyers belong, or other factors such as the volume of their purchases, it is useful to analyze sales volume according to customer groups."

Now, that is what you said?

A. Yes.

Q. And that represents a point of view that you continue to retain?

A. Yes, sir.

Q. And you found nothing in the Borden study that was improper in any way in the classification of customers for study, did you?

A. I was not asked and did not consider the classification of customers at all in the Borden case.

Q. Now, I call your attention on Page 391 to the following from your article:

> [fn. 22] "The words 'cost of manufacture, sale or delivery' in the cost proviso of Subsection 2(a), seem to include every sort of cost actually incurred. However, opinions may differ as to whether an item is a cost at all. For example, whereas some economists regard a fair return on capital invested as a cost, many accountants including the Commission's accounting staff, think it is not a proper item of cost justification."

Now, you said that, didn't you?

A. Yes.

Q. What is your personal opinion?

A. I do not think it is a problem for Robinson-Patman cost purposes. I agree with trial examiner Kolb who has just come down in the famous Thompson Products case and said so.

Q. Yes. You are familiar with the decision of Kolb in that case?

A. Indeed I am. Very much. I am very much interested. I read the whole case.

Q. You were a witness in that case?

A. No, sir. I am very much interested in the automo-

[fol. 23] bile parts business, and that is the biggest thing in automobile parts.

Q. Now, in the Thompson Products case the trial examiner found that while there were some differences in the variances between the proof and some of the differences in some of the brackets, overall it was sufficiently justified?

A. Now, are we going to discuss that case? I want another day for it.

Q. No, I am asking your opinion.

It is true, is it not, that in a cost justification problem it is not defined in exact justification on the dollar in each element of the bracket, but in approximation?

A. It must be within the meaning of whatever is due allowance, whatever that means. The difference must be within the scope of due allowance, whatever that is.

Q. And with respect to that you have stated in this article from which I just read, the following:

> "There is probably no mathematical formula for measuring due allowance. It is certainly not subject to slide rule calculations. To be workable, therefore, it should be subject to reasonable tolerances."

[fol. 24] Now, does that represent your point of view?

A. Yes, sir, I believe it does.

Q. Also you said in the same article on Page 394:

> "If the price differences reasonably approximate the cost differences they should be considered as meeting the statutory test of making 'only due allowance'."

A. Yes, sir.

Q. And that represents your present point of view also?

A. Yes, sir.

Q. Now, in this article you also made the statement which appears on Page 392:

> "Cost justification does not require balanced or inclusive costs because it is directed to a special object—showing differences in costs which are caused in the specific way. The costs which are not differentiated in this special way may be ignored with gain in time and clarity."

That represents your present point of view?

A. Yes, sir.

Q. By that you mean that if there are overhead costs [fol. 25] which are not readily allocable, that it is quite proper to disregard those from the standpoint of making an analysis?

A. Well, if they are unimportant or if they are of a character that do not produce differences between classes of customers. For instance, if the costs are costs that are common to all customers, say manufacturing costs, where the only distribution costs differentiate between customers you can ignore manufacturing costs.

For instance, in the dairy industry you can ignore pasteurizing costs because it is all the same for all customers per unit of product. That is what I mean. You can ignore all of those things that are common on a volume basis.

Q. For that reason you would regard it as entirely proper that the Borden study did not include manufacturing costs?

A. That is right. That is what I mean.

Q. And did not include any costs up to the time that the product was ready to be loaded onto the truck?

A. Oh, beyond that; up to the point where there is a customer service, at that point where all customers are alike and from that point on you can differentiate one customer [fol. 26] from another. But up to that point it is all the same.

Q. So you would regard the fact the Borden study was made on that basis was entirely proper?

A. Yes, I would say so. In fact, I think that it is economical and efficient to eliminate that. In fact, in most studies it eliminates most of the work to just concentrate on those factors where there is a difference between customers that results from it.

Q. And that is determined by the facts in the case?

A. In each case. Each case on its own.

Q. And what you look at then is to concentrate your study on those particular elements of cost which the facts indicate represent a difference of treatment between customers?

A. That is right.

Q. Now, generally in this field of cost analysis you recognize a difference between direct and indirect costs, do you not?

A. Oh, yes.

Q. Now, I am going to read you what you said here in this article on Page 392 and ask you if that does not describe the difference, and I quote:

> [fol. 27] "Analysis of the cost of selling, administration, warehousing, delivery and advertising will disclose those which are incurred directly for certain products, territories or classes of customers, and those which are incurred for more than one of them.
>
> "Costs are direct if the amount spent may be readily assigned to one of these categories; otherwise, they are indirect."

Now, that represents the proper analysis and difference between direct and indirect?

A. Yes.

Q. In other words, another word for indirect costs may be joint costs?

A. Yes, that is another way of saying it.

Q. Now, you talk about, as an illustration of when it becomes difficult to assign costs directly, and you give this illustration, and I quote again from Page 392 of your article:

> "For example, where the seller who distributes through wholesalers engages in missionary work with retailers, the circumstances must be thoroughly under-[fol. 28] stood before assigning the related costs. If the missionary effort is directed to building up total sales volume through all customers, the costs are indirect, i.e., applicable without reference to any particular class of trade."

Now, that illustration you still feel is a proper one?

A. Oh, yes.

Q. Now, when you have an indirect costs and there are some factors or facts, rather, that make it apparent that they may be compared with different weight with respect to different classes of customers or products, the problem

becomes one of finding the proper divisor of those costs, does it not?

A. Yes, sir.

Q. Now, I read what you said at the bottom of Page 392, and top of Page 393:

> "Where costs are incurred for two or more product or customer classes, it frequently becomes desirable to compute cost rates which can be applied to the number of units in portions of the mixed aggregate. Finding such cost rate is an example in division in which [fol. 29] the divisor is the total number of units, the dividend, the amount expended, and the quotient is the rate per unit.
>
> "Such dividends are likely to be the aggregate costs of performing certain functions, and the divisors those available statistical units which are the most logical measures of the differences in those costs."

Now, that again expresses your point of view?

A. Yes.

Q. Now, these measuring units to be logical must be those that are shown by the facts of the particular case to have a close relationship or a rational relationship with the subject matter to be proved, is that correct?

A. That is right.

Q. Now, the selection depends upon a finding of the facts with reference to the surrounding circumstances bearing on the rationality of that connection?

A. Yes.

Q. Now, I call your attention to what you said on Page 393 and I quote:

> "Among the many types of units frequently used in allocating joint costs are orders, shipments, invoice [fol. 30] items, shipping units, weight, bulk, floor space, time, distance and number of customers."

Now, all of those are conceivably proper measuring units or divisors of indirect costs?

A. In applicable cases.

Q. And the applicable case is determined by which one of

those particular factors bears the most logical relationship to the problem to be solved?

A. Yes.

Q. And that again depends upon a determination of the facts?

A. Yes, sir.

Q. And that determination becomes a pretty common sense appraisal of the relevance and rational connection between the facts?

A. I would say it is a matter of judgment largely.

Q. Largely of judgment; but it must be based upon the facts themselves?

A. Based upon a knowledge of the facts.

Q. Of the facts. In other words, there isn't any such thing as sitting outside a particular case and saying that abstractly one unit should be used as against another?

[fol. 31] A. In this area there are few "musts."

Q. It all goes back to the facts of the particular case?

A. (Witness nodding head.)

Q. Incidentally, at no time, Mr. Taylor, were you shown the final pre-trial order entered with respect to the cost defenses of either Borden or Bowman, were you?

A. I believe not.

Q. Now, unlike a system of cost accounting, a cost analysis once made has validity both, shall I say, prospectively and retroactively, isn't that correct?

A. Until it can be shown that conditions have changed to the extent making it invalid.

Q. Yes; I read to you what you said at Page 393 of your article:

> "Once a cost justification study is completed, its conclusions need not be demonstrated again and again because those conclusions remain valid until the business organization and methods to which they relate have substantially changed.
>
> [fol. 32] "In this respect, cost justification studies differ completely from the kind of costing useful in financial accounting and reporting where cost systems produce periodic statements."

You adhere to the point of view there expressed?

A. Yes.

Q. In other words, if you make an analysis in one year you can expect that in general the results of that will have been valid for some time past and until some time in the future unless there is a showing of significant change in circumstances?

A. Yes.

Q. Now, you were, I believe, a member of the so-called Taggart Committee appointed by the Federal Trade Commission, of which Professor Taggart was the chairman which prepared a cost justification report?

A. Yes.

Q. Now, I hand you what has previously been marked as a copy of this report as Taggart Deposition Exhibit No. 1 for identification, which is a publication of Commerce Clearing House, and I ask you if this is the report to which you were a subscriber?

A. I signed it.

[fol. 33] Q. Are you in agreement with the positions taken in this report?

A. Yes.

Q. Including the positions taken in the appendix to the report?

A. The appendix was a writing of one of the members which was added as being useful. This was Mr. Ed Kelly's writing, and Dr. Taggart thought it might be a good idea to add it on, so it was added.

Q. Well, did you review it before it was added?

A. Well, I saw it. It seemed innocuous. I had no objection to it being added.

Q. Well, do you have any differences in point of view?

A. I have not read it recently.

Q. Well, I call your particular attention here——

A. Ed Kelly is a good man. Ed Kelly is a good man. He handled the Standard Brands case when they were up before the Commission, and that was a very tough case.

Q. This is Mr. Kelly who used to be with the Commission?

A. No. He is with Macey. He is a good man. I imagine it is a good writing, too. I do not want to minimize it. I

just say—I mean, I had little to do with it beyond saying I had no objection to it being added on.

[fol. 34] Q. Well, may I summarize by saying with respect to the report itself, with that you are in complete agreement with what the positions taken there were?

A. Oh, yes. This was unanimous, of course. We had no minority.

Q. And you had no differences between yourselves?

A. Well, we had plenty of them, I assure you.

Q. But, I mean, as to the matter that was put into this report?

A. No; we were in general agreement, yes.

Q. Would you say there was anything put in here which you would not adopt as your own opinion?

A. No.

Q. Well now, turning to this appendix, then, I am going to read you a few passages here to see if these express points of view with which you are in agreement:

> "In defining a function——"

and I take it we mean a unit of cost——

> "—a distribution function may be defined as an operation or activity at the lowest practical level of supervision for which costs can be isolated and collected."

I take it you are in agreement with that?

[fol. 35] A. It sounds good.

Q. Now, there is another statement made in this appendix, and I quote:

> "Since methods of organization and operation differ among companies and industries, distribution cost functions also differ."

I take it you are in agreement with that?

A. Yes.

Q. Now, in this report, shortly after the passage I have quoted, there is a list of what might be considered as distribution cost functions of an integrated manufacturing company, and it lists eight different distribution cost functions. Are you familiar with those?

A. Yes.

Q. And that is a proper and a fair listing?

A. I think that looks all right.

Q. Now, these various functions you defined afterward —and I take it that the definitions of those functions are——

A. As far as I recall, those are good definitions.

Q. Now, I call your attention to this passage from this appendix to see if that represents your point of [fol. 36] view:

> "After ascertaining the direct costs it remains to assign the indirect costs. These costs are collected as totals of functions not chargeable directly.
>
> "Assignment of these indirect costs is done by measuring the activity or output of the function in terms of unit of functional service which can be counted or measured, and then applying to each business segment the amount of the functional costs which is in proportion to its use or responsibility for the units of functional service."

I am going to pause there. That sounds like a mere statement of general principles in which you are in complete accord?

A. Yes.

Q. It goes on to say:

> "A simple example makes this process clear. If the function is personal selling, one possible unit of functional service in a customer analysis may be sales costs. If the customers are divided into Classes A, B [fol. 37] and C, and if ten per cent of the calls are made on Class A, 30 per cent on Class B, and 60 per cent on Class C customers, then the three classes share the cost of personal selling in those proportions."

Now, that seems also to you as a very reasonable method of allocation under the facts set forth there?

A. Yes.

Q. Now, the appendix goes on to say this:

> "At the outset caution should be exercised with respect to over-emphasis on the distinction between

direct and indirect costs. This distinction should not be made for minor items of cost or for those where treatment of potentially direct items by a satisfactory application of the indirect procedure will produce completely reliable results."

Now, Mr. Taylor, I believe that is more or less in agreement with a statement you made earlier here and represents your point of view?

A. Yes.

[fol. 38] Q. It goes on to say:

"Substantial elements of direct costs are ordinarily so designated and reported in the original bookkeeping process. Establishment and maintenance of the necessary bookkeeping routine for isolating all direct costs is burdensome and justified only where amounts here involved are appreciable and satisfactory results cannot be obtained by other and less expensive methods.

"In many cases the indirect functional approach using an uncontroversial unit of function service will provide acceptable results."

Now, I take it that you are in agreement with that?

A. He is talking about something different than we are dealing with today entirely. He is talking about a system of distribution costs which is a nice thing to read about——

Q. Yes.

A. But it has nothing to do with what we are talking about.

Q. But what you are saying——

A. It may make a good romance story but it has nothing [fol. 39] to do with what we are talking about.

Q. What you are saying in that particular passage, he is speaking about setting up a system of day-by-day periodic accounting reports?

A. He is talking about his job as a comptroller, see? This is useful. It is general information like you might read a romance story tonight, it is fresh for your mind, it is useful to read a lot of stuff, but——

Q. But that particular quotation——

A. It is a good thing to add to this report.

Q. But it has little application——

A. It is nice reading, but it is not connected with our study at all.

Q. But a particular analysis——

A. I say, he is a good man. This is good stuff, but it is not Robinson-Patman stuff.

Q. Now, I come to something that I believe is Robinson-Patman. Let me read it to you and see if you are in agreement with this:

> "Functions vary widely in their closeness to the business segments being costed. Some such relationships are very close and the appropriate measuring [fol. 40] factor (the service unit) is easily identified and perhaps easily counted in relation to the segments."

Now, I take it that is a true statement and in accordance with your opinion applicable to a special study?

A. Yes, I would think so.

Q. I quote further:

> "The relationships of other functions to the costing segments are more remote and the choice of the service unit which will adequately measure a given relationship is of greater difficulty.
>
> "In many cases more than one service unit might be chosen. The precise choice will depend upon two main considerations; first, which service unit most closely approximates satisfactory measure of benefit or activity in terms of rational analysis;
>
> "The second, which service units can most readily and economically be counted both in total and in terms of the costing segments."

[fol. 41] Now, I take it again that you were in complete agreement with that statement in the way in which an analysis should be made?

A. That is right. That applies to both bookkeeping and special analysis.

Q. Now, the appendix goes on to say:

> "Different service units will yield different dollars and cents results, and a particular service unit should not be chosen merely because it maximizes cost differences.

"Where the choice is otherwise a matter of indifference, however, there can be no objection to the choice of method which produces the most desirable result."

I take it you are in accord with that?

A. Oh, indeed, indeed. I have been saying that today. That is your duty.

Q. Now, in this appendix it ends up taking the eight types of distribution functions and gives a list, sort of a tabulation of possible service units. I ask you if you are familiar with that? It starts with the word "transportation" and goes down.

[fol. 42] I ask if you are in general agreement that these are suggestive of possible service units that could be used in connection with the functional costs?

A. I think all of them you could think of. He has various ones that could be used.

Q. And there are——

A. As I said before, it depends upon the circumstances of the particular case.

Q. That is right. You cannot dogmatize about it?

A. No.

Q. And you see nothing in that particular summarization of possible service units with relationship——

A. It says here——

(The witness read inaudibly.)

By Mr. Ball:

Q. Well, going down generally, I think you find nothing to disagree with there?

A. No, no. I think it is fairly comprehensive.

Mr. Ball: I wonder if we might save time if we might have a brief break.

(A short recess taken.)

By Mr. Ball:

Q. Mr. Taylor, altogether in preparation for your testimony here, how much time do you estimate that you [fol. 43] have spent?

A. You mean in preparation immediately or from last May of last year?

Q. From last May of last year?

A. You want me to guess at that?

Q. Well, the best informed guess you have. You know you spent an hour with Mr. Woolley and——

A. Well, I could not say. I would not want to say on that because this gets into the record here.

Q. Well, then, I take it you will indicate the maximum tolerance?

A. Oh, yes. Say not more than a hundred hours.

Q. You spent one hour with Mr. Woolley the first time and two hours with him in preparation for the report?

A. Yes, and I have been doing some study and research.

Q. That study, did that go outside of the material that was furnished you by Mr. Woolley?

A. Yes.

Q. Did it?

A. Yes.

Q. What other material did you take into account?

A. Well, I looked into the literature of this subject to quite a considerable extent.

Q. Now, by "literature on the subject," what do you [fol. 44] mean?

A. The Senate Committee Reports and the House Judiciary Committee Report on the Robinson-Patman Act; the debates in the House and in the Senate on the Robinson-Patman Act; the textbooks on the subject of the Robinson-Patman account costing.

Q. Which would include what ones—Mr. Austin, Cyrus Austin Reports?

A. Cyrus Austin, and Mr. Patman.

Q. Mr. Patman's own?

A. Yes.

Q. What else?

A. The various books on cost accounting that have reference to the subject.

Q. Do you recall any of those by name?

A. Yes, yes; Neuner?

Q. How do you spell that?

A. N-u-e-n-e-r, and Blocker.

Q. B-l-o-c-k-e-r?

A. Yes; Dohr, Jim Dohr, D-o-h-r.

Q. D-o-h-r?

A. Yes.

Q. Now, was there any other literature to which you made reference in the preparation of your testimony here? [fol. 45] A. Well, I reviewed generally the decisions in various Robinson-Patman cases over at the Federal Trade Commission.

Q. None of which involved the milk industry, did they?

A. No, none.

Q. Did you read any literature with reference to cost studies in the milk or dairy industry?

A. No.

Q. Have you ever made any studies of the dairy industry yourself?

A. No.

Q. Have you any personal acquaintance with the facts concerning the operations of dairies in distribution of milk?

A. No special knowledge, no.

Q. Only somebody that has milk delivered to their door?

A. As a purchaser.

Q. And you have purchased by home delivery?

A. No, no; we buy both at the store and at home.

Q. Have you written any other articles about the Robinson-Patman Act other than the one from which I have quoted earlier here?

A. Well, my address to the Anti-Trust Bar was pub- [fol. 46] lished. You may have seen it.

Q. When was that, Mr. Taylor.

A. That was at the meeting in January of 1957. That, of course, has been published, as has all the Anti-Trust Bar symposia been published. I do not think you will find anything at variance with the article you so studiously reviewed.

Q. No; well, whatever you said to the Bar at that time I take it still represents your point of view?

A. Yes.

Q. Do you recall any other published articles on the subject of Robinson-Patman Act?

A. Of mine?

Q. Of yours.

A. No. There are no other.

Q. Now, will you turn specifically to the draft of your testimony beginning at Page 26, with reference to the Borden order, and I call your attention to Paragraphs A, B and C running over to more than halfway through Page 29, and I ask you if there is anything in those paragraphs that particularly refer to the Borden study, or isn't it a fact that what you have said in those three paragraphs represent general principles of the kind that we have already discussed?

[fol. 47] A. You will have to give me time to read this.

Q. Yes. That is fine.

(Witness examining document.)

By the Witness:

A. First with respect to Paragraph A there is nothing in there that applies any more to Borden than to any other Robinson-Patman proceeding.

By Mr. Ball:

Q. And this was not intended to be a criticism of the Borden cost study as it was presented to you?

A. It is general.

Q. Yes.

A. It applies to the Borden study only as it would apply to any.

Q. You do not know of any respect from which the Borden study departs from those principles, do you?

A. This does not have anything to do with that at all. This is just a general statement that does not apply to any particular set of facts. This applies to any Robinson Patman study. I am speaking of A now.

Q. Isn't the same true of B now?

A. The same is true of B. It has to do with the techniques of Robinson-Patman cost analysis generally.

[fol. 48] Q. Yes, and you cannot point to anything that appears in Paragraph B that applies as a criticism of the Borden studies as they were presented to you?

A. As to Paragraph B, that is correct.

Q. Now, isn't that same true with respect to Paragraph C?

A. I understand with respect to C the situation is differ-

ent. I was informed that the cost of selling and negotiating contracts of sale by Borden to the large chain organizations was not reflected in their costs, so that as far as Paragraph C is concerned, this would state a different principle than was followed there.

Q. Well, now——

A. If that is a fact, assuming that is a fact.

Q. And your last sentence in that paragraph indicated that that is merely based upon an assumption of the fact and not upon a statement that that would necessarily be applicable to the Borden study?

A. IF such costs, and with the emphasis on the "if"——

Q. Yes.

A. (Continuing)—may properly, and the emphasis on "properly," be allocated according to customer classes, [fol. 49] chain stores and others, and if one class required a disproportionate amount of such services, then, of course, the costs allocated to that class of customer would reflect that fact.

Q. But you are stating this only as a hypothetical situation?

A. If that is so.

Q. Yes, so that if the facts are——

A. As far as that last sentence is concerned, that last sentence is purely hypothetical.

Q. But that qualifies the first sentence?

A. The first sentence: (Reading)

> "The calculation of cost differences between competing retail stores should include the cost of executive time and expense attributable to securing and maintaining customers' accounts and the salaries and expenses of billing, accounting, credit and other office operations."

Now, if there were any of those costs that have not been reflected in the unit costs to be compared, why then, if that were so, and I understand it is so in the Borden case, then this is a statement of variation of good principle.

[fol. 50] Q. Now, were you aware of the fact that the Borden study did take care of the salaries and expenses of billing, accounting, credits, statistical and other office operations?

A. But not what is called executive time.

Q. But you do not know whether the order itself set forth facts that suggest they were appropriate for study or not, do you?

A. I do not think I saw a final order.

Q. And what you are saying here is if the facts shown suggested that there was a disproportionate time, then the study should be made?

A. No, no; as far as the first sentence is concerned, one of the things to be taken into account is the time of anybody that is selling, and if the executive does the selling you have to take that into account.

Q. Yes.

A. And also the clerks.

Q. But you do not know, as a matter of fact, any executive did any selling to chain store accounts at Borden?

A. No, I don't know. That was given to me.

Q. That was given to you by Mr. Woolley?

[fol. 51] A. That is right.

Q. Do you remember whether it was given to you orally or in writing?

A. I think that was given to me in writing. I think that was part of his review of the case that he gave me, and I think it showed his disagreement with that, and I thought he was sound in that.

Q. Now, if it appears from the facts that more time was actually devoted proportionately to the selling of independent stores by executives than it was to chain store accounts, then this would not be a pertinent criticism?

A. Assuming that that was a proper classification, which I thought from what I was told was basic to the whole study. I thought everybody was as cock-eyed as they could be classifying all chains together and all independents together.

It seemed to me that was no way to classify customers. But if that is the way you are going to classify, if you agree to classify them that way, then—that is why I emphasize "if." I say that is no way to classify customers.

Q. Again you do not dogmatize?

A. No, but to me it seems that way.

[fol. 52] Q. But that is said by you as a general reaction based upon the particular facts of this particular case?

A. I do not know much about it.

Q. Yes.

A. From what little I do know about it, that is the way it seems to me.

Q. Well, putting it this way, everything in C then is an opinion contingent upon the actual facts as they may be developed in this case, isn't that correct?

A. That is right.

Q. And there are no absolutes expressed in C any more than anywhere else in your comments?

A. Anything I have said today contains no absolutes.

Q. And each——

A. There are none.

Q. Yes, there are none, and what determines are the facts of the individual case?

A. That is right.

Q. Now, turning——

A. Let's see. Where are we going to continue? With D?

Q. Yes.

(Witness examining document.)

By the Witness:

[fol. 53] A. There I think that the Borden case as the case was explained to me does not reflect what I would consider the best practice.

By Mr. Ball:

Q. Well now, were you familiar with the fact that the driver's time was analyzed on time study and each element, including the service functions and the transportation functions were separately analyzed?

A. Yes, I understood that.

Q. Well, wouldn't that be all that you are asking for in D, is the separation of the costs of the two functions?

A. Yes, I think that is correct. They should be separated.

Q. Yes.

A. And if they were separated, that would cover D.

Q. Then D would not include——

A. That is correct; as far as D is concerned, I think you are right. Now, coming to E, the service functions.

Q. If I read D, all it says——

A. Oh, you did not go beyond Page 29, did you, in your question?

Q. No, my original question was on D. D involves no [fol. 54] criticism of what was done?

A. Yes.

Q. Now, looking at just E, did you understand that in the Borden case the driver's salary and wages, including his benefits and vacation costs, were in effect prorated to the service functions and the transportation functions on the basis of time and of studies? You understand that was done in the Borden study?

A. I understood that in the Borden study they were not separately allocated by customers, the cost of the transportation separately from the cost of service. I understood that they were not separately assigned.

Q. Well, putting it this way, Mr. Taylor, if the time and motion studies took account of all of the time of the drivers, if the studies separately timed the time spent in the stores and the time getting to the route and the time between stores and the time in preparing the truck, and if the total cost of wages and salaries were present, then in effect everything that you suggest in E was performed, wasn't it?

A. I did not understand the question. Could you repeat it?

[fol. 55] Mr. Ball: Read him the question, please.

(Question read by the reporter.)

By the Witness:

A. It isn't a question of time here but salaries and wages. You say the time is divided and the salaries and wages are divided?

By Mr. Ball:

Q. Mr. Taylor, the division, if you have the total costs of the drivers, salaries and wages and vacations, and you have the time spent by those drivers on each one of those functions, the matter of allocating costs becomes a mere matter of mathematics, does it not, to find out the costs?

A. You mean if you have the information you can make the calculation?

Q. Yes, yes.

A. As I understand, it was not done. I was told it was not done.

Q. What was not done?

A. The salaries and wages were not allocated between the two.

Q. Well, didn't you understand that there were no final tabulations or allocations in the Borden study?

[fol. 56] A. Well,——

Q. That the Borden study consisted of setting forth the data, summarizing the data and making certain mathematical divisions on the basis of that data with no final conclusion as to what differences of costs were stated; did you understand that that was the form of the Borden study?

A. No. As I say, I do not know the final costs, but I was given to understand, Mr. Ball, that although they had time studies of the total time spent by men, that this was not reduced to the money costs of getting the goods to the customer and the money cost of serving the customer after he got there, and I think that is what E says.

Q. Now, Mr. Taylor, what I want to ask you is this: If the order itself, the study itself showed the salaries of the drivers, salaries, wages, other costs of the drivers, if it showed the time spent in each one of the types of activities performed by the drivers, then the allocation becomes merely a matter of mathematical computation, does it not?

A. Yes; if you have all that information you could make the calculation, yes.

Q. Yes.

[fol. 57] A. I suppose you have the accounts of the company and all the informaton is there from which you could make costs.

Q. Well, did you understand that those costs were set forth, the total costs were set forth and the time allocations were set forth in the order?

A. I do not know whether they were or not.

Q. In other words, in expressing this—in drafting Paragraph E, you do not know whether or not that does apply to the Borden order, or not, do you?

A. No, I am merely expressing an opinion. My opinion

is that the money costs of the drivers' compensation should be divided between the transportation costs and the service costs, and that is all it says. Just an opinion.

Q. And you have no knowledge as to whether or not that was or was not done with the Borden study, other than something Mr. Woolley may have told you?

A. No. That is right.

Q. Now, turn to Paragraph F. Did you know that what you described there was or was not done in the Borden study?

A. I was under the impression it was not.

Q. You were informed by Mr. Woolley that Borden did [fol. 58] not allocate drivers' service costs among stores on the basis of time study?

A. No, that portion was not allocated and separately assigned as such.

Q. On any basis?

A. On any basis.

Q. Now, turn to G. Again, the logical allocation of any item of cost will depend upon the facts of the particular case, isn't that right?

A. Yes.

Q. There are no absolutes in this as in anything else?

A. No.

Q. And when we are dealing with transportation costs, there are no absolutes, are there?

A. No.

Q. And when you say the total transportation costs will most logically be allocated, you recognize that that may not be true if the facts suggest some other allocation.

A. This is a matter of opinion only, a matter of judgment.

Q. But it is a little more than that, isn't it? It is a matter of what the facts show with respect to the logical connection?

A. Yes, the facts as I understand them in this case. [fol. 59] My opinion.

Q. Yes; and the facts that you have are essentially those that Mr. Woolley told you were the facts?

A. That is right.

Q. Now, over on Page 31 you make a statement here:

"Such aggregated transportation costs may therefore be divided into parts——"

A. Now, let's see where we are.

Q. Right here (indicating).

(Continuing)—"only on a volume basis." Well, again, that is a statement that you have to qualify is it not? You cannot say it can only be done one way? In other words, what you really meant to say is, "Such aggregated transportation costs may therefore be divided into parts on a volume basis if that is the most logical basis, on the basis of the facts of the particular case."?

A. Well, I would substitute the word "preferably" for the word "only," I think would be more nearly exact.

Q. Well, it would not be preferably if the facts suggested it wasn't the most logical way?

A. No; I am stating my opinion.

Q. Well, opinion on a particular set of facts or generally? [fol. 60] A. On the facts as I understand them.

Q. Again, what are the facts you understand about transportation costs?

A. I understand that the driver loads up the truck at the platform with the amount of milk which he thinks that the customers on his route are likely to demand on that particular day.

Q. Was it your understanding that he loads the truck to capacity?

A. I have no knowledge of that at all.

Q. All right, go ahead.

A. I understand that he loads the truck with the amount of milk which in the aggregate will satisfy customers on that particular day, and that he drives that truck to the location where his customers have their stores and that the total amount of his wages in doing that, and of the other vehicle costs, constitute transportation costs.

Now, moving that amount from here over to here——

Q. Yes, now——

A. ——in that you have all of these cups, you see? (indicating) Now, one customer takes one cup, another customer takes all seven cups.

[fol. 61] Now, the only question is, how much of that cost goes against these seven cups and how much to the

one, and I say it is on the basis of some of this measured volume. I cannot see any better way to do it.

Q. Well, are you familiar with the way the facts as to how a route is originally designed?

A. I don't know.

Q. Did you see the union contract with respect to it?

A. Yes.

Q. Do you know, for example, that routes will depend upon the number of customers by the total amount of time taken to serve a group of customers within an eight-hour period?

A. Yes. I am told that. I know I read in this case that it depends largely upon the density of the population.

Q. Well, you understand, do you not, that it also takes the total amount of time to serve the individual customers once they get to the store that tends to determine or helps to determine the number of customers that are served?

A. That seems reasonable.

Q. Well, did you know that and did you take that fact into account?

[fol. 62] A. No.

Q. Did you know, for example, that it takes sometimes longer to serve a small independent store than it does a chain store, owing to the different methods in which the goods are delivered to the two types of stores?

A. Did I know that?

Q. Yes.

A. That it does take longer?

Q. Yes.

A. No, I did not know that.

Q. You did not take that into account, either?

A. I did not know anything about it.

Mr. Long: Well, I am going to enter an objection to all these questions on the basis of the fact Mr. Ball is raising matters that do not appear anywhere on this record, assuming facts that do not appear on this record here, and in respect to matters not a part of this record here.

I move the answers of the witness be striken.

Mr. Ball: Well, we will submit that to the Court.

By Mr. Ball:

[fol. 63] Q. Now, looking at Paragraph H, I want to read to you the first two sentences, or the first three sentences, I should say, down to the bottom of the page, and I ask you again if those aren't mere statements of general principles.

A. Are you going to read them?

Q. No, read them to yourself. I think that will be sufficient.

(Witness examining document.)

By Mr. Ball:

Q. That we have already covered and that is just a matter of general principle?

A. Yes.

Q. And as far as you knew, the Borden study did that?

A. The Borden study included the selection of yardsticks?

Q. Of units, yes.

A. Yes.

Q. (Reading): "Frequently the problem resolves itself into a choice of available units, none of which is perfect"; isn't that true?

A. Yes, that is generally true.

Q. Very often there are three or four or five?

[fol. 64] A. Yes. I had to pick one.

Q. (Continuing) "Good accounting practice dictates the selection of that basis which is most closely related to the activity or function the cost of which is being allocated."

That depends, does it not, Mr. Taylor, on the facts of the particular case?

A. Yes.

Q. And there might be more than one which are equally close?

A. That is possible.

Q. Now, turning to the next subject you say, "Obviously." You would have to qualify, wouldn't you, and say that that would depend upon, "in the absence of any special facts"?

A. I do not understand the question.

Q. You say, "The correct basis of the apportioning of the costs among customers——"

A. Where are we?

Q. Starting, "In the case of commissions paid——"

A. Oh, yes.

Q. (Continuing) "The correct basis of apportioning the costs among customers is obviously——"

A. See, it is obvious to me.

[fol. 65] Q. But you would always have to qualify that, "In the absence of special facts" or if the special case suggested a different measure, isn't that correct?

A. I may be wrong, but it seems obvious to me, it is how I feel. But it may be that I am quite wrong about that, but it seems to me it is obvious to me.

Q. But, as far as you know, there might be special facts that would make some other method more applicable?

A. Oh, I would have to concede that, yes.

Q. And you know about this only that—Well, did you know, for example, that the route drivers were not permitted or did not in fact solicit customers and that that function was performed by another type of employee known as solicitors?

A. I understood there were solicitors, but I didn't understand that there was any prohibition against the drivers soliciting.

Q. Well, do you know whether in fact the drivers do have any ability to increase or decrease the amount of milk which they deliver?

A. No, I do not know anything about that.

Q. And that would be one of those types of special facts that would have some relevance upon the yardstick to be used, isn't it?

[fol. 66] A. No, I do not think that would have anything to do with it.

Q. Now, will you explain that, the reason?

A. Why, yes. As you were saying, it depends upon circumstances of the case. Here is a case where you pay a man partly on time and you pay partly upon the volume, and you divide his work on the time basis for that part of his compensation which is paid on time.

So I say, since you calculate part of his compensation on volume, it is fairly obvious that the way that would be easy and direct and obvious is to divide that part of his pay

which is computed on volume, to divide it up on a volume basis.

Q. Assuming the facts that you have stated in your answer and assuming the absence of other special facts?

A. Assuming absence of other special facts which would make what I have said inapplicable, yes, if they would make them inapplicable, then, of course, the conclusion might be different.

Mr. Ball: I would like to ask the Government now on the basis of the witness' answers to produce the document prepared by Mr. Woolley, together with any other memoranda [fol. 67] that Mr. Woolley prepared that was handed to Mr. Taylor in order to meet the cross examination of Mr. Taylor.

Mr. Long: Well, we are going to respectfully decline to produce any memoranda Mr. Woolley prepared or prepared by anyone else on the Government's staff on the basis of the fact that these are work papers and that they are privileged.

Mr. Ball: I next want to request the Government to produce the correspondence that they have had with Mr. Taylor concerning the wording of the testimony which was submitted as part of the draft of the pretrial order.

Mr. Long: Well, we are going to refuse to produce those on the basis of the fact those involve correspondence files of the Department of Justice and they cannot be turned over to counsel without approval of the Attorney General.

I think that what counsel is after they can adequately [fol. 68] discover through depositions they are going to take of Mr. Woolley, which, I understand, they anticipate taking.

Mr. Ball: Well, we understand then until we have a ruling of Court on these demands, that we cannot close the deposition of Mr. Taylor.

Mr. Long: Yes.

Mr. Ball: On that basis I am through with my direct for the moment.

Mr. Stevens: I assume you would also refuse to produce that material on behalf of the Bowman Dairy Company?

Mr. Long: Yes.

Cross-examination

By Mr. Stevens:

Q. Mr. Taylor, would you produce your copies of your correspondence with the Government?

Mr. Ball: May the record show that I join in this particular request.

Mr. Long: The Government feels like Mr. Taylor should adhere to the wishes of the Government in that respect, but I will let you answer the question, at least until the [fol. 69] Court passes on this, that they not be produced.

By the Witness:

A. Did you ask me could I, or would I?

By Mr. Stevens:

Q. Would you?
A. You asked me to?

Mr. Ball: The question was framed "Would you."

By the Witness:

A. I have no attorney. I do not know how to answer it.

Mr. Ball: John, do you want to put it in the form of a question? I now request, Mr. Taylor, that you do produce the material that was furnished you by the Government and your copies of correspondence to the extent that it is in your possession.

Mr. Long: We would direct you to decline to furnish them that, Mr. Taylor. Now, you understand that this is directed at the correspondence between Mr. Taylor and the Government.

Mr. Hart: And the Woolley report.

Mr. Long: I think the Woolley report could be answered [fol. 70] by saying you do not have them, do you?

The Witness: Oh, I have nothing except correspondence. I say, my office has correspondence, correspondence files running back for a year. Do you want copies of that or do you want our original files?

Mr. Stevens: We would like to look at it and have the right to make copies.

Mr. Long: We do not think they ought to have that right, Mr. Taylor.

By the Witness:

A. I refuse.

By Mr. Stevens:

Q. Mr. Taylor, you indicated that you had spent up to a hundred hours on this matter?

A. Yes.

Q. Does that include the time that you spent in the last—well, today and any time you may have spent in the last few days getting ready for today?

A. Yes.

Q. Did you read the depositions of Mr. Taggart and Mr. Sawyer?

[fol. 71] A. Yes.

Q. Did you spend some time conferring with the representatives of the Government in preparation for this afternoon's session.

A. Yes.

Q. And that hundred hours also includes this other reading that you described, the legislative history of the statute, and various texts?

A. You have referred to a number, one hundred, which I said was just—it might have been three hundred; it might have been fifty. I do not know what it is, but whatever hours it is, I have no idea how many hours.

I have records of it which I can give you because we have time records, but at this particular moment I do not know whether it was a hundred hours or not. It probably was more than a hundred hours.

Q. But whatever it was, it included this other work also?

A. Well, I did do other work, and whatever hours they are will be billed to the Government at a per diem rate.

Q. You have not yet rendered a statement to the Government at all, have you?

A. Yes, we have rendered them up to some point or other.

[fol. 72] Q. Can you tell me whether the point at which

you rendered the statement was after the proposed testimony had been drafted?

A. I do not know really. I would have to check that. I do not know when our last statement was rendered. I do not know that. I will have to check that.

Q. Has there been more than one statement rendered?

A. Yes, yes; there have been two.

Q. Well, we would like to request those statements also, thinking they may indicate the number of hours that you spent.

A. Oh, yes, that is very easily secured.

Mr. Stevens: I do not know if the Government has the same objection to that, or not.

Mr. Long: I think we would make that part of the same objection.

By the Witness:

A. (Continuing) Well, I will refuse again. I am advised by counsel.

Mr. Ball: Let the record show Borden joins in that same request.

By Mr. Stevens:

Q. Such time as was spent on this matter by your office, [fol. 73] was it all spent by you personally?

A. Yes.

Q. You did not have any help from any employees?

A. No.

Q. Does the form of statement which you submitted to the Government indicate how you spent the various hours, or is it just a general description of the entire project?

A. It has some detail. For instance, the time sheet would show, "Conference with Mr. Woolley"; it will show, "Attendance at a hearing with Mr. Ball, Mr. Hart," like that. Or, "In search of records and studies of cost accounting texts." About that sort of detail.

Q. Can you tell me the amount of either or both of the statements which you have already submitted?

A. I do nof recall the second one. The first one was for

all of our services up to June 30, 1957 and was for $75. The second one was at some later date for a larger amount, and I do not recall that.

Q. Was the basis $25 an hour?

A. Yes.

Q. Now, isn't it correct, Mr. Taylor, that there were two memoranda prepared by Mr. Woolley, one pertaining to Borden and one pertaining to Bowman?

A. Yes, I think that is right.

[fol. 74] Q. And did I correctly understand that you have already testified that either in his written report or else in his oral statement Mr. Woolley made a criticism of the Bowman cost study insofar as the subject of transportation costs was involved?

A. Yes.

Q. And did Mr. Woolley also criticize the Bowman cost study with respect to the subject of commissions?

A. Yes.

Q. And did he also criticize the Bowman cost study on the subject of Central Office Overhead?

A. Yes.

Q. And all three of those criticisms are now reflected in your proposed direct testimony?

A. Yes.

Q. Whatever the number of hours is that you spent on this matter, of course, includes the time for both the Borden study and the Bowman check?

A. Yes.

Q. Did you review a study submitted by the defendant Bowman of the cost of serving various restaurants, hotels, and eating places?

A. Yes, I did.

[fol. 75] Q. Either in connection with this matter or at any other time, have you ever reviewed any professional literature on the subject of dairy distribution costs?

A. No.

Q. Do you consider yourself an expert in dairy distribution costs?

A. No.

Q. You reviewed the deposition of Mr. Bergfeld, I believe?

A. Yes.

Q. What was your understanding of the purpose for which that deposition was taken?

A. I knew no more about it than it had some connection with this question of the alleged discrimination in price.

Q. Well, did you understand that that was testimony which the defendant Bowman had offered in order to more fully explain written material which had been submitted?

A. I do not know more than what I have said. The purpose was not explained to me beyond the fact that this was a matter that might enlighten me about something about the problem, and I know no more than that.

Q. Well, let me ask you if you have ever read the portion of the final pre-trial order submitted on behalf of the defendant Bowman, which begins with Paragraph 28 on [fol. 76] the bottom of Page 19 and carries over to and including Paragraph 35, which ends at the bottom of Page 30; my question is whether you have ever read that material.

A. May I see what this is?

Q. Yes. Here, beginning from here on (indicating).

A. I do not recall ever having seen this. Like the man says, "It does not ring a bell with me." I may have seen it, but I don't recall it.

Q. Well, if that document is not listed on this list of material, which I believe is the material which was given to you, and I am referring to Taggart Exhibit 2——

A. This is something on a pre-trial order. I have seen things like that, that look like this, but I do not remember seeing this.

Mr. Hart: I think we have not determined yet that Mr. Taylor saw the same material.

By Mr. Stevens:

Q. Let me approach it this way, Mr. Taylor. I show you a document which has been marked -this is a photostat of a document marked Taggart Exhibit 2, being a list of documents for review by expert witnesses, and I will ask you if that is a list of the documents which were submitted to you?

A. I have no idea what that means, "Transcript Volume [fol. 77] VIII." It does not register anything with me.

Q. Did you read some of the testimony by a man named Eggleston?

A. Oh, yes, I read that. Yes, that is what that is?

Q. Yes.

A. Well, you see, I would not know from this. It does not mean anything to me.

Q. I wonder if they gave you a copy of this particular list (indicating).

A. Beg pardon?

Q. Did the Government give you a copy of this?

A. No, I never saw anything like that that I remember.

Q. Just turning to the Eggleston testimony for a moment, did that seem to you to have any relevance to the problem?

A. Oh, I thought that was very relevant to me, sure. After it was given to me for education, I got a lot of education out of it.

I remember this manual, "Government Costs Analysis Memos." I saw that.

(Witness examining document.)

Q. I suppose this is all we know.

A. The deposition, Volumes I and II, yes, I saw those. [fol. 78] "Bulk Wholesale Account: Restaurant." Yes, I saw something like that. It is hard for me to say just what I saw eight or nine months ago by titles.

Q. Is it correct, though, to the best of your recollection, the material which I indicated on these pages from Paragraph 28 at the bottom of Page 19 to and including Page 30 of the Supplemental Pre-Trial Orser entered with respect to Bowman—as far as you can recall now, that is new material to you?

A. It looks new to me.

Q. Would you be able at this time, Mr. Taylor, to tell us how much of the opinions which are expressed in your proposed testimony are predicated on material which you received from Mr. Woolley and how much is predicated on these various other items listed on this Taggart Exhibit 2?

A. No.

Q. The whole matter is all mixed together in your opinion and your opinions would be predicated in part on Mr. Woolley's material and in part on other material?

A. Yes, that is right. It was after I read all the material and then—this was just more or less a distillation of everything I got from reading and talking.

[fol. 79] Q. And would that also include your oral discussions and conversations with Mr. Woolley?

A. Yes; oh, yes.

Q. Those supplemented and helped to explain the various written documents?

A. The various what?

Q. Written documents?

A. Yes.

Q. I may have misunderstood your answers to Mr. Ball, but there was some discussion of the appendix to the Taggart report?

A. Yes.

Q. And did I correctly understand you to indicate that that had nothing to do with the Robinson-Patman Act?

A. Well, it was not part of the signed report which we all agreed to and discussed thoroughly, you know, where we had no dissenting opinions.

Now then, during the course of it, Ed Kelly said, "I have something here that explains a lot of this stuff that might be useful."

Taggart said, "Any objection to it?"

"No, no objection."

"Why don't we put it in as a supplement?"

[fol. 80] "Sure, all right."

So that is the way it was done. I mean, we did not discuss it paragraph by paragraph and sentence by sentence as we did with the other; I mean, it isn't of the same character.

Q. Well, isn't it correct——

A. (Continuing) It is like extended remarks in the Congressional Record. It is just about like that.

Q. Well, I take it the Committee did feel it was relevant?

A. Oh, yes, it is useful. As I say, as I told Mr. Ball, I think it is good stuff.

Q. Isn't it correct that the entire scope of the Taggart Committee Report dealt with the Robinson-Patman Act?

A. That is right.

Q. And this appendix was relevant to that purpose?

A. Yes.

Q. Well then——

A. All I am saying is it is a little different from the body of the report we signed. It has a little different status. It is like any appendix, you attach something on.

Q. Now, do you have the proposed testimony of Bowman? [fol. 81] The pages are a little different, so I want to be sure you take that one rather than the Borden one.

A. Yes.

Q. Calling your attention to Paragraph C on Page 23 which deals with executive time, if executives do devote a portion of their time to securing and maintaining various customer accounts, what method of allocating that time, as between different customer groups, would be appropriate?

A. Well, my own experience has been that you usually have to rely upon estimates of time devoted to the work in these cases, because the work of these people is likely to be intermittent.

You cannot take a test period of a short run, like a month. It has to be at least a year and you have to rely to a large extent upon the estimate of the person involved.

You get people that are earning anywhere from fifty to a hundred fifty thousand dollars a year as these men do, they are likely to be engaged in more than one kind of work.

For instance, a man in that category is likely to hold his job because he is on close terms with the purchasing [fol. 82] agent of a customer that buys five or ten per cent of a concern's output, and if he does not keep up that contact he loses his job.

In addition to that work, he has to supervise a whole crew of men. Now, it may be that the one or two big jobs that make him a hundred thousand dollar executive do not take up more than a quarter of his time and the rest of his time is all administrative.

So, for a quarter or a third of his time he is a direct salesman just like any peddler, but the rest of his time, two-thirds or three-quarters of his time, he is an executive and has to be prorated like anyone else, overhead.

That is ordinarily the way you have to go about it. You sit down at his desk with him and say to him, "Sam, how often do you go up to Graybar? How long do you stay? How often do you negotiate an A&P contract? Are these five year contracts?"

"Well, five year contracts."

"But do you have to go up and see them every week?"

"Well, not every week, but every once in a while you [fol. 83] have to be around there."

You get the feel of it, and then you are able to say whether it is a third or a quarter of this guy's time. His secretary goes along with it, and there you are. That is about all you can do with it.

Q. Well, first of all, the divisor you use, the service unit you use is time?

A. It is time in that case.

Q. And because of the fluctuations in his duties, you have to rely in part on his estimates and judgments?

A. And you have to take a long period.

Q. And the portion of his time in the dairy industry that, say, might be spent in procuring milk and dealing with the sale to retail customers and activities that had nothing to do with store sales, I take it that all of that could be excluded from any apportionment as between different classes of store customers?

A. And the particular problem we are dealing with here?

Q. Yes.

A. Just the store customers?

[fol. 84] Q. That is correct.

A. You have got to say, "This is the store customers. So much of this is store customers," and of that so much is direct and so much is indirect.

You have to boil it down, yes, that is what you have to do.

Q. So your first job is to exclude that portion of his time which is not devoted to maintaining and securing store business?

A. Yes.

Q. So you would exclude——

A. Exclude everything that does not have anything—say, if you are dealing only with the distribution function and if he has something to do with some other function besides distribution, you would exclude that also.

Q. Well, just as an example, I suppose you would exclude maintenance of the head office, procurement, research, motor transportation in so far as it pertains to bringing milk to the dairy from the country?

A. I would think so.

Q. Production, sales of by-products, sales of dry milk, sales of ice cream, and things of that character, which do [fol. 85] not deal with the sales of dairy products to stores?

A. To stores, yes. You are now speaking now about an executive's time, you are thinking about all the costs involved in those particular functions you named?

Q. Well, I would think the same reasoning applied to both.

A. I don't think so. I would think the whole works.

Q. And insofar as you isolate a portion of an executive's time as being devoted to store sales, you would apply the same percentage to the cost of maintaining his office and his secretarial staff and the equipment that was necessary to enable him to perform his job?

A. Well, yes, I think you might; yes.

Now, you are getting into details. I think you ought to leave a lot of that open to mechanics of your job. But I think that is one way.

You can have a rent charge and a lot of things, his pension, and so on, can go in there. His vacation. The mechanics of it I think we might just as well leave out.

Q. But if you selected time as a method of apportioning his own salary, that would also be a permissible way for [fol. 86] apportioning the supporting expenses to enable him to perform his job?

A. Yes.

Q. Because he has to have an environment in order to work?

A. Yes. In other words, if you are going to take that as a unit, you get into everything, the light, the heat, everything that goes in there, then divide it by time after you get into it. Mechanically, that is the way to do it.

Mr. Ball: Including the blond secretary.

By Mr. Stevens:

Q. Even if a time study of an executive's activities is performed, and you do have these conferences in which you estimate the portion of his time devoted to various functions, isn't it correct that there is a certain element of arbitrariness that may creep into this particular allocation in view of the fluctuation in his duties in his job?

A. Yes, that is right — well, not arbitrary. I do not think that is quite the right word, but you might say judgment. In any estimate there is an element of judgment involved there. It is not exact.

[fol. 87] Q. Is it perhaps less exact than some other areas of cost accounting?

A. Oh, yes, it is.

Q. In view of the fluctuation in the activities of top executives, is this type of breakdown of the executive costs as reliable for predicting future costs as are the more ministerial duties performed in different types of organizations?

A. I do not know anything about predicting. I cannot even find that the Weather Bureau can predict the weather. I do not think predicting has anything to do with Robinson-Patman.

It is hard enough to find what was done, let alone what is going to be done.

Q. Well now, in Paragraph F of your proposed testimony, at the bottom of Page 23 and the top of Page 24, where you refer to drivers' service costs being allocated among store customers on the basis of the time study of his activities, do you have before you what I am referring to?

A. Yes.

Q. Now, do you mean that the cost of the service function should be apportioned among customers on a time [fol. 88] basis?

A. Yes, I would think so.

Q. Why do you select time as a proper basis of allocating these service costs?

A. Well, I would not know any other way. This is time spent by men that are paid by the week, isn't it, mostly, and that time is practically paid by the hour and by the minute. It would seem to me to be the natural way to divide up the costs.

I mean, I cannot think of any more readily available unit than minutes.

Q. Now, if you select time as the basis for apportioning this item of cost, would you also use time to apportion costs of supporting the driver insofar as he is performing this service function, such as providing him with a clean uniform, and things of that nature?

A. You mean the cost of his uniform on a time basis? If you could not find anything else, you might have to. There does not seem to be too much relationship. Well, I suppose you might, yes.

Certainly his vacation and all of the fringe benefits, I think that can go on time. As far as his uniform is concerned, if you have not got anything else, I suppose that [fol. 89] is what you would do.

Q. How about the costs of providing him with tools, such as a dolly to perform the services in the store; could that also be apportioned on the time basis on the theory that it is part of the supporting facilities that enable him also to perform this service function which itself is apportioned on the time basis?

A. Well, lacking anything else, if you want to apportion it and you have nothing else to go on, and you cannot think up any other way to do it, you might.

You might think of some other way. You might use other factors. You would have to study that to see if you can think of some of these others we have talked about, all the different bases.

You have so much per customer, so much per hundred points. All these thing you would have to think about. I would if I were on the job, I would have to think about that before I would take time, because time seems a little remote to me.

Q. Well now, in your proposed testimony, you have divided the transportation expense, that is, strike that.

In your proposed testimony you have divided one area of cost into a transportation function and a service func- [fol. 90] tion. Now, would it be fair to say that for purpose of analysis to think the problem through we might assume that the transportation function was performed by one driver, that is, a portion of an individual who drives the truck, who drives the truck up, dumps the merchandise off without expending any time, and then drives on to the next stop, and the remaining portion is performed by the second hypothetical person who does the service, so that for purposes of analysis let's assume you have two men doing what is really one man's job.

Now, if you had a second man performing the service

function it would be necessary to get him to the store in a vehicle, would it not?

A. I would not know about that.

Q. Well, he certainly could not perform the in-store services without——

A. I mean, you are asking me about things about the dairy business I do not know anything about at all. That is an assumption. I would not make an assumption because I know nothing about it.

Q. Isn't that an easy assumption to make, that a man cannot do any work in a store without getting to the store?

[fol. 91] A. Well, if it is so. Your question is if you had to provide the things then it would be a cost. If you provided it, it would be a cost. The answer is yes, it would be, if you did.

Q. In one of the elements of cost of performing this service would be the cost of transporting a man to the store, would it not?

A. Yes, in that case it would on your assumption.

Q. And on that assumption you would also have to provide him with a uniform and tools and pay him a salary, and so forth?

A. Yes.

Q. Now, wouldn't it be permissible to allocate all of those costs among customers insofar as the service function is performed on the basis of time that that man spends in the various stores which he serves?

A. Oh, I don't know about that. He might be so much per store. No, no, not at all, not time, no.

You have got to transport him to each store in that case, so much for each store. I do not see how time has anything to do with it in that case. You have just got to get him to the store.

Q. So you would do it on a per store basis?

[fol. 92] A. Well, I mean, that is one thing you think of. I would not know. This is all new to me. That is the way it strikes me.

You have a contract with this man to land him at the work place. Now, you are assuming that. You have a contract and you are going to do that and it costs you

money to get him to a work place and to each work place, I suppose.

Or he walks from the first one; you transport him to the first place and he walks to the next place.

Q. Let us assume there is enough distance involved that it would be uneconomic to ask him to walk.

A. You mean then he had to be transported to each work place?

Q. Yes.

A. So you have a chauffeur for taking your men around to all the work places where they are going to pick these things up at the curb and take them in? I think we are getting into an area that is pretty fanciful.

Mr. Long: I object unless this is going to get a little nearer to the issues here of what the Bowman cost defense is.

By Mr. Stevens:

Q. Well, let me ask you this, Mr. Taylor. Wouldn't you [fol. 93] follow some method of apportioning the costs of enabling this man to perform the service function?

A. I do not know how you can identify that as a proportion of the costs because he rides on the truck, he drives the truck, and you are talking about dividing the cost of a truck between passenger transportation and freight transportation.

You have got two things there and you want to say how much of it was passenger transportation and how much was freight transportation.

Q. No, that isn't quite right.

A. We are not concerned with what might be, we are concerned with what is.

Q. That is right.

A. And it is hard enough, as I said before, to get actual costs without attempting to get theoretical costs. Now, the actual cost is that we have a passenger who is also a driver, and we have passenger transportation and we have freight transportation and, as I understand it, you are talking about dividing the two, so much for the passenger and so much for the freight.

Q. No. I have not made myself clear. The example is that the truck is free to dump the merchandise and proceed

[fol. 94] on its way without any delay at the store, and that the man who performs the service functions goes in a different automobile, a different vehicle, and the vehicle must stay at that store long enough——

A. But it does not do that. You are talking about something you do not do at all. Let's talk about what we are doing. I cannot answer questions about what some other method of doing it is.

I am only concerned with what you do, not with what you might have done. Now, what you do do is have a man at the platform, as I understand it, who loads up a truck with milk and brings it to the store. Now, we are talking about that cost. We are not talking about a man that is taken by a chauffeur to a store, because you do not do it. So let us not talk about that.

Q. Well, let me ask you, Mr. Taylor, and maybe we will come back to the other— How do you select the proper method of allocating the cost of, say, gasoline for running this truck?

A. Whatever you pay per gallon is the cost.

Q. And how do you determine how to apportion that cost? among different customers?

A. You don't.

[fol. 95] Q. You don't do it at all?

A. No. I never heard of such a thing.

Q. Well, are there any items of transportation cost that you do apportion among different customers?

A. Individually? No. I never heard of it. It is beyond my experience.

Q. Well, what about the costs of maintaining garage facilities, same answer?

Mr. Long: Now I think I object to that on the basis that that is outside any facts or figures or any kind of study in connection with the Borden case.

Mr. Hart: You mean we do not have garage expense? We do not buy gasoline? I wish you were right.

Mr. Long: Maybe the question can be made a little more meaningful with respect to this lawsuit.

By the Witness:

A. I think I know what you mean: How do you handle truck expense? It is bundle of expenses which includes

repair, garage and oil and gasoline. You deal with a bundle. You do not treat each one separately.

By Mr. Stevens:

[fol. 96] Q. You do not make any effort to analyze each one separately and proportion each one among customers on a different charge with a different yardstick?

A. No, I do not think anybody would think of it. You have got them all bundled. Then you want to know how to handle the bundle. Take the wages of the driver and your garage. You have got a bundle either for each truck or for the whole fleet, whatever your system is.

Now, I am not putting in a system here, but you get a bundle of costs, then you find a factor to divide that bundle up.

Q. What is it that led you to separate the time of the driver performing the service function from the time he is driving the truck and put those in two separate bundles?

A. Because I think you pointed out yourself he is two different people. He is a chauffeur in one case and he is the salesman in another case. He is two different people doing two different functions. Ordinarily a man in an organization of size performs one function, one function of one individual, and you always try to get that when you classify your costs. It makes it better.

[fol. 97] You draw your organization chart that way. But here is an exception. You have one man where you have to divide him down the middle and say for a certain length of time and a certain part of his wages you pay him as a chauffeur, and part of his wages then you are paying him as a delivery man.

Q. Now, then——

A. (Continuing) So it goes into this transportation bundle that I am speaking about.

Q. Now, in actual fact you have supporting expenses such as the truck and the garage, and so forth, which are necessary to get the man to the store to enable him to perform both functions.

A. Sure, you have got to get the milk to the store.

Q. And the man to the store.

A. The man and the load of milk.

Q. Now, how do you determine which bundle to put

these supporting expenses in, in the transportation bundle or the service bundle?

A. Well, I think you would need time for that. I think you need time studies for that to find out. You have to discover that.

Q. And would it be true that if he spent seventy-five or [fol. 98] eighty per cent of his time in one of the functions rather than the other, you tend to put everything in that bundle?

A. Yes. I think your time study would teach you how to divide it.

Q. I take it that in your review of this material with Mr. Woolley or by yourself you made no effort to analyze the portion of the driver's time which is spent in service function and the portion that is spent in the transportation function?

A. No, I made no analysis of any kind.

Q. Now, when one is considering—let's just assume we are dealing with the transportation function now, and one is just trying to decide how to apportion transportation expense, cost of vehicle, and so forth, how do you go about determining what yardstick to use?

A. Well, of course, you consider the various ones that you know about. You can name them off yourself from different ones that are available.

Q. Well, now, wouldn't it be correct, Mr. Taylor, that an important consideration would be whatever the limiting factor is, that when you reach, say, a certain capacity of a truck, that you then have to go out to buy another truck [fol. 99] to serve another route; that if the capacity is reached in terms of weight, well, then, weight might be a factor. Would that be found?

A. I think you would have to take that into account.

Q. Or if volume were the limiting factor?

A. Yes, I think so.

Q. Or if there were union agreements which specified the number of points which a man could deliver, that might be the factor?

A. I think that might have something to do with it. You would have to take into account everything about it that you could find out.

Q. Well, now, what if the facts showed that the trucks

were not loaded to their physical capacity but that the available time of the driver was the limiting factor of the size of the route because he was required to spend so much time at different stores, and, of course, the truck had to stand parked there while he was there; might not time then be a proper factor to consider in apportioning these transportation expenses?

Mr. Long: Now, I object to these portions of the factor, all this matter about the capacity of trucks, and how much they could load. There is nothing here that I know of in [fol. 100] the Bowman pre-trial order about it. Can you point it out to the witness?

Mr. Stevens: I do not have to point it out. That is a proper hypothetical question to be asked of a witness tendered by the Government.

Mr. Long: It is not proper in respect to the Bowman cost defense.

Mr. Stevens: My question is a hypothetical question. I am asking for Mr. Taylor's opinion on a hypothetical set of facts. We can argue its relevancy in the case later.

Mr. Hart: Well, you have got the objection.

Mr. Long: He can go ahead and answer and to the extent it is not consistent with what our record is, well, we will raise that later.

Mr. Stevens: Would the reporter read the question, please?

(Question read by the reporter, as follows:

[fol. 101] "Q. Well, now, what if the facts showed that the trucks were not loaded to their physical capacity but that the available time of the driver was the limiting factor of the size of the route because he was required to spend so much time at different stores, and, of course, the truck had to stand parked there while he was there: might not time then be a proper factor to consider in apportioning these transportation expenses?")

By the Witness:

A. No.

By Mr. Stevens:

Q. Why not?

A. The man, as I understand it, loads up his truck at the platform with the amount and items of dairy products which he thinks the customers on this route are going to require in that day's delivery. He does not know, however, how much of each item any customer is going to demand until he reaches that customer.

[fol. 102] So the transportation and the milk as costs all become merged in that truck and they do not separate by customer until he reaches the premises of the customer, at which time the proportion of the load allocable to a particular customer becomes known for the first time. So it does not matter, any of these things that you have enumerated, what the capacity of the truck is and what the agreement is.

All you have done is merely changed the location of some dairy products from the Central Warehouse to a truck warehouse ready to deliver to the customer, so that you see you do not have any way until that point of saying whose milk is whose.

See, that is the first point where you can just say it all comes up to here, when you reach location, and it is only at that point, which includes the milk and the pasteurizing of it, and everything else, it is in transportation, everything is all up to here, then it becomes this store and that store and that store.

That is the only place where there is any difference in costs from this point out. (Demonstrating).

[fol. 103] Q. Well, is your opinion based upon an assumption the truck is nothing more than a moving warehouse?

A. That is right, it should be treated as such, I think. That is your best analogy.

Q. What purpose does a warehouse perform generally?

A. As a place for the storage of goods.

Q. Does a truck perform that function?

A. Yes.

Q. The principal purpose of the truck is to store the merchandise?

A. Store the goods and have them available at the place where they are needed, yes, just as a branch warehouse, as distinguished from a central warehouse. This becomes a branch warehouse, analogues to a branch warehouse as distinguished from a central warehouse.

Q. What is the limiting factor on the use of a warehouse among different customers?

A. You are limiting this in what respect?

Q. Well, is there any limit on how much merchandise can be put in a warehouse?

A. Weight, space.

Q. That in your assumption is not necessarily the limiting factor in the use of the truck which you are using as the [fol. 104] analogy?

A. Well, as I understand, the trucks are limited in space and weight, yes, I think they are.

Q. But, I believe you indicated your opinion would be the same even if the truck were not loaded to capacity?

A. That is right.

Q. So that the capacity of the truck is irrelevant for the basis of your opinion, as far as the basis of your opinion is concerned.

A. Oh, not all warehouses are used to capacity.

Q. Can a warehouse serve more than one customer at a time?

A. Certainly. That is what branch warehouses are for. That is why you have the branch warehouses.

Q. Is there any time when a warehouse is being used solely for just one customer?

A. Yes.

Q. Well, in considering a warehouse, you do not have the problem of the warehouse taking time during the day moving from one spot to another, during which time it is not available to——

A. No, what I said was just an analogy. I do not say it [fol. 105] is a warehouse, I say it is a useful way of viewing this thing for the purpose of explaining the costs.

Q. But isn't it true, Mr. Taylor, that insofar as the analogy fails time is significant in connection with the truck

and it is not significant at all in connection with the warehouse?

For example, you need time to move the truck from the dairy to the customer's place of business, and during that time the truck cannot be used for any purpose except getting the merchandise there; isn't that correct?

A. Yes.

Q. And time is expended during the day while the truck must be parked in front of a particular customer and cannot be used to serve anybody else during the time it is parked at one location?

A. I do not know that that is so. I do not know why that should be so.

Q. Well, if——

A. I cannot see why you cannot have more than one customer served from a truck while standing in one place, if they happen to be right near the truck and across the [fol. 106] street.

Q. Well——

A. I know my own street they serve more than one customer from one spot.

Q. You are talking about a retail route.

A. I know, but why should that be? You proved already I do not know the dairy business, but I do not know why it should be so.

Q. Well, if, in fact, the stores are located two or three blocks apart, then the truck can only be used to serve one store at a time?

A. Yes. They would have to move.

Q. And while it is parked in front of one store then it could only serve that store?

A. Yes.

Q. Unlike a warehouse which can service many accounts all at once?

A. Yes, that is right.

Q. And if——

A. In other words, you can always carry an analogy too far. It is purely for the purpose of illustration and clarification. That is the only reason the warehouse was brought in.

[fol. 107] Q. But if the truck must stand, say, three-quarters of its time parked in front of these stores to

enable the merchandise to be taken off the truck and put into the store, then time has a significance in connection with the truck that it does not have in connection with the stationary warehouse?

A. Yes.

Q. Of course, the same is true with the time spent getting the truck to the place of business and back to the dairy at the end of the day?

A. Yes, but not necessarily any difference between one customer and another customer, one store and another store. Time might not necessarily have any difference there.

As I understood it, the point of the computation is the computation in the difference of the cost between one store and another that competes with it with respect to the cost of getting it to the location from the platform, and that that is the only thing I thought we were talking about, and time has no relationship to that because it becomes part of the cost of that place utility of getting it from one place to another.

That place utility is not a matter of time.

[fol. 108] Q. Well, let me give you an example that I gave to Mr. Sawyer. I will just read you the same question I asked him:

(Reading)

"Q. If, for example, it could be shown that a dairy had a half a dozen routes with a chain store on each route and by reason of a contract with a chain or any other provision that perhaps required delivery during a rush hour or some particularly difficult time to make delivery that the dairy was compelled to keep its trucks parked in front of the chain store on each route for half of a working day, and it was a condition that pertained to every day for every chain store, would it not then be reasonable to say that half the item of depreciation for those trucks should be charged against the chain, since half the truck time was spent at the premises of the chain?"

A. Do you want me to answer the question?

Q. Yes.

[fol. 109] A. No.

Q. Even if the truck—if it could be shown that half of the time of the truck was used to serve a particular customer, you would still say that it would not——

A. You are talking about depreciation?

Q. Right. Well, just as an example,—all right, let's just leave it on depreciation.

A. They do not handle depreciation that way.

Q. How do you handle it?

A. It is part of the bundle, it is only one element.

Q. Well, how do you charge the bundle if the chain required 50 per cent of the dairy's trucks to use to serve the chain?

A. You take that factor into consideration with everything else under all the circumstances of which that is one factor, but I certainly would not consider that an element to be considered isolated all by itself to give an answer. No, I could not answer that at all.

Q. But you would——

A. You cannot do accounting that way. I can't. I have only been in the accounting business forty-seven years, and I cannot answer that kind of a metaphysical question.

[fol. 110] Mr. Long: Well, I think we should give the witness a short recess here.

Mr. Stevens: Yes. All right.

(A short recess taken.)

Mr. Stevens: Are we ready to go ahead?

Mr. Long: Yes, all set.

By Mr. Stevens:

Q. Mr. Taylor, where truck transportation costs vary by distance, is mileage a proper divisor for that cost category?

A. Where applicable it is.

Q. How do you determine where it is applicable?

A. Where the circumstances would indicate that the distance is the factor of difference between customers. You are talking always, of course, between customers, aren't you?

Q. Yes.

A. Because that is what we are talking about here.

Freight rates, for example, are distance, and rate, and weight and distance make a freight charge. That is standard.

Q. Well, if we are talking about truck transportation costs——

[fol. 111] A. Truck transportation rates are distance and weight, too, I presume.

Q. I assume your proposed direct testimony was intended to relate to problems in distributing dairy products by trucks owned by the dairy?

A. Yes. There the case is different.

Q. In other words, this sentence in your proposed testimony on Page 23:

> "If truck transportation costs vary by distance, then mileage is a proper divisor for that cost category."

You were not talking about dairy truck transportation costs?

A. No, no. Where is that on Page 23?

Q. The top of Page 23 (indicating).

A. Oh, yes. Well, if it were, but it is not in this case.

Q. Well, do you suppose the truck transportation costs might be higher on a longer route than an a shorter route?

A. Yes.

Q. Well, then, wouldn't it be true——

A. If you were comparing routes, yes.

Q. (Continuing)—that in the dairy business, truck [fol. 112] transportation costs will vary by distance?

A. Yes, in some cases. Say in the instance you gave between two routes, it would.

Q. Say you added a new customer to a route that requires the driver to take a long detour and therefore burn more gas, hasn't his transportation costs been changed?

A. Not between one customer and another customer, no, not transportation costs between the platform and the route, not that transportation cost, because that has not changed any. It is only internally you are talking about now?

Q. That is right.

A. If you want to do that, of course, you will have to go into all the ramifications of this internal transportation,

which would vary all the time. You would have no standard to go by.

Q. So what you really have to do is find a factor which focuses on differences between the different groups of customers?

A. The different individual stores.

Q. All right. Now, in terms of transportation costs, assume you had a route where customers took varying amounts of merchandise but the truck was able, either [fol. 113] instantaneously or at uniform time intervals to unload the merchandise at each store in the same amount of time, and say there is no differentiation among the customers in terms of distance, so you would have to just stop, unload the merchandise, go to the next stop, unload more merchandise; would it be permissible to apportion transportation costs on that hypothesis among customers on a stop basis?

A. Oh, yes, sure. In other words, by your own definition, they are all alike. If they are all alike you treat them all alike.

Q. They are all alike in terms of the time it takes to serve and the distances, but not in terms of the quantities delivered to each customer?

A. It would not make any difference because you have already said they are all alike.

Q. So even though differing amounts are served to each store, you could still apportion the transportation costs on a stop basis on that hypothesis?

A. In the same circumstances.

Q. Yes.

A. Not the transportation to the route.

Q. Well, whatever——

[fol. 114] A. You could not do that very well.

Q. Whatever you put in the bundle, put it that way.

A. Oh, no. As we were just saying, this movement from the platform onto the route is part of the cost of the milk. You could not charge them the same amount per quart for the milk no matter how many quarts they took.

Q. I am only directing myself to the problem of apportioning transportation costs among different customers and with respect to that problem on the hypothesis that there is no difference among customers in terms of the time it

takes to get to them, the amount of gas that is burned, or the work in getting the merchandise off the truck. Wouldn't it then be proper to apportion the transportation costs among customers on a stop basis?

A. Certainly not, no. That would be foolish.

Q. Why not?

A. As I say, it would be just the same as charging a man the same for a gallon of milk as a quart. They are different things.

Q. How would you apportion it?

A. Here you have four quarts of milk and you brought that from the platform up to the route, four quarts, and [fol. 115] here is a man you only brought one quart up and you say you are going to charge the same for each?

Mr. Hart: He did not say anything of the sort.

By the Witness:

A. (Continuing) You cannot do that. That transportation is part of the milk just as much as the cream is part of the milk. That transportation in getting it to the spot, that place utility is just as much a part of the milk as the water or cream in the milk in there.

By Mr. Stevens:

Q. Mr. Taylor, I have only been directing myself to the transportation costs, you understand?

A. Yes.

Q. And you are saying that the transportation costs should be apportioned on a volume basis?

A. Certainly. I cannot think of any better way.

Q. Are there any circumstances at all that you can envision or you can remember from your history of this field of accounting where you would not recommend apportioning transportation costs on a volume basis?

[fol. 116] A. I cannot think of any. You mean time to this with the facts like this particular dairy situation, you mean?

Q. Any facts.

A. Oh, well, I cannot go that far. I have difficulty with one set of facts, to say nothing of bringing out everything I have ever seen.

Q. I am just trying to find out if this is a universal principle as far as your own practice is concerned?

A. Any place where the facts are like this or analogous to this I would say the preferable way is to treat it this way. I say the transportation up to the route is all just as much a part of the milk as any other part.

Q. What leads you to the opinion such costs should be apportioned on a volume basis?

A. Because that is part of the cost. I cannot think of any other way in which you can reflect the relative costs, the relative volume.

Q. Well, now, supposing you had a route which had thirty stops on it, various sized customers, you say you apportion the costs among them on the basis of volume delivery; suppose you have another route you have to run a hundred miles and you have one customer on it and ten [fol. 117] points of milk delivered to that customer, would you charge the cost of delivering to that customer just the same as the cost of delivering ten points as to a customer with a route with thirty points, because they both get the same merchandise?

Mr. Long: I am going to object to that question on the basis I think you have gone miles outside the record. You have gone a hundred miles outside of the record along with this hundred miles between customers. Unless you can come down to this particular case here I am going to advise the witness not to answer.

Mr. Hart: Well, if you are going to persist in advising him not to answer this question, Mr. Long, we want to go before the Court. If that is not a proper question, why, I want his determination of it, not yours.

Mr. Long: I do not see how talking about customers on a milk route a hundred miles apart has anything to do with this alleged cost justification of Bowman.

Mr. Ball: Let the record show this is an examination of [fol. 118] a witness tendered as an expert witness, and the witness is subject to a question on a hypothetical question in order to get to the basis of his reasoning. The question is advanced for that purpose.

Mr. Long: The hypothetical facts must have some relationship, some closeness to the facts on hand. He is not

here to answer every conundrum that counsel can talk about.

Mr. Ball: This becomes a proper means of questioning this witness because the witness has explained that he does not know the facts of this particular case.

Mr. Hart: If your objection is to the hundred miles we can make it ten. If you say there isn't such a fact in the milk sheds of the Chicago area, why, I will take it upon myself to prove that there is.

Mr. Long: Will you bring it down to five miles?

Mr. Hart: No. As a matter of fact, he may go up to thirty or fifty if you keep on pressing on it. I can take it upon myself to show that.

[fol. 119] Mr. Long: The Government further objects on the ground there is nothing in the record that shows the composition of these routes, the organization of them, and the distance between customers. Until this part of the record is clear, I don't think the witness needs to answer.

Mr. Stevens: Well, I would like to state for the record you have asked this witness to express opinions on the basis of an incomplete presentation of records that had been made and it is necessary for us to examine him on a hypothetical basis in order to get his opinion.

He does not know the facts. He did not review any of the large, large volume of underlying material which would have enabled him to be examined on a factual instead of a hypothetical basis. That is why I must proceed this way.

Mr. Long: I answered that by saying I think he is.

[fol. 120] Mr. Ball: Are you now instructing him not to answer?

Mr. Hart: If you are we want to suspend right here and go before the Judge.

Mr. Long: Well, I am going to persist in my instruction to the witness on the basis of a hundred miles apart not to answer the question.

Mr. Ball: I would like to have the question read back as originally stated.

(Question read by the reporter as follows:

"Q. Well, now, supposing you had thirty stops on it, various sized customers, you say you apportion the costs among them on the basis of volume delivery;

suppose you have another route you have to run a hundred miles and you have one customer on it and ten points of milk delivered to that customer, would you charge the cost of delivering to that customer just the same as the cost of delivering ten points as to a customer with a route with thirty points because they [fol. 121] both get the same merchandise?")

Mr. Stevens: Let me rephrase it.

By Mr. Stevens:

Q. Let's assume you have one route located close to the dairy with thirty customers on it, one of which takes ten points a day. I take it you are saying you would apportion the costs, the transportation costs among customers on that route on the basis of points and, therefore, charge ten out of the total number of points against this one hypothetical person, if you want to call him A.

A. All right.

Q. Let's assume you have another route which is much farther from the dairy. The truck is not able to serve as many people on the route. It drives much farther and has much greater costs of getting to the route and of making service on the route.

One of the customers on this second route also takes ten points, Customer B. Would you say the cost of serving Customer B is the same as the cost of serving Customer A, insofar as we are talking about transportation costs?

A. You say it is the same?

[fol. 122] Q. Yes.

A. How could it be the same when it is a hundred miles away? It is more. It is a different route. You have got different customers. Everything is different about the different routes. Everything is different about it. You have got to take all the facts into consideration in the different routes. Everything is different. All your results will be different on the different routes. Of course it would.

Q. So you would not apportion the costs among different routes on the basis of volume?

A. I should think—now, here, as I say, I am not a dairy accountant, but I think you would take it route by route and find out what were the facts in one route and what

were the facts in the other route and study them all, study as many routes as you need to get a knowledge of the situation.

Q. Then if we say it is much more costly to serve the people on the second route for the reasons you indicated, and you transferred a customer from the first route to the second route, you continued to buy the same amount of merchandise, would you say that the cost of serving them has changed?

A. Certainly the costs would change if you mean your [fol. 123] customers changed you have one less customer on Route A and one more on another.

Q. Well, what it comes down to, I think, Mr. Taylor, is that the cost of serving a given customer depends in large part on the route he happens to be on; is that not correct?

A. I should think it would be different on different routes, naturally, yes. I would think so.

Q. But then for a given route you would always apportion costs among customers on a volume basis?

A. The transportation costs, I would think so.

Q. So if you took a customer off of one route and put him on another route, that would reduce the total volume of the first route, is that correct?

A. Yes.

Q. And that would thereby increase the cost of serving the remaining customers, according to your reasoning?

A. Yes.

Q. So that a man—well, let me ask you this——

A. If the costs remain the same. If the costs remain the same.

Q. Assuming, at least insofar as you have the same truck and you have the same driver, same maintenance, same [fols. 124-125] depreciation, same license, same insurance, same garage.

A. If the volume increased and the costs remained the same, then the unit cost would drop.

Q. Would you think for Robinson-Patman Act purposes a dairy could justify increasing the price to a customer on such a route by taking another customer off that route and putting him on a different route, then would that be a satisfactory cost justification or, rather, cost differentiation for Robinson-Patman Act purposes?

A. If the costs differed by an amount equal to or greater than the price differences, it would be cost justified.

Q. Even though the sole cause of the cost differentiation resulted from the transferring of some customers from that route to another route?

A. Well, yes.

Mr. Stevens: Off the record, please.

(Discussion had off the record.)

Mr. Stevens: All right, we will recess then tonight until tomorrow morning at 9:30.

(Whereupon a recess was taken in the above-entitled matter, to 9:30 o'clock, a.m., Tuesday, April 29, 1958.)

[fol. 126] April 29, 1958

Otto F. Taylor, a witness having been heretofore duly sworn, further deposeth and saith as follows:

Cross-examination (continued)

By Mr. Stevens:

Q. Mr. Taylor, do you have any recollection today of the approximate amount of the second bill that you rendered to the Government for your services in this matter?

A. No more than I gave you yesterday, just a guess. You see, my firm sent the bill out. I do not keep the books.

Mr. Long: I would be willing to get the time that he billed the Government for and have it inserted here in the record, but not right now.

Mr. Ball: We would appreciate it.

Mr. Stevens: That is fine, and the date of the statement.

Mr. Long: Or statements. They can appear here.

By Mr. Stevens:

Q. Now, Mr. Taylor, let's turn to Page 22 of the material with respect to Bowman. That is your proposed [fol. 127] testimony, Paragraphs A and B. Now, at the

end of Paragraph A you refer to the Robinson-Patman study, that it must "also be in terms of cost per unit or equivalent."

Would you explain that a little more fully, what you mean by the equivalent?

A. It could be a percentage. It could be five cents or five per cent or something like that.

Q. Applying across several different products sold to a customer with a uniform percentage applied?

A. Sometimes you need to express it in a percentage, sometimes it is possible to reduce it to a unit.

Q. So that it would be possible to compare transactions with different customers which involved more than one product by comparing, say, five per cent, or something like that?

A. Ordinarily you want to do that, you see, because a price has to do with a product.

Q. Well, supposing you had a situation in which a company sold to two different customers or two different groups of customers, and several products were involved with respect to both.

A. Oh, yes.

[fol. 128] Q. And there might be certain kinds of selling expense attached to sales to one customer but did not attach to one particular product. Could you then treat one expense as a charge against a whole group of transactions with that one customer as distinguished from the other customer?

A. You could do anything with figures that you wish to do, depending upon your purpose. Certainly you can do anything with figures, that is what they are for. It is like the English language. You can say anything you wish.

I do not believe I understand that, sir, because mathematics is just a language like the English language.

Q. Well, I just want to find out what you meant by equivalent in that kind of a situation where you might have a group of expenses.

A. Oh, I mean, I think I can clear that easily enough. If you are going to compare the price of a thing with a cost of a thing, you have to have the price and the cost corresponding with each other so they would not be like this but they will be like that (indicating).

So if you have it so much per pound as the price and so [fol. 129] much per pound as the cost, all right, so you might have a percentage discount and a per cent cost difference, as long as they are comparable. That is what I mean.

Q. Then to relate it to the example I am suggesting where you have either two customers or two groups of customers and there is an item of expense which is chargeable against one but not the other, but that it is not divisible by particular product; in other words, say you have salesmen just call on that particular group of customers to maintain their good will generally, and you find that that item of expense represents roughly five per cent of your costs, or something like that——

A. Yes.

Q. (Continuing)—could you then charge that customer five per cent more than the other customer on all the products, without trying to break it down by each group?

A. Well, you might first have to do that before you broke it down because, you see, you must get it down to products or you would not have any problem. It has to get to products.

In this particular case—that is why Robinson-Patman [fol. 130] accounting is so different from cost accounting generally. Cost accounting generally you might want to know how much money you made on one customer and how much you made on another. That is another problem that we are not dealing with here.

Here we are dealing with a price of articles. It has to be an article sold to two different customers. We want to know the price of that article, we want to know the cost differences of that article. So they all have to do with the article.

Q. Well, supposing in this example this cost which is chargeable against one customer and not the other represents, we will say, five per cent of the total cost, how do you apply that to particular products if it is something maintained for the general good will of that customer?

A. May I rephrase it? If we have a case of sales to two different customers——

Q. Right.

A. (Continuing)—of mixed aggregate of articles in each

case, there are some of the articles that are not common to the two customers.

Q. No. Assume they are all common to the two customers, but in varying amounts.

[fol. 131] A. Oh. We are dealing with only one commodity sold to two different customers?

Q. No, several commodities but in varying amounts.

A. They are all the same articles then, they are like articles? They are all articles of like grade and quality, is that right?

Q. Well, just to put it in the dairy industry, suppose there is cottage cheese and quarts of milk?

A. Well, those are different articles then.

Q. All right, different articles; and each of the customers buys the same group of articles but there might be a different mix?

A. Oh, the mixes are different?

Q. Yes.

A. Now then, we are studying one of the articles in the mix, or each of them?

Q. Well, take it both ways.

Mr. Ball: The aggregate.

The Witness: You cannot get the aggregate, Mr. Ball, because we are talking about an article and that is all we are talking about, is an article. Say cream cheese or milk or whatever the article is, that is all we are talking about, [fol. 132] that one thing, and all we do is to bring it down to that one point.

By Mr. Stevens:

Q. Now, let's assume there are no cost differences at all in terms of platform costs or any difference in the articles or the method of delivery except this one item there is an overall expense of X-thousand dollars a year in maintaining the good will of the two groups of customers.

A. Say you might advertise one and not advertise the other.

Q. Something like that, or you might have salesmen call on one and not on another.

A. Yes.

Q. Or you might entertain him regularly and not the other.

A. Now then, we have divided all of our costs on these two customers. We have only two customers?

Q. That is right.

A. And each one of them has a mixed aggregate of like items but in different proportions?

Q. Yes.

A. So now we have divided our costs up in these two parts and each part has a mixed aggregate, and our prob-
[fol. 133] lem then is to separate out the particular article that we are dealing with as of this moment.

Q. Well, our problem is to give appropriate effect to this item of cost.

A. Yes.

Q. With respect to one and not with the other.

A. This would be a differential cost and not an overall cost, because we are talking about Robinson-Patman, where there is some differential cost.

Q. Yes.

A. Where there is a difference in the quantity sold or there happens to be a difference in the method of delivery.

Q. No, I am assuming no difference——

A. There is no difference in method but there is a difference in quantity?

Q. Well, no, none that gives rise to cost differences. There may be differences in quantity but they are not significant.

A. Then my definition is there are no cost differences.

Q. If there is, for example, overhead expense in terms of executive time maintaining the good will of one group of customers, you would not consider it appropriate to take that expense into consideration in your cost study?

A. You have to take into account any where there might
[fol. 134] be a difference in costs that results from difference in quantity.

Q. No, I am assuming, Mr. Taylor——

A. You are assuming there is no cost difference?

Q. No cost difference resulting from a difference in quantity.

A. Oh, yes.

Q. The only difference is the cost incurred by the dairy

by having some of its personnel devote time and money to maintain the general good will of one group of customers.

A. Well, then, you are contradicting yourself, I am afraid, sir, if you will pardon me. You say there is no cost difference, but at the same time you say there is.

Q. I say there is no cost differences created by reason of differences in quantity.

A. Well, then you have no problem. You say the methods are the same of sale, the methods of delivery are the same and the quantities are the same; then there is no problem.

Q. With this one exception, Mr. Taylor, that, let's say the sales manager of the dairy spends his full time and spends a lot of expense money maintaining the good will of one [fol. 135] of the customers. That is an expense involved in serving that customer and there is no comparable expense incurred in connection with the other customer, so that there is that cost difference.

A. Oh, yes.

Q. But there is no other cost difference.

A. This is a particular direct cost which is direct according to a certain customer or class of customers.

Q. All right, now, if on that assumption, how do you relate that cost to the products sold to that customer?

A. Well, if that were the only costs you have to deal with, the only cost difference, you just divide that by the volume and find out how much per unit that amounted to and that is the cost difference, because it is zero on one and it is the total quantity divided into the cost difference that you have in the other, and that is the difference.

Q. Would there be any purpose in bringing that back to products?

A. Well, I think you would have to bring it to products first because you are only dealing, as I said before, with an article. You have to bring it to products. It is after you have brought it to products that you calculate your unit [fol. 136] cost; and make this long division that I am speaking of, dividing the dividend.

Your dividend is the differential costs of that particular article, and the divisor is the quantity of other unit that you use as a proper means of measurement on the article.

The differential costs of that article—that part of your Robinson-Patman problem is the very thing you are speak-

ing about. You have product costs, and you have customer costs.

Q. So that you are saying that you would think that it would be important even if it was just a simple one-item cost involved to reduce that to each of the forty or fifty products that might be sold and then in turn break that down——

A. I do not know what you mean "you must." It depends on what you are trying to get at because, as I have said so many times, everything depends on your purpose, what you are trying to get at.

Are you trying to get at cost differences between customer classes? If you are, you must recognize all costs to customers.

Q. Let's assume what you are doing is you are starting out trying to make up a discount schedule that would be [fol. 137] a lawful discount schedule.

A. Say a case where you are trying to establish a price list?

Q. Yes, and you sell a large number of products to this one customer and a large number to another customer?

A. Oh, yes.

Q. And you do not know in advance exactly how many of each type or product the customers will take, but you can predict in advance what this item of expense will be because you have been dealing with the customer for many years.

A. Oh, yes.

Q. Now, is it your suggestion that you must make an estimate of how many of each of the products will be purchased over the year and apply a portion of this to each of those products?

A. I don't see how you can avoid that.

Q. You would not think it would be permissible to make an overall comparison of the costs and reduce it to a percentage and then apply that percentage to the whole group of products which are sold?

A. Well, it is difficult for me to install a system of pricing without knowing all the facts. I do say you would have [fol. 138] to examine all the facts, consider all the alternatives and then all the things that are needed to invent to get a cost-justified price.

I cannot go beyond that because the circumstances of the individual case would govern. You would need to know all you could find out about it if you are going to construct a price list.

Q. Well, I just want to be sure—you did not mean to rule out the possibility of setting up a discount schedule in which a discount was granted based on an aggregate of purchases of various products?

A. No.

Q. You did not mean to say that each product must be priced and discounted individually for all customers?

A. No, no.

Q. I assume you would agree that would be most impractical in some situations?

A. You mean in constructing a price list?

Q. Yes.

A. Well, I do not see why. You can have a percentage price list once you come to cost justify that price list. Of course, you would have to reduce your overall applicable discount percentages to the individual products.

[fol. 139] You could not avoid that because you are comparing prices of articles. Now, if it was five per cent of everything then it is five per cent on each. So that is fairly simple.

Q. Well, if you found an overall justification of five per cent you could then just transfer that as five per cent of each of the articles?

Mr. Ball: In the aggregate?

Mr. Stevens: Yes, in the aggregate.

By the Witness:

A. Ordinarily you would not do that. I have never known of a case where you would do it. Well, I know of one case in the Commission where that was done, but that is very, very unusual.

Ordinarily, you would find an article, one article where you would reduce everything to that article.

By Mr. Stevens:

Q. Then use that article in effect as the standard?

A. The cost of that article, the price on that article, and then get a difference.

Q. Use that to sort of typify the whole group of articles?

A. No, no; that is the only thing you are talking about. [fol. 140] Ordinarily you are not talking about different articles; ordinarily you are talking about one article.

In your case you are talking about cream cheese or butter, or whatever it is you are talking about, you are not talking about all of them.

Q. Do you know what we are talking about in this litigation?

A. You are talking about fluid milk, as I understand it. That is what you are trying to get at, fluid milk being sold in a mixed aggregate with others. You would have to sort out the fluid milk.

Q. What is your understanding of what was being justified or attempted to be justified in the cost defenses submitted in this case?

A. I understand different customers would have different prices.

Q. For what products?

A. For milk.

Q. It is your understanding that the case relates only to the sale of milk?

A. That is what is my understanding.

Q. That is the milk you drink as distinguished from——

A. Yes.

[fol. 141] Q. And there is not involved in this case anything to with, say, chocolate milk or cottage cheese or buttermilk or pints of cream or extra special cream, or anything of that nature, is that your understanding of this case?

A. Well, no, but I understood that milk was the principal item involved and the attention of the cost attention was concentrated largely on that. But I do not know that I had an opinion that nothing else was considered. I was never told that.

Q. Well, did you think it was quarts of milk or gallons of milk?

A. I had no opinion about whether it was as to the capacity of the containers.

Q. Well, did you get a copy of the pre-trial order that

was entered at the close of the Government's case in this matter? I show you a copy of it. (indicating)

A. I never saw anything that looked like this. I do not know. I may have seen it in another form.

Q. Directing your attention to Paragraph 1 (indicating).

A. I remember seeing a list like that, yes. Yes, I remember seeing something like that.

Q. And you are referring to Paragraph 1 under the [fol. 142] agreements of fact between the plaintiff and the Bowman Dairy Company?

A. Yes.

Q. Did you feel that had any relevance to this matter?

A. Well, I did not give it any special consideration.

Q. But did you understand that the Bowman discount schedule granted a discount just on the fluid milk item of either quarts or gallons?

A. I did not really know what the prices were of anything. I did not deal with the prices at all.

Q. Didn't you know what the discount schedule was?

A. No. I saw something in the testimony that I read. I think it was Mr. Malone's testimony, I think that it was Borden's, in which he made remarks about price, but I never saw a price list of either of the defendants.

Q. Did you see a discount schedule of the Bowman Dairy Company?

A. No, I didn't.

Q. In other words, you were asked to give an opinion on whether a justification for a particular discount schedule was valid without even looking at the discount schedule?

A. No.

[fol. 143] Q. Well, did you look at the discount schedule?

A. No.

Q. Well, wouldn't that be something that would be of interest to you to determine whether a cost study to justify various discounts would be proper?

A. No.

Q. You do not know what products the discount applied to?

A. No.

Q. You do not know whether the Bowman Dairy Company used a blanket discount or sliding scale discount, or what kind of discount it was?

A. No.

Q. Do you know what customer groups were involved in the Bowman Dairy Company discount schedule?

A. I never saw a schedule.

Q. Yesterday you made a remark about the classification between independents and chains being cockeyed, as I remember.

A. Yes.

Q. Do you know whether the Bowman Dairy Company ever made any such classification?

A. I have no independent judgment about it, but I was under that impression.

[fol. 144] Q. But you do not know from the basis of the material which you examined in preparation for your testimony in this case whether the Bowman Dairy Company made any such classification for the purpose of granting either differences in price or differences in discounts to its various customers?

A. No.

Q. Now, Mr. Taylor, again going back to Page 22 of the proposed testimony and referring to Paragraphs A and B generally, were they inserted because you felt they had some relevance to this case, or were they just put in there because they would be interesting reading of the kind of the appendage to the Taggart report?

A. That is a sarcastic remark, I think, and I do not think I will answer it.

Q. Well, was it because you thought they had some relevance to this case?

A. I think that is obvious. I was doing a job.

Q. All right, Mr. Taylor, referring to the last part of Paragraph B, where you refer to the functional analysis of expenses, which means dividing expenses into separate parts, each part representing the cost of a certain homogeneous activity, with respect to drivers' compensation, [fol. 145] am I correct in inferring that the two types of activities that are involved are the service function and the transportation function?

A. Yes.

Q. And each of those was considered to be a homogeneous activity?

A. Yes.

Q. And that the entire compensation of the driver should be assigned to one of those two activities?

A. I did not say anything about the entire compensation. The compensation that was properly allocable to the activity ought to be treated as part of that function, whatever was proper.

Q. Well, Mr. Taylor, in Paragraph B, you do indicate, do you not, that the various categories of money spent by a seller during a period of time should be assigned to a particular category?

A. Yes.

Q. Now, taking the money spent in paying drivers their compensation, I take it the relevance of this paragraph to this case is that you are saying that that dividend, that expenditure of money should be assigned to certain categories, is that correct?

A. In making the assignments you have to take into [fol. 146] account also what you are going to do with it and you have to take into account the units into which it may be divided, as well as the amount of the assignment itself.

You have an assignment but you cannot ignore the fact that once you have divided a total that you are going to have to divide it up, you are going to have to divide each aggregate. You cannot ignore that, either.

Q. But it was the purpose of this paragraph to indicate that the money spent to pay the drivers should be assigned to specific categories, is that correct?

A. Yes.

Q. And the two categories that you referred to in your proposed testimony are the service function category and the transportation function category, is that correct?

A. Yes.

Q. All right, now——

A. But I did not say that you could not divide the driver's compensation, some of the commission on a volume basis and what they are paid on time on a time basis because we accountants have to do things the easy way. [fol. 147] If you have time you use time, if you have volume you use volume. It does not mean you cannot separate the drivers' compensation into parts.

Q. Well——

A. Certainly you can. If it is convenient to do it, you do it the convenient way.

Q. Well, which category does the portion of the driver's compensation which is paid in the form of commissions——

A. I would not know how to divide that commission between the transportation and the other because I think it is all taken together, so that after you divided it, you see, you would have the same problem. So you might as well take it altogether as to divide it.

I do not see how you could attach one part of his pay to one function and one to the other.

Q. Well, what you are saying then is you do not assign all of the driver's compensation to any category?

A. I do not think you would be required to. I think it might be useful and convenient to treat one part of his compensation one way and another part another way.

Q. So that this general statement in Paragraph B does [fol. 148] not apply to your treatment of commissions?

A. Well, it would be modified to the extent that I have just said.

Q. I take it the principle on which you modify it is that it is more convenient to do it another way?

A. That is right. The mechanics in this matter of Robinson-Patman is vital.

Q. So that this basic technique that you describe in Paragraph B is one to be followed unless there is a more convenient way to handle certain items of costs?

A. Yes. I think they are all subject to exceptions.

Q. And an exception based on convenience?

A. I think convenience is important, yes, sir.

Q. So that I am correct in saying that Paragraph B was not intended to have any relevance to the portion of this case which deals with commissions?

A. Now let me read it. (Witness examining document)

By the Witness:

A. No, this contemplates treating commissions separately. That seems to be called for. I think it applies. I think it applies because you have to divide out—this speaks of getting unit costs by dividing units into money to get money costs of the units. I think that applies.

[fol. 149] For instance, if you are paying for something for a volume or where the use of volume for a unit is convenient you would say there you would apply this technique.

Q. Well, if you are applying this technique, what is the functional analysis you make of the cost of the commissions?

A. It is still two functions. You still have two functions on this that we have been talking about, because it is a transportation and a service function, and he is being paid a commission which must be paid for both functions, so you would apply that to each of the two functions and treat each of them that way, I would think.

Q. Now, again, I really do not mean to be sarcastic, Mr. Taylor, but at the bottom of Page 22 again you intended the introduction to this paragraph, which runs over onto Page 23, to apply to the problem involved in this case?

A. Yes.

Q. When you say, "these divisors should be those units for each individual function—" I misread it.

"These divisors should be those units which for each individual function most nearly reflect or cause the [fol. 150] variations in the amount spent."

A. Yes.

Q. Now, I take it that should apply to the transportation function as well as to other functions?

A. Yes.

Q. And I just want to be sure I am clear on this. Yesterday I suggested an example to you where the amount of time and distance and other elements of work involved at each stop were the same.

A. Yes.

Q. And you indicated you still would not allocate transportation costs on a stop basis, as I remember your opinion yesterday.

A. I think other bases might be preferable, put it that way.

Q. Now, supposing we had a situation where experience over many years of study indicated that a certain number of stops could be made in a day and that was pretty much constant, say fifty stops could be made a day regardless of the amount delivered at any one stop, so that whenever the fifty-first stop was reached, it was necessary to add another

route, so that that number of stops could then be the factor which caused variations in the amounts spent for new [fol. 151] trucks and maintaining them and hiring new drivers;

If those were the facts, then wouldn't the stop basis be an appropriate basis for apportioning time?

A. I would not think so, no.

Q. Even if it was the number of stops which most nearly reflected or caused the variations in the amounts spent?

A. I will have to repeat what I said so many times. If I wanted to find out the cost of operating trucks and if I wanted to know what would be the effect of taking on new territory on my truck costs, I certainly would not ignore stop costs under those circumstances.

Here we are dealing with something entirely different. We are dealing here only with the difference in cost per unit between one customer and another customer, one store and the store across the street, and that is all we are dealing with, as I understand it.

Q. Yes, but this sentence in this proposed testimony was intended to deal with that problem, was it not?

A. Yes. In fact, I think that is all this problem is about, between one store and another store, that is, as I understand it, and all we are dealing with is the cost phases of it. [fol. 152] You spoke about price. I never thought about price. I only have been thinking about costs, and that is all I was consulted about, was costs.

As a cost method the transportation to the area of the route is a cost of the whole load and none of it is for a particular customer, as I understand it.

It does not become a particular customer's milk, or whatever the product is, until it reaches the zone, reaches the store. It isn't a matter of dividing between customers from the platform on. It is not identified with the customer until later, and it is only at the point where it becomes identified with one customer or another that you can possibly have differences in the cost to one store and the cost to another store.

That to me is so plain I do not see why we have to discuss it.

Q. Well, Mr. Taylor, if that is the basis for your assumption, would your opinion be different if the customers

phoned their orders in before the truck ever left the dairy so that before the truck left, the driver knew just how [fol. 153] much was to be delivered to each customer?

A. I certainly think that would have to be taken into account and I am not prepared to say just how you would handle it in a situation like that.

Q. Well——

A. That would be more like your conventional order selling and order taking and order handling proposition where each customer's order is separately handled and where transportation and selling are separate functions. That would be a situation, if I am informed correctly, which would be entirely different than what we are dealing with here.

Q. In other words, your opinion is predicated upon the assumption that until the truck arrives at the store and the driver contacts the owner of the store, he does not know how much milk is going to be delivered to that store?

A. That is right.

Q. And your opinion might well be different if, before the driver ever left the dairy, the driver knew, say within a degree of error of five or ten percent, how much milk was going to be delivered to each one of his customers? [fol. 154] A. I would not know if it would or would not.

Q. I appreciate that these are difficult problems that require familiarity with the industry, but that might be an entirely different situation?

A. Yes. The facts control. That is a different set of facts than I was dealing with.

Q. Mr. Taylor, we referred to an example of a moving warehouse yesterday, and I notice also in Paragraph G of your proposed testimony that reference is made. Is that an analogy that was suggested by Mr. Woolley?

A. No. It was suggested by me in the first instance.

Q. Now, even in the case of a stationary warehouse if you assume, for example, that one customer of the warehouse rents the entire warehouse for the month of January, say, to store oranges for a couple of weeks, something like that, would not it be proper to apportion the cost of maintaining the warehouse, taxes, depreciation, various other items to that customer on a time basis, namely, charge one-twelfth of this maintenance cost to him, if every year he rented the warehouse for a twelfth of a year?

A. I have never known of that being done, no, and it does not seem to me to be as good as you could do. I think you ought to be able to do better than that.

[fol. 155] Q. Well, how could you do better than that?

A. I would say that warehouse costs should take into account, when they come to divide them up, space and weight, volume of the various commodities that are stored, modified by time.

You have got space, weight, time and money. I think you have everything you need for warehouse costs.

Q. Well, in the example I suggest, Mr. Taylor, if this one customer rented the warehouse for the month of January and then put either nothing or just a negligible quantity of merchandise in the warehouse——

A. This is the seller, now? You are speaking of the seller's warehouse?

Q. No, no; I am assuming a warehouse which is rented out to the public for such uses they may choose to make of it.

A. Oh, a public warehouse?

Q. Yes; and that there is one customer who rents the entire warehouse for a specific percentage of each year. My example was the month of January.

A. Yes.

Q. And I am suggesting to you that it would be proper [fol. 156] to charge a twelfth of the cost of maintaining the warehouse to that customer irrespective of the volume he put in the warehouse, because the warehouse is tied up for a twelfth of the year.

A. Whose costs are we talking about, the seller?

Q. The seller is the owner of the warehouse.

Mr. Long: I am going to note an objection here. I think this has gone way outside of anything that could possibly be germane here. The witness can go ahead and answer, but the question has no relevancy to the cost study made in the milk business.

By Mr. Stevens:

Q. Go ahead and answer, Mr. Taylor?

A. I will have to ask for a clarification of the question.

Q. Fine. I will try to make it more clear, if I did not make is clear. Let us assume that someone is in the busi-

ness of selling or renting warehouse space to the public.

A. Yes. We are looking at things from his point of view, from the warehouse owner's?

Q. Yes. Let us assume you are the warehouse owner.

[fol. 157] A. Right.

Q. And I come to you and I rent the entire warehouse for one month each year.

A. Yes.

Q. And I pay you for it.

A. Oh, yes.

Q. And other people come to rent parts of it for different periods of time, and so forth.

Now, the question is whether or not it would be proper in making a cost study of your costs of operating the warehouse to charge one-twelfth of your costs of maintenance, taxes, and so forth and so on, to the cost of doing business with me because I use a twelfth of the warehouse.

Mr. Long: Same objection as heretofore made.

By Mr. Stevens:

Q. I use the warehouse a twelfth of the time.

A. It seems to me that would be proper because I understand your question to be not in computing the costs but in dividing the costs among the users of the warehouse after you have found the cost, not in finding them, but after you [fol. 158] have found them, that one customer uses one-twelfth of the facilities of the warehouse on an annual basis——

Q. Yes.

A. (Continuing)—and other customers use eleven-twelfths.

Q. Right.

A. And by dividing by customers, if that be your problem, one-twelfth of the aggregate annual cost would be a proper charge to the customer who used one-twelfth. I think that answers itself.

Q. All right, Mr. Taylor. Now, supposing we transfer the analogy to the dairy business, and if upon analysis we found that one-half of the time a truck was being used to provide service to a particular customer during the entire working day or working year, would it not then by analogy

be proper to charge one-half of the cost of maintaining that truck after you found the costs, as you indicated, to that particular customer?

A. No, not if I understand the facts correctly. It is not a matter of time at all. It is a matter of milk.

Q. But the basis for your not accepting this

A. Because no customer is using the whole truck, if I [fol. 159] am informed correctly. The different customers take different quantities, different proportions of the truck load. I start from there, that you have a truck load of dairy products to be delivered on the route to the different customers on the route.

So it is not a matter of time, it is a matter of milk.

Mr. Long: Is this a good time for the witness to stretch a moment?

Mr. Stevens: Yes.

(A short recess taken.)

By Mr. Stevens:

Q. Let us turn to the subject of commissions, Mr. Taylor. Are you aware of the fact that there is a different rate of commission paid on rates depending on the size of the route?

A. No, I did not know that.

Q. Well, subject to Mr. Long's objection, I would just like to indicate that there is a provision in the union contract that indicates that there are no commissions on a wholesale route under 2400 points.

A. I understand that.

Q. And from 2400 points for the first 4,000 commission points——

[fol. 160] A. Seventy-five cents.

Q. And at the still higher volume it is ninety cents?

A. I understand it is a matter of individual routes. You have separate agreements on different routes.

Q. The basic formula is the same for every route

A. That is what I mean.

Q. But if the route reaches one point in size it changes from a no commission route——

A. It is a graduated scale but not different by different

routes. You do not have different contracts for different routes.

Q. No, they are not different contracts for different routes, but on some routes it would be possible that no commissions would be paid and on other routes——

A. It might work out that way.

Q. Yes. The commissions might be paid at the rate of seventy-five——

A. I know it wasn't for a man who delivered only twenty-four hundred points, he would not get any commission.

Q. And on another route——

A. But if he delivered over 6,400 points he would get a larger commission than under 6,400 points.

Q. So there would be in effect three types of routes, [fol. 161] those where there is no commission, those where——

A. I do not know what you mean by no commission. I knew it went by size because I read the contract.

Q. So we have it clear, under 2,400 it would be——

A. No commission.

Q. From 2,400 to 6,000——

A. Sixty-four hundred.

Q. Sixty-four hundred, excuse me; it would be at a rate of 75 cents per hundred, and over——

A. On the excess over 2,400.

Q. That is right, on the excess over 6,400, it would be at the rate of 90 cents per hundred.

A. No, 75 cents on the 1,600 and 90 cents on the balance over 6,400.

Mr. Stevens: All right, let's go off the record.

(Discussion had off the record.)

By Mr. Stevens:

Q. So, in any event, there are in effect three brackets. All right, now, let's take an example where there is a route of 2,400 points on which no commissions are being paid. Mr. Mart has called my attention to Article 42(a) of the union contract. Well, withdraw that.

[fol. 162] Assume a new customer is added to that route taking, say, a hundred points on which a commission of

75 cents would be paid. Would you charge that commission costs against that customer?

A. No.

Q. How would you charge him?

A. Proportionate of all the customers on the route. Proportionate to the amount they took.

Q. Let us take it the other way around. Start with 2,500 points on the route and assume we can eliminate the cost of 75 cents by taking a hundred point customer off the route.

Now, on that assumption, would you charge that commission cost against that customer?

A. There would be no cost.

Q. I mean, prior to taking him off. It would be a cost which could be eliminated by removing a customer. I take it your answer would be the same, that you still would not charge it against just one customer?

A. No.

Q. That is, "No," you would not charge it against just one customer?

A. I would not charge it against just one customer.

[fol. 163] Q. Now, would you agree with this sentence from the proposed testimony of one of the other witnesses in this case:

> "If an expense is such that it would be eliminated if the customer were dropped, it is hard to say that it is not a specific cost to that customer."

Mr. Long: I would object to that unless he could see the rest of it so you do not just take it out of context there. Let him look at the sentence or two in front of it and after.

By the Witness:

A. I am not prepared to testify to a generalization of that character, no. I am not contradicting it or affirming it. I would have to think that one over quite a bit. It is rather a broad statement, I think.

By Mr. Stevens:

Q. Well, just so there is no question about my giving you a fair opportunity to make an answer, would you turn

to Page 8 of the proposed Bowman order, that is, proposed Government order against Bowman, and read Paragraph H, which appears at the top of that page?

A. H?

[fol. 164] Q. H, yes.

A. Let me see what leads up to that. What is this all about?

Q. This is part of Professor Taggart's proposed testimony.

A. Oh, Professor Taggart is testifying and says, "If drivers do exercise some influence on volume delivery——"

(Witness examining document.)

By Mr. Stevens:

Q. Now, the question which I asked and wonder if you are in a position to answer is whether you agree with the last sentence of that paragraph.

A. No, I do not. I do not agree with the paragraph as a whole or any part of it.

Q. Thank you, Mr. Taylor.

Now, as I understand your view, and I am through with Professor Taggart's testimony now, Mr. Taylor—as I understand your view, you would charge the commission costs on a route basis, you would divide up the total commissions charged against a particular route among the customers on that route?

A. Yes.

[fol. 165] Q. On a volume basis?

A. Yes, I would think so. I cannot think of anything better, let's say that.

Q. Now, assume that you have a route on which no commissions are being paid which contains——

(Co-counsel conferring.)

By Mr. Stevens:

Q. (Continuing)—because of the 2,400 points on each side?

A. Yes.

Q. And you have another route on which some commissions are being paid because it is larger, and I won't worry about how much——

A. Yes

Q. (Continuing)—and assume that you have a customer on one route who is exactly like a customer on the other route in all respects, quantity delivered, amount of time required to serve, and everything else, and say they purchase exactly the same products, and so forth, with the one exception, that one of them is on a commission route and the other is on a no commission route.

Would you think it proper to charge those customers different prices reflecting no more than the difference in the [fol. 166] commission costs on the one route as against the other route?

A. You would find that to be so, because that would be a fact.

Q. So your answer would be yes?

A. Yes, it would be a fact if that were your problem to compare these two customers on these two routes and you had no other problem than that. You had only two routes, two customers, and you had nothing to consider but the commissions which were none in one case and some on the other, that would be the result.

Q. Well, that, of course, would be true even if there were several customers on each route and the only cost difference between them was this commission charge?

A. That is right. That is the fact.

Q. Well, would the same be true if I said you paid the drivers different amounts apart from their commission, just that each one had a higher wage rate than the other?

A. Whatever the costs were, that is what they would turn out to be. They are what they are. We are dealing here only with actual costs, money spent.

A proper division of money spent among the categories [fol. 167] that are being considered, that is our whole problem.

Q. All right. Now, I want to give you something else that Professor Taggart has written, not in this case, but elsewhere, and see if you have a comment to make on it.

Mr. Taylor, there are some excerpts from an article and we could not get the whole article out of the library so we just typed them. It was previously marked Sawyer Exhibit No. 1 for identification. There are several excerpts. The one I want to direct your attention to is the excerpt which

appeared on Pages 314 and 315 of the article, and is a hypothetical example involving the hypothetical Universal Coffee Company. I will give you the whole exhibit and you look at as much of it as you want, but this is the part I want to ask you about, the part beginning, "Assuming the Universal Coffee Company—"

Mr. Hart: Tell him what article it is from.

By Mr. Stevens:

Q. It is called "Sacred Cows of Accounting," or something like that. It is by Professor Taggart, written within [fol. 168] the last few years.

(Witness examining document.)

By the Witness:

A. Yes, I have read this. Yes, this is a dissertation on the liability under certain sets of facts of allocating on a percentage basis, say such as commissions, solely on the basis of the way they are originally calculated and there are circumstances, as pointed out here, in the hypothetical example, where the facts of the case might indicate that that would not apply.

By Mr. Stevens:

Q. So that specifically with respect to the hypothetical example of the Universal Coffee Company and the question which Professor Taggart himself asked in that example, does it really cost one hundred times as much to obtain the business from Joe's Supermarket as that from Hayseed Corners?

He then answers in the negative. Would you also make a negative answer in this example?

A. Dr. Taggart was using the device of what you might call the "horrible example," so he constructs the horrible example and then he destroys it. I mean, that is a literary technique he follows. That is all he is doing.

[fol. 169] He says, "Let's construct this great big straw man," then he builds him up, then he tears him down, and that is what he did in that article.

Q. But I wanted to be sure that you also would make

the same answer that he made in his article to that kind of an example.

A. In the same circumstances.

Q. Yes, I appreciate that.

A. Yes, in the same circumstances.

Q. And the circumstances, I take it, are that the salesman here in fact spends a great deal more time and effort on the small customer in proportion to the volume of the order he receives than he does relatively for the larger customer.

A. You say he does?

Q. Well——

A. Are you saying that to be so?

Q. That is the significant point of this example.

A. Oh, you mean in his example?

Q. Yes.

A. Oh, he points out there where the time spent proportions are quite different from the percentage propor- [fol. 170] tions in that case; yes.

Q. And——

A. That is shown to be a fact.

Q. And, of course, it is also pointed out in the example that the management requires him to call on the small customers as well as the large profitable customers.

A. Yes.

Q. And those are the kind of facts which would be relevant in determining whether or not commissions should be charged on a straight volume basis or on some other basis.

A. Well, the straight volume basis would be the obvious basis, as Professor Taggart points out, but if it can be shown on the basis of fact that that is not the best basis, some other basis should be chosen.

But, I mean, the first choice is to take the obvious and easy method. Now, then, if you can show that that works out that way and that another basis would work out better, you should take the better method.

Q. And the kind of facts which were just identified, namely, the disproportionate amount of time and effort going into doing business with the small customer is the [fol. 171] kind of thing you would consider in determining whether or not the obvious method is more appropriate?

A. Yes, I think you ought to consider that. You ought to

consider all the facts which you can get, of which that would be one.

Q. And in your testimony, proposed testimony, in Paragraph H about commissions, you were merely identifying the obvious method without trying to indicate that you had studied all the facts and made a determination of whether the obvious method was really the appropriate method?

A. This is based upon what knowledge I had of the facts.

Q. Now, Mr. Taylor, in your professional experience, have you become acquainted with any other cost studies in any other industries in which a truck driver's compensation was broken into two or more parts, one of which was allocated on a time basis and another was allocated on some other basis?

A. No.

Q. So that the suggested procedure, insofar as it deals with the driver's compensation in this case, breaking it into service function and transportation function is unique [fol. 172] in your own experience?

A. Yes.

Q. And that is the procedure which was suggested in the memorandum which Mr. Woolley prepared for you?

A. Mr. Woolley indicated to me that that was his thought, yes, and I agreed with him.

Mr. Stevens: That is all I have.

Mr. Ball: Mr. Long, I have, in the light of what were to me surprising answers today, a few more questions.

Now, I can defer those as recross but I thought it might be helpful to you if I asked them first before you.

Mr. Long: That would be fine.

Cross-examination. (Resumed)

By Mr. Ball:

Q. Mr. Taylor, what is your understanding as to how Borden set about to make this cost study? What did they do?

A. I understand that they employed a firm of accountants —I think they are an auditing firm—to advise them on the distribution of costs and also their own employees organ [fol. 173] ized a study of time and took actual time studies under the observation of their professional advisers.

Q. Do you recall what activities the time studies covered?

A. Yes. I believe that the time studies covered the timing of the various activities of the drivers throughout their day.

Q. Were there any other time studies that you recall?

A. Yes, there were observations made of the clerical costs, of the order handling and billing at the Central Office.

Q. Now, what was done with this data so far as you recall?

A. I believe it was compiled to secure average units of billing and of performing functions by the routemen whose time was observed in the tests which, as I recall, was in December of 1955.

Q. Now, what classes of customers?

A. Store customers.

Q. Yes, but what classes of store customers were covered, do you know?

A. As I recall, it was an observation of the time of each [fol. 174] customer on the selected routes of each store on the routes.

Q. It was your understanding that the study was a study of the cost of individual customers, is that right?

A. Yes.

Q. And were you or were you not aware that on these routes were also some wholesale, so-called wholesale customers who were not store wholesale customers?

A. I believe there were some. As I recall it, that was brought out to be exceptional.

Q. Do you recall what the Borden discount schedule was?

A. No.

Q. Do you recall what products were studied?

A. No.

Q. Do you recall whether or not this study was extended to executive time?

A. I do not recall that it was. I think it was not.

Q. You do not recall having heard or having been given any facts at all concerning observations as to the allocation of executive time?

A. I do not remember seeing anything about executive time.

[fol. 175] Q. You do not recall seeing anything about

time spent by Borden executives on classes of customers?

A. Yes, I think there was some testimony with respect to the aggregate amount of time spent by managers and executives, as between the proportions of time that they spent on independents and chain stores.

Q. You did not see the Borden discount schedule at any time?

A. No.

Q. Now, do you recall what, if anything else, was done with the data that was assembled?

A. No.

Q. Other than what you have just described?

A. That is right.

Q. Do you recall reading any of the testimony with regard to the method by which routes were determined?

A. I saw none.

Q. Do you recall reading any testimony at all concerning the relative functions to be performed by the drivers and solicitors?

A. Yes, I think Mr. Malone testified with regard to that.

Q. What is your recollection as to the distinction of functions between the two?

[fol. 176] A. I understood the solicitors acted quite independent[ly] of the drivers and that they called only on independent stores and they did not call on the chains, as I recall it, and that the drivers merely served the customers who had been secured as a result of the efforts of the solicitors in the case of the independents.

Q. What was your understanding as to what the drivers did, if anything to increase sales?

A. I saw nothing with respect to that.

Q. You do not know whether they had the assignment of increasing sales, or not?

A. No.

Q. Do you believe commissions must always follow volume, even if the driver has nothing to do with influencing sales of the amounts delivered?

A. Lacking any other basis of allocation, I should think that volume—you would have to take volume in the absence of anything better.

Q. Irrespective of whether the person receiving the commission has anything to do with the quantity of the sales or deliveries?

A. I did not say that.

Q. Well, that is my question.

A. No, that isn't your previous question. Let me have [fol. 177] the previous question again. It is quite different.

(Question read by the reporter as follows:

"Q. Do you believe commissions must always follow volume, even if the driver has nothing to do with influencing sales of the amounts delivered?")

By Mr. Ball:

Q. Now, assuming that the driver has nothing whatever to do and no power to influence the amount of sales of deliveries but receives commissions, do you believe under those circumstances a commission should follow volume?

A. In this case I should think it would.

Q. Now, I am asking you to confine yourself to the facts assumed. Assume these facts and no others.

A. Oh, yes.

Q. Now, assume that drivers are delivering fluid milk, that they receive commissions based on the volume delivered, that they have nothing to do and no power to influence the amount delivered; do you believe that the commissions under those circumstances, exclusive of any [fol. 178] other facts you think may exist in this case, should be allocated on the basis of sales?

A. I do.

Q. It is your belief also that in Robinson-Patman Act cases a discount on a line of products must be justified product by product, is that correct?

A. No.

Q. Well, how?

A. I think that there are no "musts" in Robinson-Patman accounting.

Q. All right. Well, then, if you have a line of products and a discount is given on an entire line of products, when is it necessary to justify product by product?

A. Always.

Q. You read the Eggleston testimony, did you not?

A. Yes.

Q. Do you recall what the Eggleston testimony was about?

A. Well, he first told about his experience with Borden, different positions he occupied.

Q. Do you consider——

A. (Continuing)—Something more about the general [fol. 179] operation of the distribution of Borden products. In general that is about as I recall it. I recall some things specifically said.

In the latter part of his testimony, he said that it did not matter whether it was sold to chains or independents, the thing that was important was the volume and the size of the store. I remember that quite distinctly.

Q. And that was one of the facts you took into consideration in the opinions you expressed with respect to the Borden order?

A. Yes.

Q. Now, you have spoken quite frequently here of the differences between Robinson-Patman accounting and other accounting. What are those differences?

A. Robinson-Patman accounting is a specific application of the principles of cost accounting which cover a very broad field.

Cost accounting is a branch of accounting which is used to measure performance. It is useful to management in arriving at a comparison between parts of their business, between the results of their business at one time and at another and at arriving at the value of their inventory, [fol. 180] and also for control purposes of controlling operations and forming budgets.

Robinson-Patman accounting, however, has to do with the discovering of those differences in costs in serving competing customers which result from one of three things—quantities sold to the different customers, the methods by which they are sold, and the methods by which they are delivered.

Consequently, in Robinson-Patman accounting you deal with only a very specific and narrow phase of cost accounting generally.

Q. And that phase is not the kind that has any other management purpose, in your opinion, is that right?

A. Not directly, but it might result indirectly, but it is in my opinion a legal matter with an accounting application.

I think the accountant's function in Robinson-Patman accounting is to assist the attorney and I think that if there is any other application of Robinson-Patman accounting it is derivative, collateral, and incidental.

Q. In other words, in order to assist the attorney, the accountant must analyze what the law means, is that [fol. 181] correct?

A. He should have an understanding as to what is meant by the cost proviso in the Section 2(a) of the Robinson-Patman Act.

Q. And he must base his opinions on what is sound Robinson-Patman accounting on his opinion as to the meaning and purport of the Act then?

A. Based upon his knowledge of accounting generally.

Q. Yes, but he must base particularly his judgments and include in all of his judgments his understanding of what the law means, is that correct?

A. He should know, yes. I think the accountant in order to properly assist the attorney, should have some knowledge of the purpose of the Act.

Q. Well, isn't it true that since the cost defense under the Robinson-Patman Act involves accounting, that it is impossible for an accountant to express an opinion on a Robinson-Patman Act cost justification defense unless he embodies in his opinion his interpretation of what the law means by permitting the cost defense?

A. I should think he would have to read the Act and have some idea of what it means to an accountant, yes.

Q. And his opinion would be affected by the way he [fol. 182] interprets the Act, the meaning of the Act?

A. I do not know that he would interpret the Act. He would read it and try to understand it and certainly not ignore it.

Q. But he would have to form——

A. He is not practicing law, Mr. Ball.

Q. No. I understand.

A. Let us not get into that. I may be prosecuted by the bar for interpreting the law.

Q. But what I mean is, it is impossible for an accountant to form a judgment as to what is sound Robinson-Patman Act unless he first forms a judgment as to what is required by the Act?

A. Yes, sir, and I would like to give you an example, Mr. Ball.

Q. All right.

A. Because we are on very serious ground here. I certainly would be disputed by many accountants, as you would know. I think the accountant cannot ignore the fact that we are dealing with the price sold to one customer and the price sold to another customer, these two customers being in competition.

So he must know something about what is meant by a [fol. 183] customer, he must know something what is meant by competition, he must have some idea of what is meant by price, as well as some idea and experience of what is meant by cost.

Q. And he must have some—form some opinion of what is meant by reasonable allowance?

A. Yes, sir, that is very important, too.

Q. And due allowance?

A. That is equally important.

Q. Well, that knowledge or information enters into and helps to shape every opinion that he must express?

A. Yes, sir.

Q. Now, you made a distinction at one point in your testimony today that in one instance in management you want to find out the profit in serving a given customer and in another you want to find out the differences in costs. Aren't the two correlative?

A. No.

Q. All right. If I have a product cost and a cost of selling and delivering Customer A at a given price, I know what my profit is on serving him, don't I? Isn't that correct?

[fol. 184] A. Will you state that again, please?

Mr. Ball: Would you read that back, please?

(Question read by the reporter.)

By the Witness:

A. That is not Robinson-Patman, Mr. Ball, that is general accounting.

By Mr. Ball:

Q. Without reference to that, if I know my cost of serving Customer A, and I know my product cost, and I know my selling price, by mathematical computation I can tell what my profit is?

A. Yes, sir. That is cost accounting generally. You have expressed it very well.

Q. In that case one of the facts that I must know is the cost of selling Customer A?

A. Yes.

Q. Now, if I know the same points about Customer B, my product costs, my costs of serving him and my price to him, I also know my profit on Customer B, is that correct?

A. Yes.

Q. But in both of those cases, having found those facts, [fol. 185] I also know the difference in cost of serving those two customers?

A. Yes.

Q. And the second is Robinson-Patman Act, is that right?

A. No, sir.

Q. Well, if I know my differences in costs in serving the two customers, isn't that the information that is relevant?

A. No, sir.

Q. All right, why isn't that relative to Robinson-Patman?

A. Robinson-Patman only deals with one small segment of costs, only particular segments of costs. Most costs have nothing to do with Robinson-Patman at all.

You must identify the particular cost that is concerned, and show that that cost is of the order where differences in quantity, differences in method of sale, and differences in method of delivery would result in a difference in cost to a customer.

Q. Well——

A. We are only concerned with differences between differences in this area.

[fol. 186] Q. Now, if I know what my product is for Customer A and I know what my product cost is for Customer

B, I know what the difference is in product cost between the two?

A. Yes.

Q. And that is a factor—that difference is a factor that is relevant to Robinson-Patman?

A. No, sir.

Q. Difference in product cost?

A. No, sir.

Q. Well, it is your understanding of the Act, then, that differences in product costs are not a matter of justifying?

A. Some of them.

Q. Well, what are and what aren't?

A. Those which result from differences in methods, differences in quantity and differences in method of delivery, only those.

Q. And your opinions are shaped on that understanding?

A. My opinions for years have been shaped on that.

Q. Yes. Now, if I know what my costs of serving—or, put it this way, my costs of selling and delivering an item to Customer A are, and I know my costs of selling and [fol. 187] delivering Customer B are, I know my differences in cost selling and delivery between those two customers, is that correct?

A. Yes.

Q. Well, now, isn't that difference exactly what can be used to justify price difference under the Robinson-Patman Act?

A. If you can show these results from the particular items I enumerated, if they result from that.

Q. All right. Now, from what else can they result, Mr. Taylor?

A. I do not know. You would have to review all the circumstances of the case and see what they do result from.

Q. Well, isn't it a fact——

A. Because, you see, you can have differences between customers that do not result for any of the Robinson-Patman purposes.

Q. Well, give us an illustration.

A. Well, for instance, you may buy goods at a bargain, raw material at a factory where the rates of pay are lower. You may have public warehouses in one case, and your own warehouse in another. You may have so many, you can

[fol. 188] have many differences, very many differences, but that have nothing to do with Robinson-Patman.

Q. In your opinion then, in your understanding, those kinds of differences in costs dealing with one customer against the other could not be taken into account?

A. No, sir, because of the fact they do not come within the act.

Q. Therefore you are illustrating the fact that it is what you understand the Act means determines what you think comes under the Act?

A. Yes, sir.

Q. And for that reason you think that there are many differences in costs in serving one customer against another that in your opinion are not permissible to be shown as cost justification?

A. That is right.

Q. Now, applying that fact to the present case,

Mr. Ball: Off the record.

(Discussion had off the record.)

Mr. Ball: Well, that is all I have.

[fol. 189] Redirect examination.

By Mr. Long:

Q. Mr. Taylor, I show you a document that has been marked as Taggart Exhibit Bowman No. 2, entitled, "Documents for Review by Expert Witness," and I ask you to run down those. Would you look at those, please?

A. Yes.

(Witness examining document.)

By the Witness:

A. Yes, I see them.

By Mr. Long:

Q. Do you recall whether or not those were the documents that Mr. Woolley either brought to you or sent to you?

A. I believe they were. If you will tell me on this first one, "Transcript of Volume 8," what that is——

Q. This is 51 C 947, the number of our case.

A. Oh, yes. Transcript, Volume No. 8, what is that?

Q. Well, this is the Eggleston testimony.

A. Oh, yes. I saw that. Then the Government pre-trial order, Bowman Document, Wholesale Accounts, Store Manual, Tests, the Government's Cost Analysis Memos, Bergfeld Deposition, Bulk Wholesale Accounts, Bowman [fol. 190] Proposed Pre-Trial Order.

Yes, I saw those.

Q. All right, now, did you base your testimony upon these documents there alone?

A. Yes, among other things it was based upon that.

Q. Now, are the views set out in your proposed testimony your own views?

A. Yes.

Q. Despite the fact you had consultation with Mr. Woolley?

A. I contradicted him on some of the things and I agreed with him on others, but whatever is in there is all my own.

Q. I would like to ask you, do you recall, in answer to a question of Mr. Ball here, the transcript, Volume 8 of the Civil Trial No. 51 C 947, do you recall which one of these milk companies Mr. Eggleston was with?

A. I thought he was with—let's see, Malone was with Borden and Eggleston—gosh, I do not really recall.

Q. I guess that volume isn't down here. May he have been with the Bowman Dairy Company?

A. Could be. My recollection is not clear.

[fol. 191] Mr. Stevens: We object to Mr. Long, if he is trying to impeach his own witness.

Mr. Long: Well, I could refresh his recollection with the transcript.

By the Witness:

A. It has been a long time since I saw that, six or eight months, or more than that. My recollection on that isn't too clear. Eggleston? I would have to say I do not recall.

By Mr. Long:

Q. Now, let me ask you, Mr. Taylor, do you have any personal interest in whichever way these cases turn out?

A. It makes no difference for me. I am working for hire.

Q. Now, you, I think, testified too, that at the time you prepared your proposed testimony in the Borden and Bowman rebuttal, you had not seen these charts of Mr. Woolley's?

A. That is right. They came later.

Q. Now, have you seen these charts now?

A. Yes, I saw them in New York some little time ago.

Q. Would you want to change your proposed testimony in any way after having seen these charts?

A. No, sir.

[fol. 192] Q. Mr. Taylor, I show you the supplemental pre-trial order between the plaintiff and the defendant, Bowman Dairy Company, and I call your particular attention to Paragraph 27 of that pre-trial order, supplemental order, and ask you if you would read it over a little bit and tell me if you have ever seen that material or similar material.

(Witness examining document.)

By the Witness:

A. Well, this looks familiar. It shows experiences of Mr. Bergfeld. I remember that because I could not have gotten that any other place, I guess.

Mr. Stevens: Are you talking about Paragraph 27?

The Witness: 27, yes.

By Mr. Long:

Q. Does that all look familiar to you there (indicating)?

A. Yes, yes, that looks familiar, although when I saw it the ink, the color of the ink and type of paper, was different; otherwise I think this looks familiar. Yes, this looks familiar.

Q. Now, on Page 14 there, what is that a treating of [fol. 193] there?

A. This is the second assignment of Bowman in '48 where they were determining cost methods of the company.

Q. What kind of costing method were they using?

A. Well, I recall Mr. Bergfeld was telling about helping installing standard cost procedures, and I think he went to some length about what he did there with respect to standard cost procedures.

Q. Would your comments on that be the same as you have testified to at length here with respect to the distinction between a management cost survey and a cost study under Robinson-Patman Act?

A. Oh, yes.

Q. You would make the same criticism directed to that page there of the supplemental pre-trial order?

A. I think this is descriptive of Mr. Bergfeld's work which he made clear—at least it seemed clear to me, that he was assisting management with getting in systems that would be helpful to management.

Q. Might they not be entirely sufficient for a Robinson-Patman cost defense?

A. Well, some of it might turn out to be useful, but not directly applicable.

[fol. 194] Q. I show you, Mr. Taylor, the Borden defense pre-trial order and call your attention to Paragraphs 149 and 150, and I ask you if you have ever seen either that material or similar material?

A. Some of this looks familiar, and it looks like some of it I thought was similar to Mr. Malone's testimony. I do not remember it in this form.

Q. It seems similar to the Malone deposition?

A. The subject matter, yes, but the phraseology is not particularly familiar to me; no, sir.

Mr. Ball: What are you showing there?

Mr. Long: I am showing 149 and 150, 150 saying no time studies were made of the time of the executive and administrative employees in contacting the executive officers and other representatives of the chain stores.

By Mr. Long:

Q. Do you remember Malone so testified to that?

A. Oh, yes, I recall that, but, I mean, this particular document does not ring a bell for me.

Q. But the material rings a bell?

A. The material is familiar, yes.

[fol. 195] Q. Now, did you take that into consideration, those paragraphs in the opinions you have set out here?

A. The subject matter that is treated here I took into account.

Q. Would you suggest any other ways of ascertaining the costs of this executive solicitation of the chain store business other than estimates that I think you testified to yesterday?

A. I have had no experience with that except on the basis of estimates. It is a difficult thing at best and I think my experience has been that you largely would have to rely upon the basis of the subject's own opinion of his own time.

Q. Well, what is your opinion on use of other objective standards rather than subjective ones such as that?

A. You mean of general executives?

Q. Yes.

A. You mean like officers and branch managers, and things like that?

Q. And sales managers.

A. I have no experience with any objective standards.

Q. What would you feel about examination of their [fol. 196] travel accounts their expense accounts?

A. It could be useful. I have no experience with that.

Q. What do you think about a study of their correspondence?

A. That could be very helpful.

Q. Now, this matter of the allocation or the distribution of the costs of the executive officer soliciting chain stores, what kind of cost is that, direct or indirect?

A. It is a mixture.

Q. Now, to the extent that the mixture is direct costs, how would you in your opinion allocate it?

A. Like any direct costs, it should be allocated to those categories to which it directly applies.

For example, if a man spends half his time as a salesman, then half of his time and the related expenses of his office would be treated as any salesman's would be.

If the other half of his time was administrative, that would have to be treated as an overhead item. There again you have the matter of, as we talked about I think earlier in another connection, where you do have to divide a man

[fol. 197] in parts. Sometimes you do. I think this is another case.

Q. Well now, those applicable overhead might be tantamount or similar to the direct costs?

A. Well, I think that you would have some direct costs. You would have some of it would be direct cost, as I say, if he acts as a salesman for half of his time. Then you treat him as direct cost. The other half is overhead and you would have to have that allocated as you would other overhead.

It might be a thing that Mr. Ball was bringing out, there are costs that you cannot allocate and you just probably would throw it out and ignore it altogether. Chances are you would.

The case I am thinking about now in my mind the part that is not direct we would ignore because it does not produce a difference.

Q. Now, I just have one other question. I wonder, the many hypotheses given here by counsel for the Bowman Dairy Company with respect to the transfer of store customers from one route to another, how would that relate to a method of sales and delivery?

Mr. Stevens: I again object to your attempting to im-[fol. 198] peach your own witness.

Mr. Long: I do not think this is impeachment.

Mr. Ball: I think I would object to the form of the question as calling for the opinion of the witness on the matter of interpretation of the law.

Mr. Long: I think he can interpret it as an expert accountant here.

By Mr. Long:

Q. What possible relation would that have, dropping a customer, adding a customer, shifting him around there, the composition of the routes; how would that affect or relate to a method of delivery and sale under the Robinson-Patman Act?

A. I do not see how it would have any relation to a method of sale and delivery. By definition the two routes are handled by the same method.

Mr. Stevens: Are you through?

Mr. Long: Yes.

Recross-examination.

By Mr. Stevens:

Q. How would any commission charge be related to any [fol. 199] difference in method of sale or delivery?

A. I do not think it would.

Q. So then commission charges would be ignored for Robinson-Patman Act purposes?

A. No.

Q. Well, maybe I can just make a general question.

So that your answer to the various questions I asked you about commissions before would remain the same in spite of Mr. Long's question.

Put it a little differently: In answering Mr. Long's question, you did not intend to modify any of the answers you gave to the questions that I asked you, did you?

A. No, I was not modifying them.

Q. Mr. Long showed you various rebuttal exhibits which Mr. Woolley had prepared. How much time did you spend reviewing those?

A. Less than a day. I would say less than a day.

Q. For both the Bowman and the Borden?

A. You mean these memoranda?

Q. No, I do not mean Woolley's memoranda.

A. Oh, these things that came in later?

Q. That Mr. Long just showed you a minute ago.

[fol. 200] A. Yes, there were six of them. Oh, yes, I gave a little study to those. They were very interesting. How much time?

Q. Just approximately.

A. Oh, a couple of days at the most.

Q. I show you a chart which is marked Chart IV-B.

Mr. Long: Now, I want to enter an objection there. I do not know what you are getting at. Well, go ahead.

Mr. Stevens: It is just based upon your redirect examination. You asked him some question about these.

Mr. Long: Of course, I am going to object to his having to interpret or construe or give any opinion on Mr.

Woolley's work. If you have that in mind I am going to direct him not to give any opinion on Mr. Woolley's work.

Mr. Ball: You already asked him for that opinion.

Mr. Stevens: That is exactly why I have to do. You asked, you said, "This does not change any of your opinions?"

[fol. 201] Mr. Long: I am going to object if you are going to go minutely over all that material there. Go ahead and ask the question.

By Mr. Stevens:

A. I show you Chart IV-B of the proposed rebuttal pretrial order as to Bowman Dairy Company containing rebuttal exhibit folder B, being a chart entitled, "Bowman Chain Stores' Rebuttal Evidence, Relationship of Percentage Glass Containers to Number of Points Delivered Daily."

I will ask you if you know what that chart indicates.

Mr. Long: Well, I am going to object to that on the basis that you are asking the witness to interpret Mr. Woolley's work there and that is something, I think, that is more properly to be asked of Mr. Woolley. I do not think it throws any light one way or the other on this witness' proposed testimony here.

Mr. White: We can all stipulate Mr. Woolley's work does not throw any light on the case.

[fol. 202] Mr. Woolley: That is a matter of opinion.

Mr. Long: Mr. Woolley is going to testify to that.

Mr. Stevens: Will you read back the pending question, please?

(Question read by the reporter.)

By the Witness:

A. Well, this is a graphic chart on graphic paper showing the relationship of the per cent of glass containers to the number of points delivered daily.

Mr. Long: I move to strike the answer.

Mr. Stevens: On the same ground as your objection?

Mr. Long: On the same ground as heretofore made.

The Witness: Shall I continue?

By Mr. Stevens:

Q. Yes.

A. This shows the chart beginning at 50 points, at which there is a per cent of glass container delivered, which is the vertical scale. There is an average of five per cent across the board on one line—no, that is eight per cent. Pardon me. Eight per cent average for [fol. 203] all points.

There is a heavier black line showing a smoothed-out curve of the points, the scatter points here, running from fifteen per cent varying down and up to an ending of ten per cent on more than a thousand points averaged delivered.

At 90 points average delivered daily the chart shows about seventeen, at 100 about seventeen.

At 200, about, well, I will have to guess this, about eighteen, down to eight and nine on this scatter chart and the heavy line is drawn in between there.

At 300 down to about three.

400, about, let's see, ten, and so on, without going into the individual points of this scatter chart.

Mr. Long: I will, of course, again move to strike the answer as not being cross examination.

By Mr. Stevens:

Q. Now, would you like to Chart IV-A, and will you tell me if there is any significant difference between the line on that chart and the line on IV-B?

A. Yes, there is a more extensive line, vertical line of [fol. 204] glass containers delivered daily, and the horizontal line is the average points again in which you have a starting point at zero points of 24 per cent declining gradually to about thirteen, where you get down to about four per cent, I guess, rising to five, and so on, going through on this scatter chart in a smooth curve running out to a thousand points where it is at about the level of, I should say, twelve and a half per cent on a thousand average points delivered daily.

Q. As I say——

A. This is all with respect to a sample taken in September, 1955 on three routes.

Q. Can you identify any significant difference between those two charts? I know you have recited various figures, but is there any significant difference between them which might lead to any conclusion of any kind?

A. No, not offhand, like this. I draw no conclusions.

Mr. Long: I am going to, of course make the same motion to strike all the testimony on the basis it is not proper cross examination.

Mr. Stevens: All I am trying to ascertain, and I think it will be a fact, and I will ask it in the form of a conclusion——

[fol. 205] Q. Isn't it correct, Mr. Taylor, that you have not had sufficient time to review and analyze these various exhibits prepared by Mr. Woolley to determine their significance?

A. That is right. I have given it more study in the last five minutes than I had done before of those charts. It is the first time I have studied them to that extent.

Q. Mr. Long suggested to you that travel expense accounts might be useful to review in connection with studying the executives' time or duties in connection with various customer groups. You would not think travel expense accounts would be relevant for making such an apportionment among customers located in Chicago of the time of an executive also located in Chicago, would you?

A. No, sir.

Q. And I take it you understand that to be the fact in this case?

A. Yes, sir.

Q. Similarly, a review of correspondence files would not be particularly helpful in analyzing the time spent and personal calls or telephone calls by the executives, would it?

[fol. 206] A. If that were a fact. You are assuming that it was all done in Chicago. If it was all done in Chicago, there would be no traveling from Chicago, but, for instance, if an executive should have to go from here down to see Mr. Hartford in New York at the Graybar Building to negotiate a contract with the A&P, naturally, that expense voucher would be used for information to any accountant making an analysis. You could not ignore it.

All I said was that that sort of thing is all grist for the mill for the accountant.

Q. You did not mean to suggest that you could draw a standard from seeing how much money he spent on one customer, traveling to see one customer, and say that that is necessarily a fair measure for determining the allocation of his total account?

A. No. I said that is something you must take into account along with everything else.

Q. Just one other question. In your professional experience, have you had occasion to find any cost studies made for Robinson-Patman Act purposes in which the premium paid to wage earners was apportioned among customers on any different basis than the basic wages of the wage earner?

[fol. 207] A. I have no experience with that. I think you asked the same question before and the answer is the same. I do not have any experience with any situation where there are two bases of pay to be divided among customers, which I think is the question.

Mr. Stevens: That is all.

Recross-examination.

By Mr. Ball:

Q. As a matter of fact, the use of either correspondence or travel expenses of executives could be misleading and wrongful information, could it not?

A. Yes, sir. Like any other information, it has to be judged.

Q. And you do not have any knowledge of any facts here that would tell us whether those would be useful or not in any of these present cases?

A. No.

Q. It is also true, isn't it, when you spoke about direct and indirect costs, that indirect can be permitted to follow direct costs?

A. Sometimes that is done.

Mr. Ball: That is all.

[fol. 208] Redirect examination.

By Mr. Long:

Q. If, Mr. Taylor, the general offices of A&P were in New York, and that is where the contractor made the purchases of milk, then it would be important, wouldn't it, to look at the expense account in respect to considering that as a method of allocation?

Mr. Ball: Just a minute. I want to object to that on the same ground you have objected, because it certainly assumes as a fact something that is not a fact.

Mr. Long: It is certainly a part of this record that A&P is in New York there and Eggleston went to New York and Borden, too, to get that business there. That is a part of this record.

Mr. Stevens: When did that happen?

Mr. Long: Well, I am not testifying. The record will show that.

By Mr. Long:

Q. Of course, you are answering Mr. Stevens' question on his assuming of facts, and that was that the purchasing agents were here in Chicago, is that correct?

A. No. He cited a case where everything was done in [fol. 209] Chicago and there would not be traveling, and I said certainly that was a fact if that were so.

Q. Let me ask another. Let me ask you on another subject, would you tell us briefly what is the purpose of a warehouse?

A. To have goods in quantities when they're wanted and where they are wanted.

Q. And what utility does it provide for customers?

A. Ready access.

Q. Do I understand your testimony that you are drawing an analogy that those costs should be assigned on the basis of space or bulk?

A. I believe it usually is.

Recross-examination.

By Mr. Ball:

Q. Was it your understanding, Mr. Taylor, that in the present case contracts were negotiated between Borden and A&P in New York?

A. I had no knowledge of that.

Recross-examination.

By Mr. Stevens:

Q. I have two other questions now. You say that warehousing costs are assigned on the basis of space. Isn't that [fol. 210] always conditioned on the amount of time and the spaces occupied by the customer?

A. Yes, I think I testified to that earlier, weight and space and time. I think I said that before.

Q. And on the—well, let's forget it. Thank you.

Mr. Long: "And further deponent saith not."

(And Further Deponent Saith Not.)

Subscribed and sworn to before me this — day of May, 1958. ——, ——, Notary Public.

[fol. 211] Mr. Long of the Anti-Trust Division furnished the Official Court Reporter with the following information:

Professional Services Rendered by the deponent, Otto F. Taylor, 92 hours, for the period from May 28, 1957 to September 24, 1957.

[fols. 212-213] Notary public's certificate. (Omitted in printing)

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendants

Deposition of Elliott B. Woolley—Filed February 13, 1959

The deposition of Elliott B. Woolley, called by the defendants for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe, a notary public within and for the County of Cook and State of Illinois, in Room 758, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Monday, June 23, 1958, at 1:30 o'clock, p.m.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

[fol. 2] Mr. Edward L. Hart, Jr., and Mr. John P. Stevens, on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

Mr. Stuart S. Ball, and Mr. Joseph Greaves, on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 3] ELLIOTT B. WOOLLEY, having been first duly sworn, deposeth and saith as follows:

Cross-examination.

By Mr. Ball:

Q. Mr. Woolley, in your Paragraph 15 of the proposed rebuttal order, you speak of something of your past history. Have you at any time had any previous experience in Robinson-Patman cost studies?

A. No.

Q. You are not, I take it, an accountant?

A. Not in the fullest sense of the word. I have had accounting experience, accounting studies.

Q. Will you describe what your accounting experience has been?

A. I have studied cost accounting and graduate work, not in the sense of a practicing accountant, if that is what you mean, not a CPA.

Q. Have you had occasion to familiarize yourself with the bookkeeping practices in corporations generally?

A. Only in the general sense that I became acquainted with them in the course of the studies in general accounting that I have had, in the course of the academic work that I [fol. 4] have had. As you realize, of course, my experience has been with the Government since I left school, and I haven't had any work.

Q. Primarily your experience has been as a statistician?

A. And an economist with the Department, yes, sir.

Mr. Stevens: Could you speak a little bit louder?

The Witness: Yes.

Mr. Jinkinson: Just speak up.

By Mr. Ball:

Q. I am always a little puzzled to know just what is meant as an economist, Mr. Woolley. Perhaps you can define it.

A. Well, an economist is one of the students of social sciences who are concerned with the general operations of the economy and in the general broad sense with the prob-

lems of production, supply, demand, distribution, and so forth.

Q. Are you particularly concerned with the field of economic theory, with the measurement of economic phenomena?

A. Well, I have had experience in both. Those are subcategories of the general field of economics.

[fol. 5] Q. Your activities then are concentrated primarily in those fields, are they not?

A. More or less as applied to the practical problem arising in the work of the Government service.

Q. Now, over on Page 33 you state, and this was prepared, of course, before the depositions of Messrs. Taggart, Sawyer and Taylor were taken, that you agree in substance with the controlling principles of cost accounting and their application to the Borden cost defenses as stated in the testimonies.

Now, having heard their testimonies on deposition, are you still in agreement with all three?

A. I see no reason to change my views. I see no reason to feel that they have more or less altered their views.

Q. You feel that as far as you can determine their views are consistent one with the other?

A. More or less.

Q. Are there any points of differences that you have with any of them?

A. Now?

Q. Yes, now.

Q. Or originally?

[fol. 6] Q. Now.

A. Well, in general substance I don't think so.

Q. Well, in particular. I am particular anxious to know if there are any aspects of their testimony with which you are not in agreement?

A. That is kind of a hard question for me to answer because——

Q. Let me ask as preparatory questions, you were present at all three of those depositions?

A. Yes.

Q. You have read the transcripts of those depositions?

A. Yes, I have.

Q. They covered quite a bit of ground?

A. Yes.

Q. They did bear upon the material that you were preparing in this case?

A. Yes.

Q. Now, is there any point at which in detail they deviated from the position that you believe to be proper?

A. As far as Mr. Taggart is concerned, Professor Taggart is concerned, I don't believe that there is anything that I could say that he deviated in any significant degree. [fol. 7] As to what my views have been with respect to Mr. Sawyer, offhand I can't recall at the moment.

Q. What about Mr. Taylor?

A. Mr. Taylor, I think he and I are closer now than we originally had been, with respect to the transportation costs, and so forth.

Q. Now, will you give your recollection of the communications that you had with Mr. Taggart prior to the time of the deposition that was taken of Mr. Taggart?

A. I presume you mean in terms of my approach with him?

Q. Oral and written communications. When did you see him and how much time did you spend?

A. I recall, last May, 1957, Mr. Long and I went to New York for the purpose of enlisting the aid of the F.T.C.

Mr. Jinkinson: Washington.

By the Witness:

A. I beg your pardon, Washington, D. C.

Mr. Jinkinson: I want the record straight. Washington.

[fol. 8] By the Witness:

A. For the purpose of enlisting the aid of the F.T.C. to recommend to us any experts they felt might outline the problems we had.

By Mr. Ball:

Q. Well, did you communicate with the F.T.C.?

A. Mr. Lund——

Q. Is he the head of the accounting section?
A. Yes, sir.

Mr. Long: Lundbahl.

By the Witness:

A. Lundbahl and his two assistants.

By Mr. Ball:

Q. Do you recall them——
A. I should know him, because he is a friend of mine, Melvin Steel. Do you recall, Bert?

Mr. Long: Not for the moment, no.

By Mr. Ball:

Q. Did you discuss your problems with these gentlemen?
A. Yes, I did.
Q. Did you ask their views about any of these specific matters?
A. After reviewing the outline—after outlining the prin-[fol. 9] ciples I was interested in, I asked their viewpoints and they seemed to be in general agreement. There are a few minor matters which they couldn't go along with.

After that we asked them if they could, or if they could recommend anyone who might conceivably be interested in assisting us in this matter, in these matters of accounting principles along the lines we outlined and they gave us these three brethren.

Q. Did they name the other three members of the Taggart Committee?
A. No.
Q. They recommended these three of the Committee?
A. Yes. Then after that conference I got clearance to go to New York. I phoned Mr. Sawyer and Mr. Taylor from Washington. Made a date with them for the following day, I think it was, and to meet with them to discuss these matters.

And then I came home from there, directly home. I didn't see Mr. Taggart en route. I came home and discussed with Mr. Jinkinson the results of the trip, and requested permission to go to see Professor Taggart, which was granted.

[fol. 10] And I think we phoned Mr. Taggart at that time to make an appointment, if I remember right.

So then I went to Mr. Taggart. I think it was around the 28th of May, somewhere along in there, the last part of May.

Q. Did you prepare a memorandum at that time on the facts?

A. Yes. As far as my review of the Borden Cost Study, I had previously prepared my reactions to it in a memorandum form. I submitted them to Mr. Jinkinson, which is the ordinary course of my relationship with the staff.

Q. Now, when you saw Professor Taggart, did you give him a copy of this memorandum of yours?

A. I didn't give it to him, no. At that particular time I made two trips—I made three trips as a matter of fact. I went up there the first time——

Q. To arrange for his employment?

A. To discuss the problem with him to start with, to get his reactions to it and, yes, I took my memo with me, I believe, at that time and showed him in general, to give him an idea what I was after, to see what his reaction [fol. 11] would be to the problems I had in mind.

Q. You supplemented that with the oral statements?

A. Yes, at that time. Then I returned home——

Q. Just a moment.

A. Excuse me.

Q. At that time in your oral statements did you tell him your understanding of the facts concerning——

A. Yes, I did.

Q. —concerning the Borden matter?

A. As far as they were relative to the particular points I had in mind.

Q. As far as you felt they were relevant?

A. As far as I felt they were relevant.

Q. Do you recall specifically what you told him about the facts?

A. A year and a half ago, two years, well, I outlined to him—incidentally, I had a copy of your material which you submitted to us.

Q. And specifically at that time that consisted of what?

A. Pardon me?

Q. Specifically at that time the Borden material consisted of what?

[fol. 12] A. That pre-trial preliminary draft of what now is your pre-trial order. It had—and plus those, that cost study that was being added as a part of it later. At that time, of course, they were separated, the brochure of the cost defense itself.

Q. That was the black-bound book?

A. That was the black-bound book. It was either that, or I had this preliminary draft in which you had already incorporated that cost study within the proposed pre-trial order. I am not sure.

Q. You don't recall which it was, do you?

A. I have forgotten. Anyway, that is what I took with me.

Q. Did you have the Malone deposition with you?

A. At that time, no. That was furnished subsequently. Then I reviewed——

Q. It is impossible for you, is it not, to remember exactly what you may have said about the facts of the case to Professor Taggart?

A. It is difficult. In general I reviewed the—as I understood the material, the basic method of allocation, types of cost to be included and, of course, my reactions with it.

[fol. 13] Q. Did you discuss with Professor Taggart at that time the contracts of the union covering the compensation of the employees?

A. I may or may not. I don't recall that. I know it was covered later. This second—pardon me. This second visit was primarily to turn over documents.

Am I talking about the first or second?

Q. You are now talking about the first.

A. The first one——

Q. How long was your first interview with Professor Taggart?

A. That first interview—oh, wait a minute. I beg your pardon. That first interview with Professor Taggart was with Mr. Jinkinson and I when he and I were together.

Q. How long did that last?

A. That lasted from about ten to 12:30, 1:00 o'clock, something like that, somewhere along there, about a couple

of hours. Then I came back and then I went back. Now we are talking about the second.

Q. The second visit, how long were you with Professor Taggart?

A. I was with him, oh, the best part of the day, about [fol. 14] nine to three or four, until the train left, around four o'clock that afternoon.

Q. You had an extensive discussion with him?

A. The purpose of that second visit was to turn over to him those documents listed in that exhibit you queried him about.

Q. When was the third interview?

A. It was in—let us see, this would be June. I think towards the end of July. He had these documents about a month, roughly.

Q. That interview took place at Ann Arbor?

A. Yes. The third one did, yes. Where I went to pick it up and also I spent two days with him to review—he prepared a brief summary of his reactions to both—well, it is strictly to Borden. To Borden's Cost Defense and the material I submitted to him including the Malone deposition.

Q. You spent two days with him at the time of this third visit?

A. Yes.

Q. Most of the two business days?

A. Yes.

Q. Were you with him in the evening?

[fol. 15] A. No.

Q. Well, did you have any other interviews with Mr. Taggart?

A. Since that time, no, other than at the time of the depositions.

Q. After the first day in which we were taking his deposition, did you have a visit with him in the evening prior to the second day of his deposition?

A. No.

Q. Now, during the course of these various meetings you reported to him from time to time all of the relevant, all of the facts that seemed to you relevant that you knew about?

A. What do you mean reported?

Q. You commented or stated to him——

A. During the course of his interview?

Q. —all of these conversations?

A. During the course of his review during that month of July that he had material?

Q. No, during these three interviews that you described?

A. Yes.

Q. You stated to him from time to time those facts that [fol. 16] you thought might be relevant to his consideration?

A. We discussed the question of the commissions and we discussed the question of payments of drivers' wages. We discussed the question of transportation costs.

Q. You did state in those discussions what you understood the facts to be?

A. Yes, referring to the pre-trial order from time to time to make sure we were right.

Q. But based upon also such information as you had gleaned from the deposition?

A. We didn't use the deposition too much. I mean, in our discussion we didn't.

Q. And such other information as may have been given to you, communicated to you orally in response to the requests that you have made of us for information?

A. Yes.

Q. And of course this distance and passage of time, it would be impossible for you to remember what the facts were as you stated to him in the course of those discussions?

A. Well, the specific words perhaps it would be, the [fol. 17] general ideas, perhaps.

Q. Well, could you for instance say whether or not you did discuss with him the terms of the union contract between Borden and the——

A. Only to point out the nature of the commission formula indicated therein which we discussed somewhat.

Q. Do you recall specifically what you told him the nature was of that formula?

A. I showed him the contract. He looked at it and discussed it and of course he could see from the face of it what the nature of it was. The question there was between us. I had raised this question about allocating commissions

on a volume basis. His first reaction was he didn't think, unless I could show some substance back of it, just on a mere form, he didn't think he would quite agree with me. So to that extent as a result of the discussion with him on the principles that might govern the question of allocating commissions I revised my own concept, broadened it to include his thought, if you could show or demonstrate incentive for the purpose or objective that these commissions [fol. 18] were paid, that should be the most reasonable basis for allocation.

Q. In other words, you and he reached the conclusion that the only reason why commissions should be allocated on the basis of sales is when you show that the payment of the commission was an inducement to the employee to take some steps to increase the volume of his sales, is that correct?

A. That would tend to fall from the concept of incentive, if that is the purpose of the payment.

Q. And in other words, your belief, stating it this way, the opinion you expressed in the proposed pre-trial order and I think that is specifically covered over here on—I am looking particularly on Page 35, the basis of the proposed draft of the pre-trial order or rebuttal order, and beginning on the previous page.

A. Yes.

Q. It is because it is your understanding and belief that the payment of these commissions induces the employee to take some action to increase sales that you allocated the commission on the basis of sales?

A. That is right, plus the nature of the contract, the elements in the contract we conceived to be relevant.

[fol. 19] Q. What are the elements of the contract that you conceived to be relevant, Mr. Woolley?

A. Turning to Exhibit N, rebuttal Exhibit N, specifically Article 42-E with respect to sub-paragraph E, commissions on wholesales I understand is the one that is relevant to the drivers we are talking about.

[fol. 20] Q. In other words, looking at Article 42-E and that is the section upon which you reach your conclusion that the commission should be——

A. Yes.

Q. Are there any other sections that you believe are relevant on the matter?

A. Over here, I believe there is one considering Article 4 wherein it says:

> "In case the route is too large to be run within the proper time schedule adjustments when warranted shall be made within two weeks by employer so that such route can be properly serviced within the forty-five hour week. If adjustments are not made within two weeks after the request is made by the union representatives such shall be considered in violation of the agreement."

Q. How do you think that bore upon the question of allocation of the commissions?

A. The union, as I understand it—I will stand corrected if it is not quite accurate, but the information I have [fol. 21] available to me, they have over here in Article 42-E established a progressive rate of payment over the first twenty-four hundred points of 75 cents per hundred up to the first four thousand, then, of course—then over that 90 cents per hundred. To me that is quite an incentive to enhance volume right there by itself. And it seems to me that the reason why, one reason they might have required to put in this particular paragraph, Article 4 would be to attempt to neutralize somewhat the apparent growth that would result from the application of this commission.

Q. You stated that you based that partly on information you had about the union?

A. Yes.

Q. What was the source of your information?

A. I understand from talking to counsel that perhaps—I don't know this for a fact, of course,—I have been advised by both sides here, not you, particularly, but perhaps the history of this thing has another purpose back of it which would be a volume concept.

Q. Now, do you recall specifically what was said to you [fol. 22] by any counsel or anybody else?

A. I understand that this commission business was instituted historically to sort of neutralize this store-home delivery proposition, home delivery problem. That is my understanding.

Q. You don't recall offhand what source you received that information from?

A. That is purely conversation between counsel.

Q. Did you report that fact to Mr. Taggart?

A. No.

Q. Or to Mr. Sawyer?

A. No.

Q. Or to Mr. Taylor?

A. No. Actually, at that particular time a year ago I wasn't aware of that history. That is something that has developed since.

Q. Did this fact that you just now recited enter into your own appraisal of the statements that are included in the rebuttal?

A. To me it strengthens my current thinking on that.

Q. To put it this way: Is that one of the facts upon which you are now basing your opinion?

A. It is an added factor, I think, that I can conceive of [fol. 23] being relevant and strengthens the proposition.

Q. Now, you quoted from a passage from Article 4. I am not entirely clear how you felt that that bore upon the question of the allocation of these costs?

A. If they left Article 42 alone it seems to me these drivers would have a tremendous incentive to increase their volume of sales to the stores, these particular kind of drivers.

Now, either the union or the company—I don't know which—offers Article 4 as apparently a limit, some unspecified limit on the size to which a route would grow, as it otherwise would under Section 42-E, and in order to keep the income level, I presume, between routes as much within reason as possible, they put a limit on these routes in order to hold them down, to spread the work a little, maybe.

Q. Is it your understanding that this provision which you read from Article 4 of the contract was inserted at the employer's——

A. I don't know.

Q. —insistence?

A. I don't know. It might be on the basis—might both [fol. 24] of them have an interest in it, I would think. The company would have an interest in tending to hold the cost down, and the union would have an interest in spreading the work around.

Q. These are the only two, this passage from section 4 and section 42-E, are the only sections of the contract that you considered are apropos?

A. At the present time.

Q. At the present time, as bearing upon your opinion that these commissions should be allocated on the basis of sales?

A. At the present time.

Q. Now, what are the facts upon which you base your assumption that the employees have some ability or their opportunity of increasing the volume of their business on their routes?

A. First of all, it is the graduated rates of the schedule. Secondly, they have opportunity to observe growth and development in the community in which their route is operating and could very well bring that to the attention of the solicitor or whoever is responsible. They might even go and ask themselves and solicit, the drivers, the prospective customer himself.

[fol. 25] Q. Do you have any information that either of those things has ever been done?

A. No, I don't.

Q. But you, in your opinion and judgment here, you have assumed that that is likely to be done, is that correct?

A. I don't know whether it is likely or not, but at least it has a possibility and within the realm of reason.

Q. And it is your opinion that the 42-E provisions of the contract are to induce the employee to do that, is that correct?

A. I would think so. If I were a driver, I would, if I could get by with it.

Q. You make that assumption in reaching your conclusion as to the allocation?

A. It is one of the factors that enter into it.

Q. All right, now, go ahead and state the other factors?

A. And in conjunction with the contract and his opportunity to talk with the store managers and independents particularly.

Q. All right, what would be the conversations with the [fol. 26] independent store managers, how would that affect their compensation?

A. He would ask the store manager presumably whether or not he would want more milk than he was going to leave. He might influence him as to the type of products he might want to leave there. If he was not taking the whole line he might talk with him about the advisability of increasing his spread and types of products to be delivered.

Q. Do you know of any independent stores that don't take the whole line to the needs of their community of fluid milk products?

A. What do you mean needs? What do you mean?

Q. You know what we are speaking about fluid milk?

A. Yes. I have seen plenty of independent stores that don't take chocolate milk, for example. Why they don't, I don't know.

Q. You don't know whether that is a matter of customer demand, or not?

A. Possible. That is a factor.

Q. Will you describe what is your understanding of how the driver could really increase the amount of sales by conversation with the manager or owner of an independent [fol. 27] store in view of the fact that any fluid milk products not sold are returned and netted against the sales of the next day?

A. Supposing he should be able to induce the customer, supposing a holiday coming up, and he is suggesting he increase his volume in the store and the customer agreed. Supposing he raised it 20 per cent. Supposing he sells the whole additional 20 per cent. He has then increased the sales through his suggestion to the store, even though he returns the normal amount.

Q. Well, just a minute. Merely putting more milk in a store icebox won't increase the sales of that store any, will it?

A. It is possible.

Q. You assume that merely putting more milk——

A. If the customer himself gets the price, decides to reduce the price to make it more attractive, and use it as a leader, whatever you might.

Q. Putting aside whatever the customer might do in cutting the price of milk, is it your assumption implicit in what you have stated in this rebuttal order, that if a driver can induce an independent store dealer to accept 20 per cent

[fol. 28] more milk on a day's delivery, that that will affect the sales that that store makes to the ultimate consumers?

A. It might.

Q. Just how do you assume that it might affect that?

A. That 20 per cent might be in anticipation of a general holiday or something like that, anticipating, which the store manager might not have conceived of making provision for.

Q. Putting aside holidays or any special occasion, that on Wednesday, assuming deliveries to that independent Monday, Wednesday and Friday, that on Wednesday the driver suggests he leave 20 per cent more milk of various kinds in the refrigerator, what would be the effect as you view it, on the net sales made by the dairy company to that particular independent store?

A. It might increase ten per cent.

Q. Just why would that under those circumstances increase the sales, allowing for the returns of unsold milk?

A. Why would it?

Q. Yes.

[fol. 29] A. It might happen to be an increased demand at that time.

Q. But merely putting the milk in the store would not increase the demand of the customers of the store?

A. No.

Q. You recognize that?

A. Obviously any control of supply has to take into account the prospective demand that you are going to meet.

Q. So it would only be if there were a difference of opinion between the store manager and the driver as to what his anticipated demand would be——

A. Perhaps.

Q. That it would affect, that the effort to need more milk would affect the amount to be sold, actually?

A. If the independent store manager is at all concerned, some of them may not be concerned, and leave it up entirely to the driver.

Q. You don't know, as a matter of fact, whether the independent store manager ever does anything more than leave it up to the driver?

A. No, only what has been recorded in Mr. Malone's deposition.

[fol. 30] Q. But in reaching the conclusions or opinion that you have expressed in this rebuttal pre-trial order, you make the assumption that the driver can increase his net sales by leaving more milk in the stores?

A. He has that potentiality.

Q. It is upon that basis you believe that the commission should be allocated?

A. Yes, sir.

Q. On the basis of sales, allocated on the basis of sales?

A. Yes, or volume.

Q. Sales volume, put it that way?

A. Yes, volume delivered.

Q. Now, going back to your meeting with Mr. Taggart, did you have any interim inquiry in writing him for additional facts or additional information?

A. No.

Q. Did you write him any letters in the interim stating additional facts?

A. No. I presume you mean by that up to and including the last time I met him?

Q. That is right, yes.

[fol. 31] A. While he was supposedly reviewing the material.

Q. Prior to the time his part of the pre-trial, proposed pre-trial order?

A. Prior to that time, no.

Q. How long a memorandum was this that you handed him that you had prepared?

A. Around fifty-five pages, if I remember rightly.

Q. Fifty-five pages?

A. Somewhere around there, much more than the expert testified to.

Q. Now, will you describe what factual information you stated in that memorandum?

A. I gave a description of, first, the kinds of cost elements covered in your pre-trial order, a description of the details and methods by which those categories and costs were allocated to the customers or customer classification, emphasizing, of course, those particular points which I find at issue in my mind.

Q. That included the matter of allocation of commissions?

A. Allocation of commission, allocation of transportation costs.

Q. Now, with respect to the allocation of commission [fol. 32] that memoranda stated what you understood the method of operating——

A. Yes.

Q. —was?

A. Yes.

Q. That included information that you may have gathered from some of these conversations with counsel or the witnesses that you have mentioned, is that correct?

A. Would you restate your question?

Mr. Ball: Will you read it, Mr. Reporter?

(The last question read as recorded above.)

By The Witness:

A. What testimony do you mean, Mr. Malone?

By Mr. Ball:

Q. You mentioned that you did get various impressions of facts from conversations that you had had at various times with some of counsel and some of the witnesses, is that correct, that are not included in the deposition itself?

A. As to witnesses, you mean Mr. Malone?

Q. Specifically Mr. Malone, yes.

[fol. 33] A. I didn't want to get the impression you are talking about the expert.

Q. No.

A. Yes, O.K., but based mostly on facts that I found.

Wait, let me back up a little. As to your question when I was writing the memo?

Q. Yes.

A. That was based solely on this pre-trial order, information I have been furnished from counsel. As far as the writing of the memo is concerned, for the preparation of that memorandum, I had no access at that time excepting for clarification purposes in our conference.

Q. Yes. Well now, let me state it this way:

In writing this memoranda you based it upon your interpretation of the draft of the pre-trial order and the documents that have been furnished you, together with such enlightenment as you had had from the various conferences of counsel concerning it?

A. Yes.

Q. Does that express it correctly?

A. Yes.

[fol. 34] Q. It stated your understanding of the factual background as derived from those sources?

A. I am trying to recall the sequence of events here. I am trying to segregate the sequence of events. In the preparation of my memorandum, the usual procedure in our office is this: Mr. Jinkinson received from you these brochures which you proposed as your cost defense here, as far as the facts were concerned. I was given that document by Mr. Jinkinson and told to review it and see whether or not I could agree with it. That I did. That memorandum coming out of that work at that time did not reflect any consultation that we may have had subsequently with you and Mr. Malone.

Q. Which was a memorandum that you gave to Mr. Taggart?

A. That one I am talking about plus Mr. Malone's deposition, your abstract of it.

Q. Subsequent then to the preparation of that memorandum you did attend the deposition that was taken of Mr. Malone?

A. Yes.

Q. And you were furnished various additional informa-
[fol. 35] tion?

A. Yes.

Q. As the result of inquiries made?

A. Yes.

Q. Now, do you recall whether any of that subsequently received information or the facts from Mr. Malone's deposition affected or changed any of the statements that you made in that memorandum?

A. I don't believe so at this moment.

Q. As a matter of fact, presently you do not remember exactly what the contents of that memorandum were in detail, do you?

A. Only what I have outlined in a general way.

Q. You have given a general outline but the specific way in which you phrased anything, you can't recall at this time?

A. No, not without referring to it.

Q. You stated something which was more or less a conclusion of yours as a fact or not, you would not be able to tell us at this time?

A. At this time I would hesitate unless I had the memo before me, which I don't.

Q. And I take it——

Mr. Ball: Mr. Jinkinson, the position of the Government [fol. 36] is that we will not have the memo in front of the witness then to refresh his recollection?

Mr. Jinkinson: That is right, Mr. Ball.

By Mr. Ball:

Q. Now, you had several visits with Mr. Sawyer and with Mr. Taylor. Will you give us the length of time and the nature of those?

A. As I stated before, preliminary to Mr. Taggart's visit, I had arrived in New York, if I recall, around the 20th of May or something like that and visited with Mr. Sawyer first in the morning, and Mr. Taylor in the afternoon, doing the same thing which I have subsequently done with Mr. Taylor; namely, outline the problem that I had.

The purposes then, enlistment of their services and observing their reaction and getting them in agreement more or less after discussions with intent to help us out in the matter.

Q. You didn't see the two of them together?

A. Oh, no; Oh, no. I said Mr. Sawyer in the morning and Mr. Taylor in the afternoon. Their offices, incidentally, are at the end of the island, and the other at 42nd Street.

[fol. 37] Q. Taggart and Taylor, or I mean Sawyer and Taylor?

A. Sawyer is down south and Taylor is up north, about five miles apart.

Q. Now, at that time did you give them any documents?

A. No. I showed them in the course of the conversation with them, outlining my problem. I, of course, referred to my memo, referred to the pre-trial order and after those interviews returned home.

Q. How long were your interviews?

A. About an hour and a half, to two hours.

Q. Now, when was the next time you saw these two gentlemen?

A. That was in, after I had returned the documents, gone to Taggart's, returned, picked up the documents to bring them back. I think about a week later, sometime the first part, no, around the end of July or first part of August. I went on my vacation in August. So I made the trip to New York, turned over the documents to them so that they would have the month of August to review for this purpose.

Q. How long a discussion did you have with these two men in connection with the turning over of these documents?

[fol. 38] A. If I remember rightly, a half a day each. I arrived on the morning train and left on the evening train.

Q. It could have been, however, a day apiece, could it?

A. Not at that time. I know a day apiece was after I went back to review and discuss with them in September the results of their review.

Q. At that time you spent about a day with each of them?

A. About a day with each of them.

Q. And your conversations with those two gentlemen followed much the same pattern of the conversations you described with Professor Taggart?

A. That is right.

Q. You discussed back and forth the problems and also the facts as you understood them?

A. Yes.

Q. And at that time you discussed with them and mentioned your understanding of the facts as derived not only from the original cost brochure but from the Malone deposition and your conversations with counsel and witnesses and [fol. 39] the information you had?

A. Yes.

Q. Again, I assume you could not at this time recall or state what particular factual statements you may have made to either of these gentlemen?

A. That is right, specifically.

Q. I take it that you discussed with both of these gentlemen the problem of these commissions?

A. Yes.

Q. You stated to both of them your understanding that the contract provided and induced activities on the part of these drivers to increase the amount of their sales, is that correct?

A. I mentioned the problem. I raised the questions we have. That seems to harmonize with you on that matter.

Q. We identified, I believe, as Taggart Deposition Exhibit No. 1 for identification, the cost justification report prepared by the Taggart Committee. I take it you are familiar with that report?

A. Yes.

Q. When did you first run across that report, Mr. Woolley?

A. About two years ago in connection with this case [fol. 40] when I was assigned to it, brought to our attention, shortly after it came out.

Q. That was before your visit with Professor Taggart?

A. Oh, yes.

Q. You studied over this cost justification report?

A. I have reviewed it.

Q. Are you in agreement with all of the positions taken?

A. In general principles, I suppose.

Q. Well, specifically, are you in disagreement with any part of this report?

I am trying to shorten this deposition rather than going through it with the other gentlemen, in finding out whether you have any points of specific difference.

A. No.

Mr. Long: Is this about the time of our recess?

Mr. Ball: Yes.

Mr. Long: Mr. Woolley might need a drink of water.

Mr. Ball: All right.

(Recess taken)

[fol. 41] By Mr. Ball:

Q. Well now, when I asked you about this cost justification report I am also referring to the appendix A. I take it you have no difference with the points that are brought out in this appendix, either?

A. No. These are general principles, and as general principles I haven't any serious objection.

Q. You accept all of these principles stated here?

A. Yes, in terms of principles.

Q. Now, if you will turn to Page 34 of this proposed pre-trial order, I notice you say each truck has a volume capacity in which all of the amounts of fluid milk could be delivered on that day on the truck were carried.

What do you mean by that, Mr. Woolley?

(No response)

Q. Do you mean that all trucks have the same volume capacity?

A. That is a general statement which is descriptive nature of the truck. That is the capacity in which the fluid milk can be delivered. It may vary from one size truck to another.

[fol. 42] Q. Do you know to what extent on the various routes the volume is used of the truck?

A. You mean the capacity that is used?

Q. The capacity used?

Mr. Long: No. We are going to object to that question because Mr. Woolley can answer but that is something that is outside of this record.

Mr. Ball: I am asking him if he knows.

Mr. Long: No.

By the Witness:

A. From what I have observed, some of the trucks I have seen drive up to the stores out in our area, they are not loaded to the top, no.

By Mr. Ball:

Q. And have those been Borden trucks?

A. Some of them have, yes. And some of them Bowman.

Q. In other words, you have yourself occasionally seen a Borden truck and watched the process, is that correct?

A. Just in a general way.

Q. All right, has what you have seen in those situations entered into your appraisal of the facts in this particular [fol. 43] case upon which your opinion has been based?

A. I would say only in a general way, the fact I know the truck has a given capacity in which obviously for the purpose of the truck is to carry this volume of goods from the point of origin to point of destination. It may or may not be loaded to capacity at that particular point.

Q. What I wanted to say, what are the circumstances under which you have seen a Borden truck operating?

A. Oh, when I went to the store in the morning to get some milk or something.

Q. What particularly did you observe, was the store—or was the truck parked outside of the store?

A. Yes.

Q. Did you look in there?

A. A chain store, for example, an A&P.

Q. You purchase at the A&P, do you, Mr. Woolley?

A. I do, on occasion. My wife likes to purchase at the A&P. Right now we are buying from the National though.

Mr. Jinkinson: That is just linking up the record.

[fol. 44] By Mr. Ball:

Q. Did you look into the rear of the truck on any of those occasions?

A. I looked in through the driver's area. No, I have not made any specific detailed survey of the truck, no.

Q. What I am trying to get at is to what extent, has what you saw at that time been reflected in what you say in this proposed pre-trial order?

A. Just in a general way.

Q. You did gain the impression, however, that the trucks are loaded fairly well to capacity, is that correct?

A. Some of them were and some of them were not at the time I saw them but maybe up later in the afternoon they might have been further along the route. I don't know precisely.

Q. Well, looking at Page 34, did you make the assumption there that these trucks are ordinarily loaded fairly well to capacity?

A. Not necessarily, no. I don't think that question is relevant.

Q. I am trying to figure out just what you mean that each truck has a capacity?

[fol. 45] A. Just the fact that it has a square box on wheels with a given cubic content.

Q. Yes. Under what circumstances do you conceive that a truck would be sent out from the plant not loaded, or not fully loaded?

A. Special delivery, perhaps.

Q. I am thinking in connection with the regular routes.

A. Regular routes, I suppose that would depend on the size of the route in relation to the size of the truck being used. I would not expect Bowman to utilize a truck excepting as it would be mere optimum capacity, I mean filled to that.

Q. In other words, you have made the assumption that ordinarily they will use only that size of a truck on the route that could be filled pretty nearly to capacity?

A. Obviously you can't fill them clear to the top. It would be uneconomical to get the stuff out. There is a limit to which they will tend to load them.

Q. What are the factors, as you understand them, that determine the amount, determine the makeup of a route?

[fol. 46] A. I don't know.

Mr. Long: I object to the answer on the basis of relevancy.

By the Witness:

A. There are so many different factors. I don't know what went into the mind of Borden or labor unions in determining the route structure, the location, density of population. I don't know, it may be gerrymandered for all that matter.

Q. Let me ask you this: Did you take into account in the opinions expressed here the fact that some route areas would be much farther away from the plant than would other route areas?

A. That is not a relevant question, I am thinking. So I did not take it into account. I did not consider it.

Q. You did not take that into account because you did not regard that as relevant?

A. That would be a relevant question if you are comparing costs between routes, but not within the route as we are doing here.

Q. Did you take into account in connection with this analysis of transportation costs the time that it would [fol. 47] take to drive from the plant to a particular area and the relationship of that time in the determination of the number of stores to be served on the route?

A. For the purpose of allocation I don't think it is a question.

Q. So you did not take that into account.

I assume also that you did not take into account any possible fact that in a given neighborhood or a route area the stores average small volumes as against larger volumes in a different area?

A. That would be reflected in the method of allocation by volume.

Q. Let me ask you this: Suppose that you had an area in which the stores were widely separated within the route area and the corresponding time to be taken driving between stores, did you take that fact into account in considering the basis of allocating transportation costs?

A. Those are conditions which are reflected in your own cost study to start with and hence in that sense I guess I did. To the extent that you have considered it in your costs, reflected them in your cost structures, they are reflected in mine, excepting for the fact taking into account [fol. 48] I am allocating transportation costs on a basis of volume and distribution and insofar as those volumes of distribution among the various stores on the routes as between the different routes are already reflected in the averages by classes of stores, then they are taken into account.

Q. In your opinion, and I am testing your opinion by assuming this state of hypothetical facts, suppose that in a given area way out, far away, seven miles from the plant, that assuming that that area was occupied by only small stores

A. Yes.

Q. —and that those stores were widely scattered, one from the other

A. Yes.

Q. —And assume that it would be impossible for a truck to make deliveries to more than twenty of those small stores widely scattered and return to the plant within an eight hour day?

A. I was asked to cover half a route one day and a half a route the other day?

Q. No, let us suppose that the route was determined [fol. 49] what I am trying to say is in determining the route it was impossible to serve more than the limited number of stores because of the area

A. Yes.

Q. —distance.

A. Yes.

Q. Now, the geographical factor and the number of stops that had to be made in that case would affect, would it not, the actual transportation costs?

A. Sure, it would affect them.

Q. Yes. In other words, irrespective of any effort of the driver or any other factor, that kind of a route would be a small volume route, isn't that correct?

A. Within the limits of the availability, size of the truck might have some bearing upon the scope of the route?

Q. You would say you would send a smaller truck?

A. Or, if you could send a larger truck out there that would enhance the area he could cover.

Q. Mr. Woolley, I am trying to get your opinion on this situation. Assume that there are in that area, that twenty [fol. 50] of the widely scattered stores in that area are all that can be served within the 8-hour day, allowing for the truck to leave.

A. You are hypothesizing the size of the truck. You are starting out on the premise you have given the size of the truck.

Q. I have not given any size of a truck.

A. Sure you are.

Q. I am assuming that no matter what the size of the truck, the time taken to get from the plant to the route and to go from store to store and to deliver, and back to the

plant, that the distance of the route area from the plant as such and the distance between the stores is such that within the 8-hour day only twenty stores could be served?

A. Yes.

Q. Now in that case the cost of transportation would result not from the volume but from the location and geographical distribution of the stores, would it not?

A. Undoubtedly.

Q. Did you take that kind of a situation into account?

A. That is all reflected. That is all reflected in your [fol. 51] distribution studies. I mean, the structure of the route does there state, it is taken into account, whatever the situation is.

Q. You recognize that that structure in that case would be imposed not by the desire of management or of the union but as the result of geographic factors?

A. Yes.

Q. So to that extent you recognize that geographic factors do enter into the cost of transporting to those stores?

A. Yes, so far as the total cost of the route is concerned, yes.

Q. You also recognize that the fact that all stores within the area would have to be served, that the number of stores, were they large or small, would affect the time it would take to serve that area?

A. So would the volume delivered to each store, too.

Q. Just the very effort of getting from store to store so that it would mean the number of stores would affect the cost of transportation?

A. Sure.

Q. So that we recognize here that the transportation costs would be affected not only by the volume by also by [fol. 52] the geographic location of those stores and by the distances between the stores?

A. So far as the total cost of the route is concerned, yes.

Q. Now, on Page 34 you say the only rational basis of allocation of this cost is in proportion to the volume of fluid milk products delivered to each store. Do you adhere to that word only"?

A. In terms of allocation of a given route, yes, among the customers of a given route.

Q. Let us suppose that you had twenty stores and that

it was demonstrated that half of the time of the driver was taken in driving to and from the route and between the stores. Certainly, the cost of transportation to and from the route and between stores might also be divided rationally on the basis of the number of stores making up that route, isn't that correct?

A. I wouldn't agree with that, no, because that is overlooking the fact that this truck is used for the purpose of moving goods and the amount of time it takes is really not too relevant, as far as that particular function is concerned. These were goods occupied at given volume and space and that cost, whatever it may be, however, it may be derived, [fol. 53] or how many factors may enter into deriving that or affecting that total cost, nevertheless, that is the cost of the truck plus the driver's cost equivalent, and I can't see any real basis of allocating that warehousing element excepting on the volume that that particular kind of product, of that particular store occupies in that truck.

Q. Let us suppose that you have a truck which has certain costs that are independent of its operation, that that is depreciation.

A. There are.

Q. There are, are there not?

A. Yes.

Q. Those are included within the transportation costs?

A. Yes.

Q. Let us suppose that you have two trucks of the same size, but one of them can serve thirty stores of approximately the same volume because they lie close at hand to the original plant and are close together, and the other truck can only serve twenty stores of comparable volume because they are much further out.

[fol. 54] Now, isn't there a difference in the cost of transportation to the stores on the one route as against the cost to the stores on the other route?

A. In terms of total cost, yes. I would say to the extent the total cost of the two routes differ, the allocation to the individual stores would be different as between the two routes, but that is not the problem. The problem is allocating the total cost of the route, however, it may differ from another route to the stores on that particular route. That is the problem.

Q. Let us suppose this: That you had nineteen stores in an area that were bunched together, and that there was one store and one only in another community, and that you added that store to the route because this route can serve that store better than any other.

You would recognize that the cost of serving that store would be greater than the cost of serving the other nineteen stores, isn't that correct?

A. Yes, sure.

Q. Therefore,——

A. Simply because the distance involved might affect the cost of the store.

Q. In that case you ought to allocate the costs from a [fol. 55] different basis than volume, don't you?

A. And upon my concept, yes.

Q. In other words, a ton mile concept would be another basis of allocating?

A. Yes, incidentally.

Q. And incidentally, you did suggest that as a basis?

A. I suggested that to Professor Taggart and others and drew a blank. So for this purpose, I still, don't misunderstand, I still think the ton mile concept would be a better concept than just a straight volume.

Q. Your opinion is really not the only rational basis of allocation?

A. For the purpose of this suit, yes.

Q. And how wide is this suit—what do you mean by "for the purposes of this suit" your opinion is limited?

A. Well, because that is the way I am suggesting it be done for this particular case.

Q. Yes.

A. Simply because I do not have any statistics to do otherwise, mainly.

[fol. 56] Q. If you had other information, factual information, you would recognize that the ton mile basis would be another rational basis?

A. It might conceivably be satisfying more conditions.

Q. So really, you are not really adhering to the idea this is the only rational basis?

A. Not in the absolute sense, no.

Q. Turning a little farther down on Page 34, you had stated at Paragraph 181 in Schedule 24 of Borden's Pre-

Trial Order, demonstrate the calculation of drivers' commissions as based on the total volume.

Now, Paragraph or Section 24, or Schedule 24; just how do these two matters compel the opinion that you state there? I would like to have you explain how you draw the conclusion in Paragraph 181, Schedule 24.

A. Paragraph 181 is my citation of the fact that demonstrating the method by which Paragraph 181, the whole paragraph, which is several pages, plus Schedule 24 at the end of it, is merely put in here demonstrating the method by which your method of calculating these total commissions be calculated, demonstrating that it is reflecting the union contract formula.

[fol. 57] Q. In other words, what you are saying is that in your opinion when for the purpose of using a yardstick of determining the compensation of an employee, one of the factors is the volume served?

A. In that segment, if there is a segment of that compensation that is based upon volume, yes.

Q. Then you think that must necessarily be taxed as a cost on the volume of the customer?

A. Sure.

Q. That is all that you mean by that passage and nothing more, that is what I am trying to get at?

A. In that particular sense, yes.

Q. Now, turn over to Page 35, the bottom of Page 35. You discuss the classification of costs by independent customers as against chain store customers, and you say comparisons of costs of such chains and independents is not statistically valid since they are not expressed in comparable classifications.

Then you go on to say that as a rule of statistical principle averages as to statistical meaning in comparison must be based on comparable treatment of conditions.

[fol. 58] A. Yes.

Q. I take it that your objection to classifying chains and independents is that the method of delivering and the handling of the delivery at the two types of stores is different; and, therefore, you can't statistically compare them?

A. No, that is not what I had in mind.

Q. What do you mean?

A. What I had in mind is in your classification as you have presented your statistics, you have lumped all chain units together.

Q. Yes.

A. All chain units together and have computed your costs in the chains as a total, whereas by comparison you are allocating costs from the size classes of independents, and yet your discount structures for your independents of course is reflected in the fact of size. You make no attempt to break down the costs of the chain stores by size or unit which I believe should be the proper basis of allocating these costs to start with. That is why they are not comparable. You can't compare the average of the chain as a whole with a given size of independent, which you are [fol. 59] apparently attempting to do here, at least it is evident from the way you have analyzed your data.

Q. You understand, do you not, there were only two chain stores, companies involved.

A. Two companies but there are some two hundred and fifty different units of different sizes.

Q. All right. Now you would recognize, would you not, Mr. Woolley, that if you classified the chain stores by volume and allowed a different one as those chain stores, each class of volume of chain stores allowed on their sales, that the result would be no different in the long run than if you picked overall, a discount for all these purchases by a chain store?

A. I don't necessarily follow. It depends upon the distribution and upon your discount structure that you set up.

Q. Putting it this way: If we had only one chain store or two chain stores singly?

A. You mean a single unit?

Q. Yes. You would not quarrel in classifying the chain stores separately?

A. If you only had the one unit, obviously you would [fol. 60] compare the one unit against another unit.

Q. No, you would compare it against all of the units, could you not?

A. If you had one single store obviously that is the only basis of comparison you have, but you don't have in this

situation, you have different sizes of stores, each one of which would have a different unit cost.

Q. Suppose that I have a customer who has three stores and one store, one volume, is entitled to six per cent discount; one store is entitled to four per cent discount; and one is entitled to two per cent discount.

A. Yes.

Q. Now, if I find that a discount of three per cent equals in dollar amount, on all sales equals in dollar amount the discounts that would be given on the stores computed independently, there is no violence done to the statistics, is there?

A. Yes.

Q. Why?

A. In terms of comparing the discounts granted these different sizes because your costs are different. It is not [fol. 61] a valid comparison to compare the three per cent average with the six per cent, which is what is implied here, in order to cost justify the difference between, because you are granting one store six per cent and another store three per cent. Your costs are going to be different because of the different sizes of stores.

Q. The customer gets the same discount, doesn't he?

A. The problem is a matter of justifying the difference. You can't compare an average difference with a single difference.

Q. Oh, but you are comparing the distance, the amount to the customer, aren't you?

A. You are comparing the discount to the individual customer and the cost should be so allocated according to the individual customer.

Q. Let me take it then: Your position is that the chain stores themselves should have been divided by volume classes?

A. In terms of analyzing your costs which should have been allocated by size.

Q. Would those sizes have to be the same sizes as the independent stores?

[fol. 62] A. It would be preferable for comparable comparison, yes.

Q. Well——

A. That is as far as cost.

Q. Is that necessarily true if you have got a different method of distributing and handling through the chain stores?

A. Yes. It would be true also because what you have here, you got three factors involved. You got three factors involved, according to the Act. You got your volume consideration. You got your method, difference in methods of sales, difference in method of delivering. You've got two classes of customers.

The volume effect will be a function of the size of the store unit. That will produce a given difference in the cost for the different sizes of stores.

Now, if we didn't have these differences in method and no differences in method of sale or delivery, all you would have left would be the effects of cost due to differences in volume. So that the same size of chain store and the same size of independent store I can't conceive of how there [fol. 63] would be any difference in cost for the same size. There would be for different sizes of independents compared with different sizes of chain stores, obviously.

Q. You can't conceive of why serving a chain store where you don't make cash collections, which is on an independent basis, which does more work by the chain store than the other stores, that you can't conceive of the cost of serving them is any different than you can an independent store?

A. Sure, if you have a difference in method of sales, yes. There would be some difference arising from that difference in the cost between the chain store and the unit store, but the effect of that difference for the different sizes of stores of chain units would be different.

Q. Let me ask you this, Mr. Woolley:

I am trying to find out what your meaning is.

A. Yes.

Q. If we had not attempted to analyze cost by volume brackets of independents, but had merely taken cost of chain stores and cost of independents——

[fol. 64] A. Which in effect is what you have done, is only the statistics you have calculated.

Q. That would have been a perfectly proper statistical method?

A. I wouldn't think so.

Q. Why not?

A. Because if you had a single discount granted to all independents, yes. It might be. But you don't have it. You've got different discounts granted to different sizes of stores. You've got volume reflected in your price pattern in the independents.

Now, therefore, of necessity you are having to compare in this case 8½ per cent in the chain stores with two per cent for the independent, and 8½ per cent with the four per cent, and the 8½ per cent with the six per cent. Actually, you've got a stratofield discount structure here, each element of which must be cost justified.

Q. Yes.

A. Because you got stores, chain stores and independent stores in competition with each other of similar sizes and not too far different, that one unit of your chain store getting an 8½ per cent along with one getting a four per [fol. 65] cent, something like that. That is the comparison that you are making. Your cost would have to reflect that fact, reflect that type of analysis, size for size.

Q. Mr. Woolley, let us suppose that my arrangement with the chain stores was to give a $10,000 discount at the end of the year, a lump sum, irrespective of the number of stores.

A. Yes.

Q. Now, how would you then determine on a cost justification whether that would justify it or not? Would you have to break that and allocate it to each store and then find out store by store whether it was justified?

A. I think so.

Q. That is your idea?

A. I think you have to because your stores are in competition, each store in competition with each independent store.

Q. Are you saying that, are you giving that opinion, Mr. Woolley, because of some principle of statistics or because of some opinion you have about the meaning of the law? [fol. 66] A. A combination of both.

Q. All right, will you explain the basis of your opinion, why you hold that opinion?

A. I think I have already covered it from statistical procedures. First of all, it is a general principle of statistical treatment of data, comparisons must be under similar conditions.

Q. Just a minute, if you are making reference to the Patman Act where differences of method of delivery are one of the justified things, you are therefore necessarily comparing two things that have a different basis.

A. True, true.

Q. Nevertheless, it would be statistically proper to make those comparisons?

A. In arriving at cost upon which you are going to justify that difference, those costs must be—depends upon what the combination is. Actually, the treatment of data depends upon the nature of the price structure which is involved, obviously. Whatever that price structure is governs the treatment of the data that you are going to develop. If your price structure is such that a single overall figure [fol. 67] for one class and an overall figure for another, then the cost structures reflecting the proper analysis could be aggregated together. If you are going to have different sizes of stores reflecting different sizes of discounts——

Q. I think you have made the point that I wanted to ask you next.

If the price structure where no discount to independents and X-per cent to chain stores, then it would be perfectly right to lump all chain stores in one set of figures and all independents in another, is that correct?

A. I am not so sure about that.

Q. What is that?

A. I'm not so sure about that.

Q. I thought that was just what you said, but now why won't you agree with that? I want your reasons.

A. You have taken into account the stores that are in competition with each other, don't we? When you get into that kind of an analysis you are forcing them into size classification, even though the discounts——

Q. You mean if the stores in the Chicago area, are you [fol. 68] suggesting this is improper because we haven't taken and compared Chain store A with those independents with which it is in competition?

A. At least the comparable size class.

Q. Well now, forgetting the size class at all.

A. All right, you can do it either way you want to. You can do it both ways.

Q. I say, suppose the price structure had been four per cent to chain stores because of the different method with which we deal with them, and no discount to the independent. You could get this cost structure classified all independents in one group and all chains in another group within the principles you are saying, could you not?

A. I am not so sure. You will have to make sure that your stores would be in competition with each other. You would have to break them down into a particular area.

Q. You mean in that situation if we decide that Chain Store A was in competition with—I mean, each individual store owned by a chain was in competition with four independent merchants who are also customers, that you would have to break the cost study down to compare the costs of [fol. 69] that store with those four independents, is that your idea?

A. Either that or else handle it on a general basis when you classify them by size, it is the same thing.

Q. What would size have to do when you were not granting a discount on the basis of volume?

A. Because size affects your cost difference.

Q. In other words, what you are trying to say, it is your concept that you must so break it down that you make, in effect make a cost comparison store by store, is that correct? With the group?

A. Or comparable, similar analysis where you have reflected those conditions in your cost structure by size. In other words, if I had a chain store here in a thousand units and four or five independent stores ranging from one hundred to five hundred, you could either do it on a geographical area basis, store by store, or you could make a single study reflecting the graduated size of the stores, chain and independent alike, and compare them volume by volume.

In effect, what you are doing is taking all the stores and lumping them together and segregating them according to [fol. 70] size and then you are reflecting those cost differences that result.

Q. Do you think the law requires that?

A. I don't know about the law. That is my own idea.

Q. That is your own idea based upon a statistical principle?

A. On a statistical and economic analyses, that would be the way I would handle it. I don't know what the law says. That is for the attorneys to decide or the judge to decide that. As far as my approach to the problem as an economist and as a statistician, that is the way I would recommend it. I would even recommend it to you and your staff and as a matter of fact with all due respect to Mr. Malone.

Q. What I gather is that you believe you recognize that two stores even of the same volume have different costs?

A. They can have. They may not necessarily. They can: it depends upon the situation, if they are in competition.

Q. Is any cost study accurate in your opinion that does not take into account the differences between two stores even with the same volume?

[fol. 71] A. Would you read that question?

(The last question read as recorded above.)

By the witness:

A. Is not accurate if they do not take into account volume with respect to costs?

Q. Differences of cost even if they have to be of the same volume?

A. Well, naturally, if there are any differences which exist for the same size of stores, naturally they have to be taken into account.

Q. That really means that you cannot get a true comparison unless you study the costs of each individual unit?

A. Or comparable size classes. All you have to do is to reflect the size.

Q. But you have to make the assumption if you have got the comparable size of store that your costs are going to be the same to all that size?

A. Well, on the average, yes, for a given size class, yes.

Q. Let us take the situation of three stores of the same volume, one five miles, one ten miles, and one fifteen miles [fol. 72] from the plant?

A. All right.

Q. The costs of serving those three stores are different even on the same volume?

A. Then when you classify them by size those three

stores following the same class, what you come up with is the cost structure reflecting the average route structure, is what you are doing.

Q. But you do recognize in that case the average is comparable, is that right?

A. Under those circumstances, yes, because what we are after here is a cost structure reflecting size or volume which is an element in our problem.

Q. Now, is there anything——

A. If you don't do that you are forced into the situation——

Q. Is there anything in the Borden discount schedule that says that chain stores get it because they are big, little, or anything else, get a discount? Is there anything in the Borden price structure that suggests that chain stores should be treated on a volume basis?

A. Naturally not.

[fol. 73] Q. No. I thought that you said the price structure determined the kind of study you should make?

A. Surely.

Q. And since the Borden price structure doesn't have anything to do with the volume of the chain stores, then you don't have——

A. No, no, that is not—that is only half the horse.

Q. Well, what is the other half?

A. The other half is the nature of the discount structure given to the independents.

Q. How does that affect the discount?

A. Because you are comparing the chain stores with independents and independents get a graduated discount. The chain stores are getting a flat discount. Any chain store, regardless of the size, is getting the same discount. That means in the given area where the chain stores are competing with the independents, discrimination arises because he is getting eight per cent and these other ones are getting anywhere from two, or four to five per cent.

Q. How do you know that discount is allocated to that store, on an eight per cent basis?

[fol. 74] A. It goes without saying that any contribution of that chain store to the total, whatever that basis of the eight per cent was, I don't know, they would be chargeable

in proportion to the contribution to the total volume on which the eight per cent applies.

Q. You are just assuming that?

A. I think they would do that. I think that is a pretty reasonable assumption. If they were to allocate, in other words, if Borden had the problem of allocating the costs on a product analysis or a store analysis, they would allocate that commission expense, that commission savings to the individual stores on the basis of their volume.

Q. Let me ask you this, Mr. Woolley:

Let us suppose that Borden gave a chain store seven per cent on chain store, the volume of chain stores above a certain amount and four per cent on chain stores for a lower volume, and it happened that they averaged it out at seven per cent, six per cent of the total purchases of that chain store, that could happen, could it not?

A. It is possible, it depends on the nature of the distribu-
[fol. 75] tion and sizes.

Q. And then the chain store received a check at the end of the aggregate sum of money of the discount, isn't that correct?

A. I suppose that is what would happen in terms of actual payment.

Q. Then it would be perfectly possible for the chain store having the money on hand to then divide it up among all of those stores on the basis of volume, is that correct?

A. Possibly.

Q. And in that event even though your discount was paid to a store on the basis of four per cent of the volume of the store, it might receive six per cent credit on the books of the chain store?

A. I don't think it would be so precise as that. I think they would make a more detailed analysis of the size of the store.

Q. You are making that as an assumption, are you?

A. I don't know exactly how I would do it. I would have to get into the statistics and analyze it and come to a judgment of what ought to be done.

Q. The answer about that is, isn't it true when you come
[fol. 76] down to it that the matter in which an aggregate discount to a single customer is computed does not matter so such if on the store-by-store basis enough of a discount

was justified that would equal the same aggregate amount of the discount that is actually paid?

A. No, I wouldn't say that.

Q. The economical effect to a chain store that is able to compete would be the same, wouldn't it? It doesn't matter whether you compute ——

A. Naturally.

Q. —ten thousand dollars and say it is made up by a lot of different amounts to ten stores, or whether it is just a flat percentage to all ten stores, it is still ten thousand dollars, isn't it?

A. The aggregate, sure.

Q. Its affect upon the ability of the chain store to pay remains the same, doesn't it, Mr. Woolley?

A. Naturally the Borden or the chain store has a tremendous amount of economic power back of it. That is not the point.

Q. The ability—what I am trying to get at is the net [fol. 77] cost to the chain store.

A. Unit of.

Q. The entire company that affects the ability of that chain to complete, doesn't it, economically?

A. I suppose so, in the aggregate.

Q. Yes. So it doesn't really matter the mechanical or mathematical method that you use to compute the amount that the chain store pays, it is the amount the chain store gets that counts?

A. No, it depends upon what your purpose is.

Q. The purpose is that the chain store gets as much money as it can?

A. Sure.

Q. It doesn't matter how John Jones competes, the amount he pays, so long as the chain store gets that amount of money which obtains the same economic result?

A. The problem here is, the question is, the question of individual stores in competition with chain units in competition with individual stores.

Q. And you think——

A. The ability to compete, of course, is naturally affected by the overall company position.

[fol. 78] Q. Your basis for this study must be based on the

basis of the individual chain stores against their competitors?

A. Sure.

Q. Now, turn over to Page 38.

A. You are skipping 17.

Q. Yes. I don't understand the sentence, these three factors are the sole basis Borden uses to allocate all direct delivery costs among the classes of customers, classes of stores. What three factors?

A. Oh, driver time, number of stops, number of locations.

Q. Driver time is an aggregate figure. That is a factor for dividing it?

A. Sure it is. What you did, you took your—you made your cost study, didn't you, your time study, the drivers' activities. You add forty elements, forty different work elements. Your problem is to take the aggregate amount of drivers' salaries, wages, and in your case including commissions, and to ascertain how much of that cost is to be allocated among the forty elements, work elements. You use time study for that purpose. You aggregated the time study——

[fol. 79] Q. When you say factors are the sole basis of allocating, I am thinking ordinarily as they use the time cost study as meaning divisory. You don't mean these are the three divisors we use to allocate?

A. Yes, I mean that.

Q. The total driver time includes all of the time driving to and from routes, the amount of time spent serving stores and it includes, that is the total, total time figures?

A. That is right.

Q. That, therefore, is the total cost figure and that is not used to divide?

A. Yes, it is. I beg your pardon. Let us look over in your schedule.

Q. Well, I am lost.

A. Turn to Schedule 26. Have you got your book here?

Q. No, I have not.

Mr. Hart: What page is that?

By the Witness:

A. This is on Page 128 and this is, what do you call that exhibit? This is Borden's Pre-Trial Order number, what is it?

Mr. Long: Borden's Defensive Pre-Trial Order.

[fol. 80] By the Witness:

A. This is Schedule 26 of that defense Pre-Trial Order entitled "Borden Company, Chicago Milk Division, Allocation of Labor Costs of Routes, of Route Operations to Store Customers for July and August, 1955."

By Mr. Ball:

Q. What you mean is—may I state it this way: That where our studies show that certain time is directly chargeable to a given unit, that the time there is used as the divisor?

A. Not quite. It is that, too.

Let us start at the bottom here. You have given $29,242.50 were the total labor costs, right? From the time study you came up with an allocation in time on these forty different work elements shown here as they distribute themselves among those chain stores as compared to the independents and other stores and later on by the size of the store.

That aggregates to a certain amount of minutes for Item No. 1 down through Item No. 40. In allocating the twenty-[fol. 81] nine thousand dollars, all you did was to divide the twenty-nine thousand by the total number of minutes served, or spent, and that gets you a certain cost per minute and apply to these number of minutes distribution, and that gives the total cost, and all your problem is, is to allocate this total cost per minute among the stores according to the bases and the time, location and stop.

Q. I see what you mean now by what you have said.

Now turn over on Page 39.

A. Yes.

Q. Looking at your Paragraph 21.

A. Yes.

Q. And I call your attention to the second sentence:

"Not all of the independents themselves receive all of these differential services on the sample day of their time study in 1955."

Will you please describe the basis you have for that statement?

A. Well, the record in your case is not clear on the matter and I would like to have it clarified in my own mind, because in Bowman's cost study I find that to be a fact and I presume the two companies operating the same in [fol. 82] dustry and under similar circumstances have a similar reaction.

In other words, if I had asked you to go into a detailed analysis of this, of these services as they accepted them on the various sample days, I would come up with a picture similar to what I found in Bowman on these points.

Q. You did have available——

A. I want a clarification of the record on that.

Q. You did have available and turned over to you as bulk exhibits the time——

A. I don't have the bulk exhibits.

Mr. Ball: The bulk exhibits were turned over to you or made available to you.

The Witness: Made available. I did not call for them.

By Mr. Ball:

Q. And the bulk exhibits indicated, that is the time spent on the various items to all classes of stores. What I am getting at, you did not make this statement on the basis of any information contained in those bulk exhibits?

[fol. 83] A. I presume if I had asked for it to be done like I had asked for the volume distribution of these store classifications, if I had the same thing done with each of these elements, I would probably come up with the same picture that Bowman did. Maybe we should do that. I don't know.

Q. But as the record stands now this sentence is not based upon any information presently in your possession so far as Borden is concerned?

A. No, but to me this was a simple way of getting the answer that I would come up with, anyway. True, I would like to have a clarification of the record in the matter.

Q. It is made here as a statement of fact, Mr. Woolley.

A. I know, because presumably this is a trial order. If you and I and counsel and everybody else agree to it, it will become a fact of record.

Q. At the present time you don't?

A. At the present time it is up in the air. That is why I would like to clarify it.

Mr. Ball: That is all the questions I presently have. I trust that you will permit the deposition to stay open, though?

[fol. 84] Mr. Jinkinson: Yes.

Mr. Ball: Until such time as Bowman has taken the deposition and with the same idea if there is anything relative that should be included that will not delay our work going ahead and trying to formulate a rebuttal pre-trial order?

Mr. Jinkinson: I have no objection. That is agreeable.

Mr. Ball: That is all, then.

Mr. Long: Just a few.

Mr. Stevens: We will reserve ours until the material is ready for us.

Redirect examination.

By Mr. Long:

Q. Mr. Woolley, in your opinion, as our expert here, does the ownership of the store have any effect on cost?

A. Offhand I don't see any relationship between the fact that one store is owned by an independent businessman or entrepreneur, otherwise known as a corporation or even a partnership, for that matter, as far as this particular [fol. 85] problem is concerned.

Q. What would you say about a classification?

A. A classification on the basis of ownership to me is totally irrelevant. The classification would be on the basis of cost structure. It is the cost structure that is involved. You have a different type of discount structure. Well, that is the basis upon which the analysis should be based.

Q. On Page 34 Mr. Ball asked you about the only rational basis of allocation is on the basis of volume, upon what basis, for what reason do you think this is the only rational basis of volume concept?

A. You have here a truck whose purpose, which should be the basis of allocation of cost, is to provide a movement of a quantity of goods from one point to another. That is the sole purpose. The driver's time involved in that is also a relevant cost of the operation of that function.

Now, that commodity, those commodities occupy a certain amount of space in that truck, obviously, and as the expert witnesses had testified heretofore, which I agreed to, it can be compared with, as Mr. Taylor so well stated [fol. 86] it, to a warehouse, mobile warehouse and it is a standard procedure of allocating warehousing costs to reflect the space occupied in allocating the cost of the warehouse to a given set of commodities occupying a given space.

Similarly, truck costs can be handled in that way. That is in a sense which I say only a rational basis.

The warehouse providing motion, the costs can be allocated to the various products within that truck on the basis of the space it occupies or volume which is similar to it. I mean, they are both directly related and since the customers' contribute to that total volume delivered they share in that demand for that service, incidentally.

These customers could obviously come to the warehouse, come to the distribution plant to pick up their own milk if they wanted to, if they felt the need for it: if they felt they wanted to pay for some costs, they could do it for the cost analysis on their own part is cost delivered to them, if Borden would let them, of course.

So these customers require, and it is because of their requirement, that this type of service comes into being. So [fol. 87] they are responsible to that extent for the cost of transportation. And the thing that is most closely related to that demand is the volume they are receiving, naturally. That volume is tied in with the space that is occupied in the truck. So it is on that basis that I feel that the allocation of this cost of the transportation including the driver's portion, his salary allocated to that function, should be

allocated to each of the stores because they contribute to that demand for that type of service.

Q. You feel it is a vast and most profitable thing?

A. Yes, and incidentally there is another thing, reviewing the method of transportation here, in reality you don't have any difference in method of delivery between customers. The mode of transportation is identically the same. It is by truck. The place of delivery is identically the same in terms of principle to the door of the customer. The time of delivery is the same in terms of daily versus monthly or annually or quarterly or whatever you might say. The ownership of the truck is identically the same.

[fol. 88] Those, to my way of thinking, are the principal sources by which a method of delivery might be distinguished between customers. The ownership might be by the supplier or it might be by the buyer. In so doing there would be a difference in cost arising from that difference. The place of delivery might be different. You might have a truck delivered direct to the door in this case of each customer, or you might have some of those customers receiving, like in the case of the chain they might want it delivered to their own warehouse or some other central point from which they would then take up their own orders for the distribution of their own individual units. In that case there would be a difference in the method of delivery and a difference in cost arising therefrom.

You might have another source of difference arising from differences in frequency of delivery which would be either daily basis or monthly or quarterly or annually, in which case there would be a difference in cost arising therefrom.

So you have all of this and of course you might have differences in type of transportation involved, you might [fol. 89] have a truck on the one hand, an airplane, water, train, etc. on the other."

These are general principles of course, rail, water; and different customers might conceivably be receiving their commodities in these different methods, manners or methods of delivery. So you have about four or five different types of ways in which the method of delivery might differ, hence, it gives a variety, and in this particular case you have no differences in any of those patterns.

Q. Do you recall, Mr. Woolley, whether you discussed this particular matter with Mr. Lundbahl of the Federal Trade Commission?

A. What do you mean? Just what I have been talking about or this question of the allocation of volume?

Q. Yes, sir.

A. On the allocation of volume, yes.

Q. Do you recall what his attitude was?

Mr. Ball: I think that would be hearsay evidence.

Mr. Long: Oh!

By the Witness:

A. I was talking to him.

[fol. 90] Mr. Ball: It would be objectionable. I can't prevent you from asking the question here, but I think it is disputable.

Mr. Long: Counsel has already gone into what you told Mr. Lundbahl here.

By Mr. Long:

Q. What did you tell him? Did you talk with Mr. Lundbahl?

A. I talked with Mr. Lundbahl about——

Q. Let us have Mr. Lundbahl's attitude?

A. I talked on this particular point of volume.

Q. Yes.

A. Of course, I went to him with the idea of seeing whether they would agree with my concept of a ton mile system of allocation of these costs and they didn't quite see the point that I was trying to make, or at least they didn't agree with me on the ton mile concept. They did agree with me on the fact that the volume would be the proper basis, or conceivably could be a proper basis.

Q. Mr. Woolley, when Mr. Ball was asking you about Article 42 of the union contract——

Mr. Ball: 42-A.

[fol. 91] By Mr. Long:

Q. He asked about 42-A. Is 42-A what you relied on?

A. I guess I was—no. Oh, I was thinking when I said 42-A, I was thinking of 42 applied to that whole paragraph. No. It was 42-E.

Q. You meant 42-E?

A. I meant 42-E on commission wholesale and that is the thing that is involved here, just for the sake of the record.

Q. Let me ask you another question about the ownership of the store.

If two stores take the same quantity on the same route, can ownership make a difference?

A. No. No, I don't see any difference on costs. It is the function of volume, the functioning of other factors which give rise to the accretion of costs.

Mr. Long: That is all I have.

Recross-examination.

By Mr. Ball:

Q. Mr. Woolley, I own, or assume for the moment that John Jones owns two stores. Isn't it the truth that he can [fol. 92] for purposes of keeping the smaller of the two stores going and competitively allocate his costs in such a way that some of the profit from the larger store is used to keep the smaller store going?

A. Oh, sure.

Q. So economically the fact that there is a common ownership can well mean stronger competitive effect of the smaller store, is that true?

A. Naturally the larger the multiplicity of stores the stronger the economic operation power there, derived therefrom. Naturally every unit benefits from it.

Q. So there is an economic difference between an independent store and a chain store, isn't there?

A. Only because of the size and not because of ownership. Not because of corporate ownership versus independent ownership. I mean, an independent businessman might develop conceivably a series of chain stores and still keep himself as an entrepreneur or partnership, if he

has financial backing himself, as against the corporate form. I think that is the direction of the question.

Q. I am not talking about the corporate form. There is [fol. 93] an economic difference between the store unitarily and the store which is one of a group which is singly owned?

A. In the terms of the number of plants owned, yes. You don't have a different ecor omic effect.

Q. Different economic effect?

A. Effect of cost but not in terms of form of ownership.

Q. I want to ask you this one situation here, one more hypothetical question.

Suppose that I have a truck. I am going to deliver on a route going out of the town that has my warehouse. A day's route. I am covering the little communities that are on the average twenty miles apart. All I can do in a day is to cover ten of those communities.

A. Yes.

Q. Nine of the ten have stores or customers that take comparable volume, and one store takes three times as much as the other. Isn't it a fact, however, that it costs me just as much to deliver the small store as it does the large store?

Mr. Long: I object.

[fol. 94] Mr. Ball: I am asking that as a hypothetical question.

Mr. Long: I am objecting on the basis this is irrelevant, incompetent and immaterial. It has nothing to do with this.

Mr. Ball: It is merely to test the opinion of the witness or basis of his opinion.

By the Witness:

A. The total cost of operating the truck is a route cost. The question of allocating that cost to the store is a different question.

By Mr. Ball:

Q. As a matter of economic fact, however, isn't it costing me just as much to serve the small store as it is to serve the large store?

A. No, because their contribution to the use of that truck is different, because the use of that truck is a function of the volume they receive.

Q. Now, let us add one more factor to the hypothesis and see how far you go down this line.

Suppose that a big customer drops out and I replace him with a customer no larger than the others but I can't. [fol. 95] I still have to make the twenty miles to that location.

Mr. Long: The same objection.

By Mr. Ball:

Q. The cost of serving the new customer is just as great as serving the old customer, isn't it?

Mr. Long: Note the same objection.

By the Witness:

A. His contribution to the use of that truck is different.

By Mr. Ball:

Q. So you are looking at no other factor in that answer but the use of the truck, is that right?

A. Sure, that is the basis. That is the purpose of the truck to start with.

Q. Your answers on this matter of allocating transportation costs are based upon the fact that you rigidly adhere to the concept that it is the use of the truck by volume that determines the total cost of allocating the truck?

A. Yes.

Mr. Ball: That is all.

[fol. 96] Redirect examination.

By Mr. Long:

Q. Mr. Woolley, your following is not a matter of rigidity, it is a matter of intelligence?

A. I hope so.

And Further Deponent Saith Not.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendants

Deposition of Elliott B. Woolley—Filed February 13, 1959

The deposition of Elliott B. Woolley, called by defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.; pursuant to agreement of the parties and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, before Joseph R. Betz, a notary public within and for the County of Cook and State of Illinois, on September 11, 1958, commencing at 10:30 o'clock, a.m., in Room 219, United States Courthouse, Chicago, Illinois.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

Mr. John P. Stevens, and Mr. Robert Havemeyer, on behalf of defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

[fol. 2] Mr. Stuart S. Ball, on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 3] ELLIOTT B. WOOLLEY, having been first duly sworn, deposeth and saith as follows:

Direct examination.

By Mr. Stevens:

Q. Would you state your name, please?

A. Elliott B. Woolley.

Q. And, Mr. Woolley, you testified in the deposition in this case that Mr. Ball took a few months ago, didn't you?

A. Yes.

Q. And if I asked you the same questions that he asked you at that time, I take it you would give the same answers?

A. Yes, with the exception of the fact that I would like to amplify a couple of statements, if I might, at this time.

Q. Could you tell me on what subjects you would want to amplify?

A. With respect to Mr. Ball's question relating to my being in harmony with the preceding experts' testimony, I think I just gave a categorical answer that I was in general agreement with them, but there is one point I would like to point out.

[fol. 4] That is in his interrogation of them on the matter of alternative uses of methods of allocation where you have possible alternatives, I think their general answer was that either was more or less likely and equally acceptable. I may not be quoting their answers exactly right, but the impression I got from them was that there was a basic assumption, of course, involved in those answers, and that is that such alternative methods, if they exist, will be equally acceptable only if the result from the application of those respective methods are consistent with each other with respect to the conclusions to be drawn from the facts developed.

For example, if you have two alternative methods of allocating certain elements or cost and they give such a wide disparity of results, conclusions to be drawn from those are going to be radically different and perhaps even the opposite direction; then I would say it is not equally rightfully acceptable to use either one of the methods.

Under that condition, as I say, I have reservations with respect to their answers.

Q. Is it your opinion, Mr. Woolley, that alternative [fol. 5] methods may be acceptable only if the alternative methods produce substantially the same results?

A. Wherein the net conclusions are not changed or altered.

Q. By net conclusions you mean if one method shows cost justification and the other does not show cost justification?

A. No; then they are not equally likely acceptable methods.

Q. In other words, to take a concrete example, assume by one approach a differential of five per cent can be justified and by another approach a differential of six per cent can be justified.

Now, if the actual discount were only four per cent, you might find them both acceptable, assuming one per cent is significant?

A. Well, if you are trying to justify four per cent to start with, and they both come up with something greater than four, then it is immaterial. But if one comes up with something greater or equal to the discount that you are trying to justify, and the other comes up with something substantially less than you are trying to justify, obviously [fol. 6] there is something wrong because the result should be consistent if both methods are equally acceptable, or if we are likely to produce two. That is what we are after, a true accounting of what the real costs are. That is what we are after.

Q. Well ——

A. (Continuing) And the real costs under any method of allocation cannot be inconsistent with themselves, otherwise there may be something wrong with one or the other method, or they may be both wrong.

Q. Well, let me go back then to the assumption. Assume the two methods are being experimented with and by one method a differential of five per cent is determined, and by the other method a differential of six per cent is determined.

Would it be possible for both methods to be equally acceptable?

A. Depending upon what your price is. It is relative to what your price is, of course, and what the result is that you want.

Q. Well, my first question ——

A. It is all relevant. I should not say what you are after. The price structure that you're dealing with or what the [fol. 7] differential is you are talking about, you cannot talk about it in a vacuum, of course. It depends upon what your purpose is.

Q. My first question is, just as a matter of accounting analysis, would it ever been possible for both methods to be equally acceptable if one produced five per cent and the other six per cent?

A. Depending on your purpose, yes. You cannot divorce it from purpose. No statistical treatment of any case can be divorced from purpose. That applies to accounting as well as to general statistics.

Q. Well ——

A. You have to keep in mind that is true of sampling as well as anything else. You can have several different methods of sampling. In one circumstance for one purpose one method might be applicable, and in another circumstance or for another purpose the other method might be applicable. In a third purpose both might be equally applicable.

Q. Well, just ——

A. So you have to define your purpose before you can answer the question.

Q. Just to be sure I understand you, there are some [fol. 8] situations, at least under your modified answers to the questions at the last deposition, wherein it might be acceptable under accounting principles to use one approach which produced a justification of five per cent and to use another approach which produced a justification of, say, six per cent.

A. Yes.

Q. I say there might be some situations.

A. There might be some situations.

Q. But I take it you are saying that situation in your opinion would not and could not be present if, for example, the price you are trying to justify was a five and a half

per cent price, so that the five per cent answer would not justify it but the six per cent answer would?

A. Well, of course, then you get into the question of diminimus and what constitutes the significant difference.

Q. Well, let's assume the difference is significant.

A. Well, if it is significant, whatever the measure of significance might be, then I would say yes, the five per cent method is not applicable to that situation.

[fol. 9] Q. So that the question——

A. Either one or the other may not be. It may be that both may be at fault or have some deficiencies in them to produce the discrepant result.

Q. So the acceptability of the two possible alternatives would, in your opinion, be dependent upon whether one was below and the other above the price which was attempted to be justified?

A. Not that alone, no. It would depend upon the reasonableness and degree of care with which the respective methods have been applied and the principles upon which they depend.

Q. Well, let's assume that both approaches are done with equal degree of care, equally thorough, but the difference results entirely from the judgment exercised by the expert in selecting a different service unit or different principle of allocation, and that one principle would produce one figure and the other would produce the other figure, and by terms of abstract reasoning you could not support one any more than the other.

Might there not be some situations in which you would have to say, at least in the abstract, that one approach was equally acceptable as the other?

A. Well, I suppose so, yes——

[fol. 10] Q. What I am asking is, if you had all those conditions present, would you still say that if one answer was above the price differential and the other answer was below the price differential?

A. If that result came forth from those conditions, I would suspect that something was wrong with the fundamental conditions. I would expect two alternative methods would not be significantly different from one another if the principles themselves upon which they are founded are consistent with each other.

If the two principles upon which they are founded, if they are not consistent with each other, then, naturally, you are going to get different results and you are going to have to make up your mind which you are going to take, because truth can't be inconsistent with itself.

Q. Well ——

A. The two principles pre-suppose certain premises, and if those premises are inconsistent with each other the results are going to be inconsistent with each other. You are going to have to make up your mind which one you are going to take. It can't be inconsistent. You cannot be inconsistent with yourself. At least I would not want to be. [fol. 11] In that situation I would have to make up my mind which one I wanted to accept as representing my judgment as to the best of my ability of the facts of the matter.

Q. Well, what do you mean when you say that the two alternative approaches should be consistent with one another? Isn't the very fact that there are alternative approaches a suggestion that there are inconsistent ways of going about attempting to answer the same question?

A. Well, you are getting into matters of degree, I suppose.

Q. Do you mean they must produce the same answer in order to be consistent?

A. I would expect them to produce something similar and not have significant differences. That is my point. If they have significant differences where conclusions are altered thereby, then I suspect there is something wrong in either one or both.

Q. Well, does it matter—Would you automatically say that the one which is wrong is the one which tended to justify?

[fol. 12] A. Not necessarily, no. That depends upon the whole scheme, the schematic by which the results are obtained.

Q. So that if you had ——

A. Comparing one with the other, you have to make up your mind which one you want to accept. That is all.

Q. If you have two answers, one of which will justify a differential and the other one of which will not justify a differential, your judgment as an accountant as to which

was the more acceptable would not be influenced by the fact that—by which was below but, rather, by your judgment as to which employed the more appropriate approach?

A. A more reasonable approach in relation to your purpose, yes.

Q. Now, other than that, would you still make the same answers to the questions which Mr. Ball asked you before, if I were to go through the same subject again?

A. I think more or less. All I can recollect. Now, there is one other matter in connection with my deposition of two months ago. I have forgotten the page number on which it occurred, but there is a discussion or there is a line of interrogation, rather, in which I was asked some-
[fol. 13] thing about transportation costs and the reasons for the use of volume statistics.

I would just like to add a sentence or two. I don't know where it will fit in there, but Mr. Ball's abstract of my deposition will show me. Do you have it there?

Mr. Ball: Yes, I was going to turn to it.

The Witness: Let me have it and I will show you. I will read the paragraph which I would like to have an amendment added to. Here, this is Mr. Ball's preliminary draft of my cross examination.

Mr. Ball: Off record.

(Discussion had off the record.)

By the Witness:

A. (Continuing) Now, I would like to expand.

By Mr. Stevens:

Q. There is some general subject you wanted to modify or expand your answer on?

A. Expand, yes. With regard to transportation costs, in the former deposition or the preceding deposition it deals with a discussion of my reasons for using volume as a basis for allocation of transportation costs.
[fol. 14] I did not quite finish the thought I had in mind. Now, this is to be added to what I said. I am going to quote now. Put this in.

"The volume concept for purposes of this suit under the Robinson-Patman Act is consistent with, in result, the lack of difference in method of delivery that do not exist between the classes of customers involved."

Now, maybe I have not got that clear.

Mr. Ball: May I ask a clarifying question?
Mr. Stevens: Yes.
Mr. Ball: I don't want to interrupt here.
Mr. Stevens: O.K. Go ahead.

By Mr. Ball:

Q. Do you mean, as you read the provisions of the Robinson-Patman Act, that you interpret the phrase "differences in method of delivery" as not including the subject matter that has been used in the Borden cost study?
A. Not all of it. Some of it. Not all of it.

By Mr. Stevens:

Q. Well, let me ask you this.
[fol. 15] A. Well, let me rephrase my thought now. To the extent that differences in methods of delivery do not exist between classes of customers, therefore, there cannot be any cost differences resulting therefrom. Therefore, a volume basis of allocation of transportation costs, which necessarily are related to delivery, and methods of delivery thereof, should not or will not produce any cost differences between the classes of customers just by the nature of the arithmetic involved.

So the use of a volume concept to me is consistent with the conditions which I find in the Bowman and Borden cost studies, as far as I am aware of them, and that is that there are no differences in method of delivery and, therefore, there cannot be any originating cost differences from transportation costs.

If you are going to include transportation costs at all, they should be allocated on a volume basis, since that is consistent with the underlying premise of the conditions that exist, namely, no cost differences.

Q. Does that complete your answer?

[fol. 16] A. I think that is more or less the way I would like to amend that particular section where it fits in.

Q. Well, now, in your opinion, Mr. Woolley, are there any differences in the method of delivery of fluid milk as practiced by the Bowman Dairy Company between deliveries to independent stores and deliveries to chain stores?

A. I see none.

Q. You see none?

A. I see none.

Q. So it would be your opinion that there would be no basis whatsoever for justifying any differential in price as between independents and chains?

A. On the basis of costs originating from differences in methods of delivery, of course, there are other sources of costs which are relevant to the Act which may be there. The method of sale might be different.

Q. Are there any relevant differences in cost between Bowman's dealings of all kinds with independents and its dealings of all kinds with chains——

A. That is too broad a question.

Q. (Continuing)—which you would recognize?

A. As I understand the terms of the Act, you have the [fol. 17] costs that are relevant, according to my concept, those originating from differences resulting from differences in volume, which are more or less always present, the differences in method of sale and the differences in method of delivery.

Q. Now, you would agree, would you not, that at least as between a large chain store and a small independent, there might be cost differences resulting from differences in volume sold?

A. Surely.

Q. Incidentally, I take it you did not criticize the Bowman study for failing to take into account the varying sizes of the different chain stores?

A. No, because you reflected those different sizes in your cost structure, or your cost analysis, I should say.

Q. And the Bowman analysis did take into account the size of each individual chain store which was studied and each individual independent store that was studied?

A. I think so.

Q. So your objections, and I recognize you have objections, do not go to the classification of the customers?
[fol. 18] A. Oh, yes, but for another reason. For a different reason. I don't agree that for purposes of price making the question of the fact that one is a chain and the other is an independent has any meaning for the purpose of pricing.

Q. But for the purpose of justification?

A. For purposes of justification, either.

Q. The differences, such as may exist, have been taken into account in the study?

A. As far as they reflect differences in volume and the relevant differences in method of sale and delivery, if any.

Q. But what you are saying is that all the chain stores are charged the same price, even though there are variations in costs as between individual chain stores; that is what you are commenting on now?

A. You lost me.

Q. I thought you were comparing chains as against independents.

Mr. Stevens: Read the question, please.

(Question read by the reporter.)

By the Witness:

A. I was thinking about the cost comparison between [fol. 19] chains and independents.

By Mr. Stevens:

Q. Maybe you better explain again what your objection is to the method of classification employed in the Bowman study.

A. The method of classification arises out of the fact, as far as I see your cost theory—it arises out of your approach to allocating these costs to these classes of customers; but in so doing, there have been introduced here inherent discrepancies—well, that is not the word I want to use, but discrimination between the two classes of customers simply because you are claiming that a certain class of services are applicable to independents and not appli-

cable to chain stores, and your cost differences are derived accordingly.

Q. Well, Mr. Woolley——

A. Let me finish. Now, that might be all right if all the independents did receive all those services you claim as a source of difference between the two classes of customers, chains versus independents, but in analyzing the facts of your customers from the data supplied, I find that that is not the truth.

[fol. 20] The fact is that you have independents who stand in the same category as your chains with respect to your theory of justification, or your source of justification.

Q. Stand in the same category as chains?

A. As chains, yes. You have some independents who do not take the so-called services upon which you rely for your cost differences, yet you are claiming on the one hand that we can justify the differential between chain stores and independents through this method or this theory; yet, on the other hand, even if you were successful there you still would have an inconsistency there because you still have a group of independents who do not take that customer service, and yet stand on the same basis as chain stores, and yet they are getting the same discount as independents.

So your whole system is inconsistent.

Q. Mr. Woolley, isn't what you really mean to say——

A. Inconsistent with the facts of the case.

Q. Isn't what you really mean to say, is that on the days in which the time studies were made, there were some independents who received no customer services on those particular days? Isn't that the fact from which you have [fol. 21] drawn this?

A. As far as I know, they may never take it. We don't know.

Q. But isn't it also true, Mr. Woolley, that you found on your review of the data that there were independent customers who did not receive optional services on some days and did receive optional services on other days?

A. That is right.

Q. And what you are saying is you don't know whether all of the independent customers received some optional services on some days?

A. Nobody knows that unless they make a complete study of it.

Q. And you did not find in your review of the material, I take it, Mr. Woolley, that there was any indication that the optional services were not made available to all independent customers, or did you?

A. That is one of the troubles with this case, with this case as I see it, that those stores were not told that they would get a differential discount if they did not take these optional services. They were not advised that there is a cost difference involved to Bowman if they did not receive [fol. 22] these customer services and, therefore, a beneficial discount would be given to them if they did not receive them.

Now, my point is——

Q. Well, you say——

A. Let me finish my point. My point is that under those conditions, under those facts of your customers, it seems to me that the question of chain stores versus independents is irrelevant to the question of discount policy. But if you are going to devise a system here wherein you are going to reflect in it, in your cost structure, which should reflect your discount structure, conditions which are applicable to one group of stores and not applicable to another, then those conditions must be consistent with both groups of stores.

So, therefore, your basis of discount policy under these conditions that you find in your industry, if we are going to set up a discount, if we are going to justify this thing on the basis of services, then we must find out who those customers are who consistently take it and who those customers are that don't consistently take it, and who those are that don't take it at all.

Then we should adjust our discount to reflect those cost [fol. 23] differences resulting, if that is a proper source of cost difference, not the basis of chains versus independents as a group of customers. That is what I am getting at.

Q. Just summarizing, your point is that the data does not show in your opinion that all independents take the optional services?

A. That is right, which introduces an inconsistency into the theory of justification.

Q. Now, assume that they did all take the optional services or we were only talking about customers who did take

optional services, independent customers who did take optional services, just so that I can understand your views.

A. Which, incidentally, is only half of your total number of customers.

Q. Well, more specifically, Mr. Woolley, if you are going to comment, it is only half of the customers that took them on the particular days that there were time studies.

Now, you do not mean to say that in your opinion only half of the customers ever took customer service? You don't mean to indicate that?

[fol. 24] A. The sample of the sample stores, and they are presumably a representative sample according to Bowman's claims of your independent stores' structures, and on your samples and from your samples you found that roughly half of those stores took the customers' services.

Q. Bowman did not so find, Mr. Woolley. Can you point to anything in the Bowman study that so finds?

A. From your basic data I obtained that information, yes.

Q. You drew that conclusion from the basic data.

A. From the basic data which I took, which you could have done the same yourself.

Q. All right, but the data which you examined then was data which showed specific time studies of specific customers, and you found that on the days in which the time studies were made, there were, whatever number you say, that did not take customer service on those days.

I am asking you if you drew from that the inference that those customers never took customer service?

A. It is a possibility some of them never do, yes.

Q. Well, did you draw that inference?

A. That is an inference I think I can rationally draw [fol. 25] from that sample. Remember, that is a sample. Now, if you were to repeat that sample you probably would get different results.

Q. Well, is it your view, Mr. Woolley——

A. That is the purpose of a sample, to give you a generalization from a partial counting of your total population, and if you cannot draw an inference from a sample, assuming it is representative, then there is no purpose in using a sample and no purpose in your cost study.

Mr. Stevens: Off the record.

(Discussion had off the record.)

By Mr. Stevens:

Q. Is it your conclusion from the data, Mr. Woolley, that one-half of the Bowman customers studied never take customer service?

A. Well, wait a minute. I think it is the other way around, half of the customers. I think the figures I had in there showed roughly half of the customers took the services on the sample basis, and I think another forty per cent, or something like that, were the ones that did not take it at all, and ten per cent or twenty per cent of them took it on part of the days, on half the days that were sampled. [fol. 26] Q. Well, is it your opinion, based on this data, that the remainder never take customer service?

A. I think that is a fair conclusion from that sample, lacking any other evidence.

Q. How many days were covered by the sample?

A. Well, I don't recall offhand, but it was spread through the year, I can remember.

Q. Do you know how many times a given customer was studied at the most in the study?

A. Twice, I think, on this particular one.

Q. Were any customers studied more than twice?

A. I don't think so.

Q. Now, are you drawing the conclusion that if a customer were studied twice and did not take customer service on either of the two days on which he was studied, that it is fair to infer that he never took customer service?

A. No, I am not saying that at all. No, I did not say that at all. There were some studied in which there was no customer service rendered at any store on either of the days. Let's go back to the study. In the first place, as I recall, some of the routes were sampled once, so that [fol. 27] means each store was sampled once with respect to its customer service.

Now, on those routes that were sampled once, some of them took it and some of them didn't.

Now, as a sample, a preliminary judgment would be that, all right, some of these customers would not take it at all.

Some of them might take it the next time you sample. Some would not take it at any time. I do not know what the proportion would be.

Now, on the other set of routes we sampled twice. We repeated the sample. Now, those routes that were replicated I found some customers that were served on both days. Others were served the customer service on one sample but were not served on the other. The third class were not served on either of them.

Now, from that as a sample, it is fair to assume that there are customers who probably will not take any customer service at all during the year. There are others who will take it some of the time, but not all of the time. And there are others who will take it all the time. There will be some varying degrees between.

[fol. 28] You would have to make a more adequate representative sample, incidentally, of your whole customer list before you could come to that conclusion. On the basis of this partial data we have before us, there is some reason to doubt that all of your customers take it all the time or even part of the time.

Q. Now, if they all took it all the time, in your opinion would that be a method of delivery which could properly be considered as a basis for analyzing cost differences?

A. No, because I don't consider those services relevant to the Act flowing from a method of delivery.

Q. You would not consider that a different method of delivery in any event? So your basic position is——

A. No, all I am saying is if—I am premising this in the preceding argument on a condition that if it is a proper source of cost difference, then under these conditions your application leads to an inconsistent discount structure.

Q. Well, you would consider for one group of customers the merchandise is actually put in the display cases, and for another group of customers the merchandise is not actually put in the display cases by the driver, that that [fol. 29] is not a difference in method of delivery which should be considered?

A. No. I consider the delivery stops when he delivers the milk to the store. What he does after that is purely optional, purely something where he wants to give personal

service. It is just a service rather than method of delivery.

Q. I am just trying to get your view.

A. I think my definition of method of delivery is more completely defined in the preceding deposition Mr. Ball took. I think I went through it. I am not sure. I think I covered it. If it isn't there, it will be in our argument.

Mr. Stevens: Off record.

(Discussion had off the record.)

By Mr. Stevens:

Q. All right. Then you submitted—rather, the Government has submitted a volume of exhibits in its proposed rebuttal to the Bowman Dairy Company phase of the case. I take it you prepared or were in charge of the preparation of most or all of those exhibits?

A. Yes, sir.

Q. Now, in the portion in which you make certain cost [fol. 30] analyses of the Bowman delivery picture, you do give effect to the cost difference resulting from this particular difference that we have been talking about?

A. Yes, that is right.

Q. But I take it in your view that would not be a correct way to go about it?

A. No.

Q. All right.

A. May I explain the reason for it?

Q. I was going to ask you: What were you doing in all these exhibits?

A. All right, I am merely trying to show to the Court, assuming he is going to read it, or look it over, that you have got two propositions to solve. First of all, he has got to determine whether or not these services are relevant to the Act, and, if they are,—rather, if they are not relevant to the Act, and, of course, any cost differences arising from them are to be eliminated entirely, then you can easily see what the affects upon the cost differences is.

But if he comes to the conclusion that they are relevant, then I have certain technical criticisms of the method by which these customer services were determined in terms of [fol. 31] translation into time and cost.

So, for that reason I incorporate them in this data here to show my technical criticism of the methodology by which those time elements were developed from your formula.

Q. Now, Mr. Woolley——

A. They are not there because I agree that they are part of the method of delivery.

Q. So that——

A. That also applies to the data relating to fibre versus glass proportion as it affects your development of the number of cases and the number of glass containers delivered to stores, and so forth. Maybe I am getting a little ahead of you.

Q. The portion of your study which is based on—I think it is Charts IV-A and IV-B, and everything that is developed from those, you would say in your opinion is not correct, but you include it on the assumption that if the Court considers this factor correct, why, then, these are the answers he should get from this particular portion of the case?

A. Yes. Pardon me one moment. It is not Table IV, I don't think. It is Table——

[fol. 32] Q. I meant Chart IV, excuse me. Where I said Table 4 I meant Chart IV.

A. One? You mean customer service?

Q. No, I referred to glass-fiber.

A. Oh, excuse me. Well, that is Charts III and IV.

Q. Well, III is the one on containers.

A. Yes.

Q. And IV is the one on glass and fiber.

A. Yes.

Q. Well, now, would your same comment apply to your——

A. No. III is on chain stores. It covers both class of customers.

Q. The relationship between the number of containers and the number of points is what you try to express in Chart No. III?

A. That is right.

Q. But again you would say that in your opinion is really not significant—or, I mean, should not be taken into consideration; but if it is to be taken into consideration, it

should be taken into consideration in the way in which you analyzed it in your material?

A. Yes.

Q. Did you have assistance in the preparation of all [folio 33] these exhibits?

A. Initially, no.

Q. Well——

A. I did it all myself.

Q. Well, ultimately did you have personnel who worked for and with you in the development of this material?

A. No, only for the purpose of checking material after you found substantial errors in them.

Q. Well, I might do it this way: Originally, is it not correct, that you submitted a group of exhibits to us?

A. Yes.

Q. And then when they were reviewed, there were some changes to which both sides felt needed to be made, and then you revised your material and submitted a revised group of exhibits?

A. That is right.

Q. All right. First with respect to the original group of exhibits, did you prepare all of those exhibits yourself?

A. Yes.

Q. Did you do all of the calculating and the assembling of underlying data and review of material that was neces- [fol. 34] sary to precede the preparation of those exhibits?

A. With one exception. Yes, with one exception.

Q. What was that exception?

A. With respect to the fiber-glass where we obtained a one-third sample of routes from your company. The initial tabulation or the conception of the analysis originates from myself. The mechanics of tabulating the number of points delivered, the number of containers delivered by stores from each of these routes, chains versus independents, that initial calculation or tabulation was performed by the FBI for us.

Q. How many men did they have working on that?

A. Oh, gee,——

Mr. Jinkinson: If you know.

By the Witness:

A. I think they had three or four. It varied. One time they told me a couple and one time they had three. One man was in charge of it and he did most of the work. He had some helpers. He finally wound up by himself.

Q. How long did it take him to do that?

A. Since he has other tasks assigned to him besides this thing, it took him actually two months to do it.

Q. And how many months did it take you to do the work which you performed which went into the original group [fol. 35] of exhibits?

Mr. Jinkinson: I do not see the relevancy of this at all, myself. What is the relevancy of how long it took him to do the work?

The Witness: Well, if I could do it in this length of time, they sure could have been able to do it, too.

By the Witness:

A. I do not know how long it took them to do that, excepting I had to wait two months to get it, but they did not work consistently two months on this material. The rest of this was in the process of preparation, oh, let's see. The actual analysis that I performed was spread over a couple of months, three months.

By Mr. Stevens:

Q. Then how long did it take to make the revisions after the original corrections were submitted and it was decided they should be changed?

A. One month.

Q. And on that——

A. That is from computational activity and complete revision of material through the typing, of course.

Q. Is that work which you did yourself?

A. No. On corrections I had other statistical clerks as- [fol. 36] sist me. They did it under my direction.

Q. All right. Now, would it be necessary, Mr. Woolley, to go through all this work every time there was a price change if Bowman were to employ the approaches which

you have employed in your work, rather than the approaches that they employed?

A. I don't think so.

Q. Now, which——

A. All you would have to do to reflect changes in costs would be to—unless you had reason to believe that over a 10-year period, or fifteen or twenty year period some underlying changes in route structure, or something like that, had changed, or your time studies you felt were invalid now and had to be redone, barring those long-time trend factors, which undoubtedly would have to be considered every ten years; but from year to year until that time is reached, all you have to do is take the basic data in Table 8 and recalculate those for whatever period you want to cover—in this case it is a couple of months—take those factors that are contained on each of those respective tables and apply those rates as I did here in Table 15 or 16. Well, it is really Table 16—oh, 15, I beg your pardon. 15 and 16.

[fol. 37] On the basic table, you would have to revise those. Those are the only two tables you would have to change from time to time as you wanted to change the cost estimates.

The only tables you have to revise, just to get it again, is Table 8 and

A. Table 8 and

Q. And Table 8 is the difference in costs, I take it, from time to time?

A. Table 8 reflects your various cost rates that are necessary to work these tables. Table 8—now, let's see.

Q. When you say Table 8 you mean Table 8-A through Table 8-G, of course?

A. Yes, and all sub-tables. Remember Exhibits K-1, K-2 and K-3, which are the basic data to Table 8. Those, of course, would have to be revised from time to time to provide your basis statistics.

Then taking those and running them through the calculations involved in Table 8-A through D would get you the basic rates which would be applied to Tables 15 and 16, respectively, and summarized on Table 16. That is about all you have to do.

Q. And of course Table 17, too, which is where your [fol. 38] final conclusions are?

A. Well, yes, these tables would not take you more than a couple of days each. In other words, a week would do it.

Q. But if you had to make revisions in Charts I, II, III or IV, that would involve the kind of detailed work that you were required to perform?

A. Well, it would require a restudy of your whole time study, for one thing. It would require probably a refinement of much of the data that I have done here or the work I have done here on these basic tables. Yes, that would have to be done perhaps every ten years or so.

Q. But it would not be necessary to go through them one at a time and to do Table I and I-A in that particular original group of tables over again—rather, charts, I mean: Charts I-A, B, C, because——

A. Well, I would not say—let's go through this systematically now.

Q. Start it with Chart I-A.

A. All right.

Q. Insofar as your time standards reflected or described elements which really did not change from time to time, then it would be appropriate to continue to use time stand- [fol. 39] ards and then your chart would continue to have the same validity that it has today?

A. That is right. For example, Chart I, based on your customer service data, I would not expect that to change too radically. It might over a period of five or ten years when you get different personnel in with different habits, it might change the calculation, but——

Q. That, of course, covers I-B and I-C?

A. Yes. These are Roman numeral numbers. Roman numeral III and IV likewise probably would not have to be checked more than once every five or ten years.

Q. Now, turning to Chart——

A. Well, of course, depending upon the degree or rate of change of trend in the use of fiber containers. If you find a definite trend it might be well to take these mathematical formula and introduce a time factor which would be added to it which would automatically take care of your problem.

Q. But for Chart IV to be valid for the purpose of use in different periods of time and with different price structures

and different discount structures, you would have to assume that the ratio of glass to fiber was a constant?

[fol. 40] A. No, constant with respect to time, yes, but not with respect to volume. That is where you and I differ. I mean, that is what you are doing in all this structure here. You are assuming all these relationships are constant. Structural relations are constant with relationship to time until you have reason to believe the time has altered the nature of the structure.

Q. Let's assume there is no change in the time standard at all. Let's assume that if you conducted periodic time studies you would come up with the same time standards over and over.

A. That includes this stuff here, too.

Q. Nevertheless, might it also be true, Mr. Woolley, that if the relative importance of fiber or glass changed over a period of time——

A. Yes, you would have to reflect that.

Q. (Continuing) Then it would require a recalculation of the material that went into Chart IV?

A. If you are going to do this mathematically or statistically, logically and correct, what would need to be done in Charts III and IV is to use this thing for another four or five years, but keep a sampling record, much as I have done here. You would do it on a sample basis each year, just take [fol. 41] two or three months out of each year and run the same type of tabulation on it as involved in these statistics and do that each year for a period of four or five years until you have established a trend of one another.

Then you can take that mathematic trend and reflect it in your formula.

Q. Well, if——

A. Either that or else check it from time to time.

Q. If from month to month there were a substantial variation in the use of glass as compared to the use of fiber, wouldn't that require——

A. No, not for that purpose, no, because this curve represents an average. Actually, to eliminate monthly variations, you ought to use yearly data, anyway, total data, anyway, rather than just monthly, to eliminate the effect of seasonal.

There may be seasonality in this thing and there probably

is; but to do this correctly the total figures for the year ought to be used as a basis for developing these curves that I have here on Charts III and IV to start with, so that you eliminate the effect of seasonality in the thing, because your [fol. 42] discount pattern is not a seasonal thing, anyway. It is an annual or maybe a bi-annual change. I do not know how often you change a discount.

But the point is you are not changing your prices to customers—or at least I don't think you are; you may. I don't know, but you would not have to change these structural equations necessarily every months.

Q. Well, would you have to change them every time you made a cost study? That I think is the question.

A. Well, how often are you going to make a cost study?

Q. If there were reason to believe that there was a difference in the relative importance of glass or fiber at the time another cost study were to be made, would it be necessary to recalculate Chart IV?

A. If you found in your analysis of your data that you had a systematic variation because of seasonal or cyclical variation in these proportions that are involved here then I think, yes, you would have to take that into account.

Q. Well——

A. For example, if you could imagine this Chart III here, for example, on a three dimensional scheme, three dimensional pattern, like this room here, this chart here repre- [fol. 43] sents only the pattern as it would exist on that wall over there, but now the other dimension would be time, seasonality, or cyclical, whatever you want to introduce into the thing, and that curve—you would still have to take into account the structure with respect to volume, yes, but that pattern might change with respect to the season.

It might be horizontal during the middle of the year, it might be this way during part of the year, and that way during the other, I don't know (indicating).

If you are going to take that into account, my point is **the whole structure would have to be considered, not just an** average of all the stores.

Q. What you are saying, if I understand you, Mr. Woolley, is if instead of just being one constant where one month would be typical for later periods of time, you found cycli-

cal changes, you ought to take those cyclical changes into account?

A. I would assume, judging from your general formula, depending upon how frequently you want to make your cost revisions.

Q. What if you did not find any cyclical change or any significant pattern of changes, but merely had reason to [fol. 44] believe that the ratio of glass to fiber was different during the later period than it was during the period when this particular chart was made?

A. For what reason? There has to be a reason. It can't just be different, otherwise that is just more of a random-type activity that you don't need to take into account.

Q. Well, if it is merely a random activity—

A. It ought not to be reflected in a cost justification.

Q. Could it be reflected in cost justification even though it were a random activity if its effect was merely considered for the period when it was actually studied and when that sample was taken?

A. No, I would not say that was a reasonable approach. In the first place, I do not think it is relevant as source of cost difference, anyway. It is not a real source of cost difference, it is just a random observation for justifying something on the basis of something that might not exist tomorrow.

On a random basis there is no basis for using it as a basis for cost justification, to start with.

If it was a systematic variation, then I would say you [fol. 45] would have some basis for incorporating it consistently in your formula. That is, assuming it is relevant. Otherwise, no.

That is why you use averages, to eliminate the effect of random variation. An average is supposed to represent, and the statistical relationships are supposed to represent some underlying real causal relationship that governs the existence of your factors you want to use in your formula.

Q. Well, in your view, is there such a real relationship —and this is apart from your opinion as to whether it should be taken into consideration under the Act; but is there such a real relationship with respect to the glass-fiber situation?

A. I think there is a real relationship, yes, with respect to size of stores.

Mr. Long: Why don't we take a recess now?

Mr. Woolley, would you like a drink of water?

The Witness: Yes, I think I would.

Mr. Long: Why don't we recess at this time for a few minutes?

Mr. Stevens: All right.

(A recess taken.)

[fol. 46] By Mr. Stevens:

Q. Directing your attention to Chart IV-A of the proposed material, first of all on my photostat of the copy in the lower right-hand corner between the four hundred and six hundred point indication, there is what appears to me to be a smudge there.

A. It is a smudge.

Q. That is not a dot on the chart?

A. No, no.

Q. It should not influence the direction of the line there?

A. No. I think that was an error in the original plotting and it was not quite erased.

Q. Now, would you tell me, Mr. Woolley, what Chart IV-A shows?

A. Chart IV-A shows the results of the tabulation of the number of glass containers as a percentage to the total number of containers delivered to independent stores, as related to the average number of points delivered to those stores at the same time.

Q. Now, was there any particular mathematical technique used in shaping the line which appears on Chart IV-A?

[fol. 47] A. That was just a freehand curve drawn through the middle of the line. This is on semi-logarithmic paper, if that means anything to you.

Q. You say it is on semi-logarithmic?

A. Yes, it is a semi-logarithmic paper.

Q. What is the difference between logarithmic paper and semi-logarithmic?

A. Well, on logarithmic paper you have the scale on both angles of the paper, both directions. This has it only on one direction. I did that in order to simplify the scattering or reduce the variation on the paper itself of the observation that I was dealing with so I could get a better picture of how it smooths out.

Q. Now, Mr. Woolley, if the line on Chart IV-A had a different shape than the one it does have, is it not true that it would be necessary to change the figures in several of the tables which are in your material?

A. Oh, certainly.

Q. For example, to be specific, if the line on this Chart IV-A were changed, is it not true that that would require a change in a recalculation of data on Table XIV?

A. I think so, XIV, yes, because that is the purpose [fol. 48] of this thing as it developed the number of cases and number of containers reflecting this percentage from independents. It entered into the formula.

Q. Now, the data in certain columns on Table XIV is merely a reading of what the line portrays.

A. An interpolation.

Q. On Chart IV-A. Now, on which columns on Table XIV are you really doing nothing more than reading the line which is sketched on Chart IV-A?

A. Column 3.

Q. Column 3? The title of Column 3 begins, "Fourteen hundred," and runs down to fifteen hundred?

A. That is right.

Q. And that really is a fifteen per cent. Isn't that really what we are talking about in the column at the bottom?

A. At the bottom, yes.

Q. Now, if that column were changed, would that cause changes in other columns on Table IV?

A. Every one of the columns on the right.

Q. On Table XIV?

A. For the independents.

Q. And if IV-B were changed——

[fol. 49] A. Specifically it would change Columns 4, 5 and 6.

Q. And then would that not in turn require a change in Table XV, in practically every column on Table XV?

A. It would change the independents, it would change all

of the—well, leave out the store size column; it would change Columns 1, and I think 2—yes, 2.

Q. Would it also change——

A. Of course it would change——

Q. Would it not also change the columns which are headed with the footnote Pegs of 6, 7, 8 and 10?

A. Yes.

Q. And then over on the right——

A. Also 12.

Q. Also over on the right the column pertaining to independents for March, 1955, with the footnote "12" and also similarly for the footnote "December, '55"?

A. It would also change on 16 and it would change the costs for bottle expenses, milk room wages and costs.

Q. And then the total costs?

A. And the total costs for independents, the average costs, of course, too.

Q. And the driver's service costs?

A. That is right.

[fol. 50] Q. And then, as you say, the daily unit costs per store?

A. That is right.

Q. Then 17 would require changes, too?

A. Yes—well, changes in unit costs and independents, and, of course, the relative difference.

Q. And the relative difference. It would go all the way to the conclusion of the study?

A. Well, assuming the unit costs for the chain stores did not change, yes, because if they changed that might be offset or it might be added to it.

Q. No, but I am assuming everything remaining the same except the line on Chart IV-A were moved a little bit.

A. That is right.

Q. And if the line on Chart IV-B were moved a little bit, you would have corresponding changes in all these tables except that the changes would pertain to chains rather than independents?

A. That is right.

Q. Now, on Table XIV, for example, the Column 3, to what degree of accuracy do you purport to read and interpret the line which is portrayed on Chart IV-A?

[fol. 51] Oh, I think I can read it just as I see it there.

Q. Well, is it within——

A. Within the third decimal place.

Q. As to the one hundredth of one per cent really, because you are talking about percentage?

A. This is one-tenth of one per cent. This is ratio. These figures are 14.85 per cent, so in terms of the ratio it is .1480.

Q. And you can read it to the——

A. Tenth of a per cent.

Q. Tenth of a per cent, which is the fourth figure to the right of the decimal point?

A. No, third.

Q. The third figure to the right of the decimal point in Colume 3?

A. Yes.

Q. Of course, you have on occasion differentiated between, for example, .1480 and .1485?

A. Well, that is my interpretation by virtue of the fact—Remember now, this is a freehand curve, and if I had a mathematical formula like I did on Chart III here, and set it down, actually computed it out, it would move in a smooth pattern.

[fol. 52] Now, all I have done here is I first made the first approximation in terms of, I think it was tenths of a per cent, and then interpolated just a gradual interpolation from each level upward, in order to get sort of a smooth transition.

Q. Well, now——

A. It is a rough approximation.

Q. How much in terms of figures in Column 3—what is the one space on the chart equal to?

A. What do you mean? I don't understand you.

Q. Well, would moving the line up one space change——

A. For example, from 100 to 120? Take a 100-unit store and a 120-unit store. Do you mean from 13 to 1350?

Q. No, I am talking about Column 3 and I am asking you——

A. Table XIV?

Q. (Continuing)—on Table XIV, and directing your attention to IV-A, I am asking you if the line on Chart IV-A were moved up just one space, how much of a change would that produce in the figures in Column 3 on Table XIV?

A. Oh, I see what you mean. It would be two per cent, [fol. 53] two percentage units.

Q. In other words, the last group of figures instead of being fifteen per cent would be seventeen per cent?

A. That is right. If you shifted the whole curve up.

Q. Just moving it one space would move all these figures two per cent?

A. Two percentage points.

Q. Two percentage points?

A. That is right.

Q. Now, how many percentage points are occupied by the dots which you purport to read? Don't they each occupy about two percentage points?

A. About half. Remember, when I plotted these things, I plotted a small pinpoint about the size of that pencil lead.

Q. I take it you have already stated that the location of this line, its shape and slope, were not calculated by any mathematical formula but rather this was a freehand sketch which represented your judgment?

A. It was a visual observation reflected there.

Q. Now, did you have any means, any mathematical formula or statistical type of test by means of which you could verify the accuracy or skill with which you attempted [fol. 54] to sketch this line?

A. Oh, by taking the trouble I probably could have fitted a mathematical curve with which to test it.

Q. That isn't my question. My question is: Did you?

A. No, I didn't. I did not deem it necessary.

Q. Now, can you——

A. Because if I had I would have come out with a curve probably similar to this. The deviations between them would not be too far apart.

Q. Can you explain why, for example, the line on the right-hand portion of the chart does not come closer to the dot which is furthest to the right on the chart?

A. That is because I considered this to level out.

Q. Now, if the line had run through that right-hand dot instead of being placed by your sketch two or three spaces below the dot, what would the percentage figure for all the lines in the bottom portion of Table XIV have been?

A. Oh, about—you mean if you drew a straight line through there?

Q. If the line had gone through that dot?

A. If that line had gone through there? Oh, it would [fol. 55] be close to 24 or somewhere in there.

Q. Instead of 15?

A. Yes.

Q. And is it not true that all of your calculations in these various tables that we have indicated would be modified if the line were changed, all of those calculations would be changed in a manner which would tend to indicate a higher cost of serving chains—excuse me, serving independents if the line had been moved closer to that last dot?

A. If it had been, yes, I think it would work in that direction.

Q. Now, the degree of accuracy carried out to the fourth and fifth decimal place in these various charts really is all dependent on the accuracy with which you exercised your judgment in sketching in that line, is it not?

A. Certainly.

Q. Now, did you employ any mathematical principle or accepted statistical approach in determining what groups of data to use in picking the dots that find their way onto Chart IV-A?

A. I merely classified all these stores according to—— [fol. 56] Q. According to what?

A. Arbitrary size classes, from zero to five, five to ten, and so on up the scale of selected units.

Q. Now, are those the size classifications which are shown on Table—is it 12 or 13? In other words, from zero to five, five to ten, ten to fifteen? In other words, the five point level is up to fifty, a ten-point level from fifty to a hundred, twenty-point levels from one hundred to two hundred, and then a two hundred point-level from two hundred to four hundred, and then an infinite division over four hundred?

A. Yes.

Q. Now, what factors influenced you to use categories of one size below fifty, and another size from fifty to one hundred and still another from one hundred to two hundred and still a different one from two hundred to four hundred?

A. That is the usual statistical treatment of data where you have a wide dispersion of data.

Q. Did you use the same intervals in making the calculations and groupings that went into Chart IV-B?

A. No, because their levels are different. Their range is different.

[fol. 57] Q. Now, is it not true, Mr. Woolley, that a different grouping would produce different dots?

A. But not necessarily different conclusions.

Q. Might not different groupings produce a different shaped curve?

A. Slightly, but not statistically, though.

Q. Did you experiment with any different groupings?

A. No, I did not feel it necessary.

Q. Did you try any alternatives at all?

A. No.

Q. Well, now, isn't it true, Mr. Woolley, that if instead of using the first groups of zero to five and five to ten, you had used a group from zero to ten, that instead of having two dots on your left-hand portion of Chart IV-A, just above 8 to the left, you would have one dot instead of those two?

A. On the other hand, I could have gone the other way and divided it from zero to five and gotten additional dots that I don't have here.

Q. My question is whether——

A. Oh, of course, I could average the whole thing out and take one average, but that is not what I wanted to do. That destroys the purpose of my analysis. I want to show the [fol. 58] effect of size. The statistical procedure involved is to get as many size classes as you have need for.

The more size classes you can obtain then the better off your relationships are going to show up.

Q. Well, now——

A. Assuming you have got sufficient data to handle it. Of course, the more size classes you have to use or need, the more data you need and the more observations you need.

Q. How many customers would you say you should have in a class before considering it a valid size classification?

A. Well, that depends on what your population is.

Q. Well, did you make any such judgment before you drew this chart?

A. If you have in a given size class—if you know beforehand there are only one or two stores, then you should take those one or two stores and that is your population.

There is no question of sampling. But if you have got a hundred of them you can use, say, five, ten, fifteen.

Q. I am asking you about the examination or analysis [fol. 59] you would make before you determined the size class. Would you feel that there would be any requirement that there must be a given number of stores in a class in order to justify having a separate dot for that class?

A. There ought to be around, at least eight or nine or ten as a minimum.

Q. Would you say the same thing with respect to all the charts you have prepared, or does that only pertain to Chart IV-A and IV-B?

A. Oh, that is a general statistical concept. A lot depends on population you are dealing with. It is conceivable you might have a population but you would only have a couple of hundred observations to start with.

Q. Now, subject to your verification later, I would like to show you my copy of Chart IV-A in which I attempted to combine the first two groups from zero to five, five to ten, into one group of from zero to ten.

First of all, I would like to ask you how I should do that by the material in 12-A, if I were to do it. Should I not add the number of stores in all divisions, namely, 27 and 61 altogether?

[fol. 60] A. Let's see, that is Table——

Q. 12-A.

To get the number of points, isn't it correct that you would take the column under 12-A beginning with 27 and 61 and add those?

A. I think you would be safe in adding 68 and 393, probably.

Q. Pardon me?

A. What are you talking about now, points?

Q. What did you suggest?

A. Oh, no, you would have to take the total number of points, not the averages. You would have to go back to the total number of points represented by those two classes.

Q. And that is on 12-A, is it not? You would be adding 87.7 and 466.6 there?

A. Yes.

Q. All right, then you would get the average number of

points per store by adding the stores 27 and 61 for a total of 88, and then dividing one of those figures by the other would give you an average, as we figure it, of 6.3 points per store, if that is your grouping.

A. That is right.

[fol. 61] Q. Now, to determine the number of containers you would go to 13-A?

A. Do the same thing.

Q. And add 68.8 and 393.4, getting a total of 462.2, and that figure would be——

A. Divided by the total number of stores.

Q. Divided by the number of stores?

A. Yes. According to our calculations we got a figure that would be about five, or something like that, six.

Q. All right. Well, we attempted to do that, Mr. Woolley, and what I did, I drew a red circle and crossed out the two dots that I intended to eliminate and put a red dot where I felt the new dot would be just to get a rough idea. Is that the kind of change that would be made by that change in the grouping at that level?

(indicating)

A. Well, I think you misplotted it. It would be a little higher, actually. It would actually show up higher than where this plotted black dot shows.

Q. Red spot?

A. It should be a higher figure.

Q. Well, where should it be.

[fol. 62] A. What you are averaging in effect is this dot and this dot, so the average should fall somewhere between the two. It should not be below it. It cannot be below it. Remember, you are talking about percentages here. You are not talking about absolute figures.

Q. Well, now, it could be only a trifle above it, could it not?

A. It would not be below it. It would be slightly above it. It depends upon the weights. They are weighed in terms of Class 10, so it would be above that. How much above it, I don't know.

Q. Well, you will notice on Table 12-A your second group of stores has sixty-one stores, and in the total here has eighty-eight, so it would be more heavily weighted.

A. Naturally, my point is the dot would lie somewhere

between wherever that figure is—here, I will show you between 14 and 7. It would be about 7½ or maybe 8.

Q. Well, now——

A. As an average.

Q. Let's figure more precisely. You said 6.3, that is the number of points.

[fol. 63] A. Take the total number of points and the total number of containers and divided by the total number of stores. Well, you have to get the average number of glass containers, too.

Q. 6.3 is the point at which the dot would fall on the horizontal axis. Why don't you calculate it out?

A. Because, look, I have got a seven per cent here—oh, I beg your pardon. Let me get back here so we can get in harmony.

All right, I have got 7.6 to start with and three points and a quarter——

Mr. Stevens: Let's go off the record a minute.

(Discussion had off the record.)

By Mr. Stevens:

Q. Mr. Woolley, just to recapitulate since we have been off the record, the two points on the left-hand side of Chart IV-A, I take it, are taken from Tables 13-A and specifically the column the fourth on the right of 13-A which is "Percentage of glass containers delivered daily for all divisions," and you have got 18.46 for the zero to five bracket, and 8.26 for the five to ten bracket; is that correct?

[fol. 64] A. That is right.

Q. And in the left-hand of the chart, the dot is at the level of 18.46?

A. That is right.

Q. Now, if those two brackets were combined into a single bracket of from zero to ten, is it not correct that those two left-hand dots would be omitted from the chart, and there would be substituted a single dot which would be placed between the six and the seven on the bottom, the horizontal axis, at a point of about nine per cent. In other words, slightly above the second dot but below the first dot?

A. That is right.

Q. Now, my question to you, Mr. Woolley, is whether if that regrouping were made, would you have drawn the same shaped curve that you did draw on Chart IV-A?

A. I do not know without having to do it.

Q. Well, if merely that one change were made?

A. Not necessarily. I do not know how it would affect the other dots. It might or it might not. I don't know.

Q. And if——

A. For example, if you took up the other end here, and [fol. 65] took the group from four hundred, that big dot you talked about originally, then you took the next dot to it, down around three hundred, and averaged those two out, as you did the lower one, you would get a figure that comes closer to the line where it now stands.

In other words, if you averaged those two extremes there like you did these two extremes down below at the other end of this curve, you would have a dot that would result in a position just slightly below the line instead of so far off where it is.

Q. Well, now——

A. As a matter of fact, you could do this. I can tell you what it will do just by taking these figures right as they stand now on the dot. Take the next two dots. You have already handled two dots, haven't you?

Q. Yes.

A. All right. Take the next two dots and draw an ovular circle around the two, just connecting the two by a line. I don't care what you do—or just use a straight line.

Now, if you took the average of those two dots like you did the other one, it would fall exactly right on that line, [fol. 66] on the curve where it now stands.

Then if you took the next two dots it would be slightly above it. If you took the next two dots it would be right exactly on it. If you took the next two dots it would be slightly below it. If you took the next dots it would be slightly above it.

So the general shape of the curve would not change at all.

Q. Well, would there be any basis, if you made all those changes, for the portion of the curve to the left of No. 6 on the horizontal axis, would there be any basis for bringing

the curve as high as it goes, namely, almost up to twenty-four?

A. Certainly, because you cannot ignore the more detailed data. As a matter of fact, I should even have a finer classification than I have here, probably.

Q. Well, can you explain why at the left-hand side the line goes through the dot, whereas, at the right-hand side it stays about five or more percentages below?

A. It is only because of the vast difference between the number of observations involved.

Q. In other words, it was your judgment on the basis of the number of observations involved that the dots for [fol. 67] stores which have an average number of points delivered daily of only three units was much more significant than the dot for the stores which——

A. I have enough observations in the smaller class of twenty-seven cases in which to use that information.

Q. But with respect to the portion of the line that is covering the area between, say, two hundred points and on up, your data is less complete, is it not?

A. It is still usable.

Q. Is it less reliable because it is less complete?

A. Well, the dispersions are a little larger, because the number of observations is smaller. Yes, but it is not necessarily insignificant.

Q. Do you think the data for independent stores of volume over two hundred, as portrayed in this Chart IV-A, is sufficiently complete and reliable to base an accurate cost study on?

A. On the basis of taking two hundred and over, on the basis of purely small sampling, yes, because there are sixteen observations involved and that is sufficient to draw a conclusion as to a location of an average point.

Incidentally, that is why I grouped these large enough [fol. 68] so I would have sufficient observations in a class that would give me a reliable statistic for that class.

Q. Well, is it your position—I just want to be sure I understand—if you regroup all those points in different-sized classifications that that would cause no change in the shape of the line?

A. In the manner you were suggesting, it would not change it, no.

Q. Well——

A. I mean, consolidating classes won't change that curve excepting on extremities.

Q. But it might change it on extremities?

A. It is possible.

Q. And if it changes it on extremities, it would change——

A. If you change it on extremities on the higher end—well, no—actually on the higher end it will not change that at all. On the lower end it might suggest a change, but I would not change it anyway, because I have enough observation down below to justify the curve as it stands.

As a matter of fact, I could even break those into classes [fol. 69] in half again and I do not think it would change the curve too much. It might shift a little bit one way or the other. It would be interesting to see, because I have got enough observations to do it.

Q. Well, in any event, I think you have indicated you did not experiment with different groupings, and on the basis of the discussion we have had so far today, none of the suggested different groupings which I have presented to you would persuade you to change the shape of the line at all?

A. No, sir.

Q. I take it that would be true with respect to IV-B as well as IV-A?

A. In general, yes.

Q. And it would also be true with respect to IV-B as well as IV-A that you did not compute it on the basis of any mathematical formula, but merely exercised your own judgment and skill as a draftsman?

A. Which is the usual thing a statistician would do when it comes to a complicated computation, they use a freehand method, and having had a vast experience in the use of statistical data and fitting curves to it, I feel confident it represents somewhere in actuality as far as these data [fol. 70] are concerned.

Q. Well, let's look at IV-B for a moment.

A. IV-B?

Q. Yes. Is it not correct that each of the three dots on the left-hand portion of that chart represent only one store each?

A. That is right.

Q. Now, is that a sufficient sample in order to justify the use of a dot?

A. I think in this case it is because I think from your own cost study texts you indicated that below one hundred, or something or other, you only had one or two chain stores below one hundred units, anyway, so that represents your population. So it is valid to use it.

If that is your population, that is it. It is not a sample. That is your population.

Q. If you eliminated those three dots——

A. You can't eliminate them because they are part of your population.

Q. If you eliminated those three dots, would the shape of your curve have been the same?

A. Certainly—well, no, no. I beg your pardon. It would [fol. 71] not be the same, but you cannot eliminate it. I don't agree you can. I don't agree with your proposition, because that is your population.

Now, if that were simply a sample, there would be a question—you could legitimately question as to the validity as to the shape of your curve, but that being the population, you can't.

Q. Are you equally confident of the validity of the shape of this curve as the validity of the shape of the curve on Chart IV-A?

A. No, I would rather have more data. Frankly, what I probably should have done is ask you for a complete tabulation of all chain stores. But I didn't. I just used this as a sample.

If I were doing it over again I would have—Chain stores are such a small portion in terms of number of stores, of your store population, it would be better to use the entire population of chain stores.

Q. What degree of error do you think may be present in Chart IV-B?

A. Five per cent. Not five percentage points. I am talking about five per cent. Take any one of those points on the curve and take five per cent of it, possibly ten per [fol. 72] cent.

Q. Let me just make sure I understand. A square equals two per cent in terms of glass containers?

A. That would be two-tenths of one per cent.

Q. So you mean it might move the line one-tenth of one space in one direction or another?

A. Two-tenths of one space.

Q. Each space is——

A. Two-tenths. Each space is two percentage points.

Q. So, in other words——

A. Oh, no, no. (Witness examining document.)

By the Witness:

A. Oh, yes, that is right.

By Mr. Stevens:

Q. It would not move it as much as the width of the line at any point?

A. No.

Q. You are satisfied that this is reliable? At least that it should not be changed more than the width of the line itself at any given point?

A. I will tell you. Oh, no, I did not do it on this. I did it on the others.

Q. Your answer is yes to that, I take it?

[fol. 73] A. I am sorry.

Mr. Stevens: Would you read that back?

(Question read by the reporter.)

By Mr. Stevens:

Q. And I am referring to the line on Chart IV-B.

A. You mean the drawn line?

Q. The line you sketched in, yes.

A. Probably not more than—oh, ten per cent, I would say, would be right. That is just my judgment.

Q. Well, now, that line is drawn from the data which appears on Table 13-B—is it not, 12-B and 13-B?

A. I think so. It should be.

Q. And directing your attention to Table 13-B, is it not correct that the data is drawn from the column which is under percentage of glass containers delivered daily, the column headed, "All divisions," that that is the one from

which you get how high up the points will be on the vertical axis?

A. That is right.

Q. Now, is it not correct, Mr. Woolley, that in the revision which you made and have most recently tendered to us you made a number of changes in the figures which appeared in that column on Table 13-B as compared with [fol. 74] the original submission?

A. I think so. What are those two? It wasn't those two particular small classes, but it was somewhere in there.

Q. Do you have available your original submission so we might ascertain that to be a fact?

A. Do you want to see this, you mean? (indicating)

Q. No.

A. There were no changes down in that lower class. Changes took place from 180 units and above.

Q. First of all, let me ask you a preliminary question, Mr. Woolley. If the line on Chart IV-B were at a lower point—went through a lower area than the area through which it does go, would not the effect of lowering the line be to produce a lower cost of serving chains in the ultimate calculations, to summarize a lot of steps?

A. Let me see. Assuming that curve shifts downward?

Q. Yes, on IV-B, the one pertaining to chains.

A. Let's see.

Q. Thereby showing a smaller percentage of glass containers, which in turn would be reflected in a lower cost of delivery to chains?

[fol. 75] A. That would reduce the number of containe 's? Yes. Reducing the number of containers would lower the estimated cost, yes, for that class.

Q. All right. Now, going back to the comparison of your original submission of Table 13-B and your revised submission of 13-B, is it not correct that on the original submission for the volume bracket of 180 to 200, you had shown a percentage of 7.08?

A. Now, let's see. I don't recall what the percentage is but I know the figure would change. I don't recall whether I kept the original percentages or not.

Q. We have a copy of the typewritten one if it would help you. I don't know if it would help you at all.

A. You are talking about Table——

Q. 13-B.

A. Yes. All right, I have got the revised 13-B.

Q. I want you to get the original 13-B. We have a copy.

A. Well, wait a minute.

(A short intermission took place, after which the deposition was resumed.)

The Witness: O.K.

[fol. 76] By Mr. Stevens:

Q. All right. Now, is it not correct that on the original submission—

A. Pardon me, but for example, on your original figures, what do you have for the lowest classes, seventeen seventy-nine and seventeen fifty-six? This is the original tabulation I made that I have reference to. I am not sure it is exactly the same figures.

Q. 7.980 is the total.

A. That isn't it. Excuse me. All right.

Q. Do you have it now?

A. Zero to ninety and ninety to one hundred, right?

Q. Right. Well, that is true on both of them.

A. Eighteen, six, five. All right.

Q. Now, the first change I am trying to identify, is on the original calculation for the volume bracket of 180 to 200 points delivered daily.

A. Yes.

Q. You showed a percentage figure of 7.08.

A. Check.

Q. And that was revised downward to a figure of 5.46?

A. Correct.

[fol. 77] Q. The next bracket from 200 to 250, your original submission showed a figure of 6.09, and that was revised down to 4.09?

A. Right.

Q. Now, just stopping there for a moment, is it not correct that the Chart IV-B which you submitted to us, remains in the same form after the revisions as it did before the revisions?

A. That is right.

Q. In other words, it was calculated on the basis of the

dots which were plotted from the original 13-B, rather than the revised 13-B?

A. That is right.

Q. Now, if the dots for the two brackets we just discussed, namely, 180 to 200 and 200 to 250 had been replotted after Table 13-B had been recalculated, each of them would have been moved down about two percentage points, is that not correct?

A. That is right.

Q. Now, then, take a look, if you will, at the brackets 400 to 450. In your original submission the figure you had was 11.57 per cent, is that not correct?

A. I think so, yes.

[fol. 78] Q. And was that not revised to 8.59 per cent or a reduction of about three per cent?

A. That is right.

Q. Now, again, that would mean that the dot on Chart IV-B, which is between 400 and 500, and sort of a peak of a pyramid there would actually have been lowered to fall right on or just about on——

A. Which one? Excuse me.

Q. (Continuing)—the average line of eight per cent?

A. Four hundred per cent?

Q. Yes, the one between four hundred and five hundred?

A. Oh, yes.

Q. Now, in your judgment, would not the moving of those points require some modification of the shape or the slope of the curve portrayed on Chart IV-B?

A. Not sufficient for this purpose. In the first place, the lowering of the first two would just change the slope in that area. In other words, tend to raise the slope in that area. As a matter of fact, because the other data did not change significantly, I don't think there was any significant change.

These three I did not give too much weight to. As a matter of fact, it tended to, if anything, broaden out the [fol. 79] valley there.

Q. Wouldn't the effect of all of the changes that we have indicated been to flatten out the line?

A. No, no. All it would tend to do, it would tend to—as far as I am concerned, tend to sharpen the first slope and

broaden out the valley of the rest of it. That is all. It would extend it back a little bit and make it sharper.

In other words, it would just make a more broad valley below the line, that is all.

Q. Well, in your judgment, you could move those three points from two to three percentage points downward without affecting the slope or shape of the line?

A. I think so, significantly.

Q. Could you eliminate those dots without affecting the slope or shape of the line?

A. Well, if you eliminated the two small ones, it might raise it a little bit. If you eliminated the middle one which you are talking about, I do not think that would change it too much, because you have got these others to counterbalance it.

Q. How many dots do you need in order to get a line that you consider sufficiently reliable for use in predicting [fol. 80] costs in a study of this kind?

A. Oh, something over ten. In other words, size classification determines the number of observations you are going to have, in which case we would have here about fifteen.

Q. Well, now, is it not true, Mr. Woolley, that there was another change in the bracket between 600 and 700 points where a correction was made from the orginal submission of 8.5 to a revised submission of 7.86?

A. I think so.

Q. Then, as you say, there was another one in the bracket between——

A. Enlarged from 900 to 1,000.

Q. —in which there was a reduction from 8.14 to 7.96?

A. It is not significant.

Q. Now, did you after making the revisions which are shown in the new Table 13-B, do any replotting and experimenting to test whether in your judgment it would be appropriate to draw different-shaped curves?

A. I might point out in the category 400 to 450, the revision went from 11.57 up to 12.08. I think that is right.

[fol. 81] Q. Well, what is the figure in the 400 to 450 now? 8.59, is it not?

A. Well, —oh, I see, yes. Yes, that was a reclassification of some stores. That is what happened. Reclassification of stores between the 400 to 450 and 450 to 500 is what

happened, so you have an insert of a point of twelve units. You took one store out of a large value, in other words, and reduced it.

Mr. Stevens: Would you read, Mr. Reporter, the question I asked a minute ago?

By the witness:

A. (Continuing) You have a counter-balancing influence there.

Mr. Stevens: Well, I will ask the same question again.

By Mr. Stevens:

Q. Mr. Woolley, after making the recalculations which are found in Table 13-B, did you do any replotting of points or rechecking of the shape of Chart IV-B to determine whether or not in your judgment the shape of the curve retained the validity which you originally thought it had? [fol. 82] A. Yes, I came to the same conclusion.

Q. You did actually replot the points?

A. On my work sheets I did.

Q. Do you still have the work sheets that you replotted them on?

A. No. All you have to do is just like we have been doing: I just took the resulting figures and compared them with what they actually showed on the original chart I made.

Q. You formed the opinion that moving those various points we have identified down a per cent or two would not change the curve?

A. And up. There was a counter-balancing on that, too.

Q. There was one counter-balancing, is that right?

A. I think so.

Q. And that was an increase from 11.57 to 12.08?

A. No, it was from zero to twelve, I think.

Q. Yes, but what happened: I mean, the only way in which there was an increase was where there had previously been a point at 11.57, which was eliminated, there is now a point at 12.08?

A. That is right. It had another observation added. [fol. 83] That is what happened.

Q. And you feel that—For what volume classes is this curve reliable for making predictions as to the relationship of glass containers to the total number of points delivered daily?

A. Oh, I think——

Q. You think——

A. I would take the entire range as plotted there.

Q. You think it is valid between the area between fifty and sixty points?

Mr. Jinkinson: Do you have much more? It is after twelve-thirty, you know.

Mr. Stevens: Oh, I am sorry. Yes, I have got quite a bit more.

Mr. Jinkinson: Well, then, let's go to lunch. We can come back.

Mr. Stevens: Fine.

By the Witness:

A. The answer is that that is a hypothetical. It probably is.

Mr. Stevens: Let me just ask one more question. It is relevant right now.

Mr. Jinkinson: Surely.

[fol. 84] By Mr. Stevens:

Q. If in your predictions you find a difference between the effect of the curve, such as you do in the range between 90 and up to about 180, and the actual experience of the only three stores involved in that area, which in your opinion is the more relevant data to use in making judgments as to the costs in serving customers in those ranges?

A. Would you restate that?

Mr. Stevens: Read him the question, please.

The Witness: No, I would like you to restate your question.

Mr. Stevens: All right.

By Mr. Stevens:

Q. All right.

If, in making your cost analysis, you find that there is a difference between the result which would be produced by taking your data from the curve and the result which would be produced by taking the actual data—and I suggest there is such a difference in the Chart IV-B between the ranges of 90 and about 180——

A. Yes.

[fols. 85-86] Q. (Continuing)—Which basis would you use for purposes of making your analysis?

A. I have to be consistent; since I am using the curve for the other areas, I have to use it for the lower areas, also. Either that or change the shape of the curve.

Mr. Stevens: All right. We will break for lunch now.

(Whereupon a recess was taken in the deposition hearing of the above-entitled cause until 2:00 o'clock, p.m. of the same day, September 11, 1958).

[fol. 87] September 11, 1958

Elliott B. Woolley, having been previously duly sworn, further deposeth and saith as follows:

Cross-examination. (Continued)

By Mr. Stevens:

Q. Mr. Woolley, the data on Tables 13-A and 13-B, shows your conclusions from the sample used of the ratio of glass to fiber containers at various volume levels, and also those tables, as I understand them, at the bottom show aggregate figures.

A. Yes.

Q. Do I correctly understand the charts to indicate that if you combined all independents, at least in the sample you reviewed, that the percentage of glass containers used by independents on the whole would be 11.21; is that right?

A. That is right, sir.

Q. And that there would be a lesser percentage for chains, as indicated by Table 13-B?

A. That is right, sir.

Q. And that percentage for chains was what.

A. 7.68.

Q. 7.68?

A. (Witness nodding head.)

[fol. 88] Q. Now, I believe this morning you said that it would be possible to make a mathematical calculation or series of calculations to test the validity or accuracy of the line which is sketched on Chart IV-B, is that correct?

A. It would be possible.

Q. If that is true, is it not essential in such a calculation that the line be capable of expressing in some form of a mathematical equation?

A. It could be, but not necessarily so. I mean, it is not necessary in some cases.

Q. I mean, there is a method of testing a line?

A. Yes. I could have done the same thing to this Chart IV-B as I did over here to Charts III-A and B.

Q. Why did you do it for Charts III-A and B and not for IV-A and B?

A. It is a question of simplicity versus complexity on the other hand.

Q. In which of the two Charts III or IV did you attain a higher degree of accuracy?

A. Not because one is mathematical and the other is a freehand drawing, but mainly because of the nature of the scatter diagram involved.

Q. Well——

[fol. 89] A. In the case of the Chart III-B.

Q. The III-B is the one in which in your judgment the line is a closer fit to the dots?

A. That is right.

Q. (Continuing) Than is the case with IV-A and IV-B?

A. Let's put it the other way around; the line represents the data more accurately because there are less variations from the line than in this Chart IV-B.

Q. And that you could determine merely by inspection of the two charts, could you not?

A. That is right.

Q. III is more accurate than IV?

A. That is right.

Q. Well, then, why is it that it is on III rather than on IV that you elected to make the mathematical check?

A. Because the mathematical formula involved in III is less complicated than this one. (indicating) This would be quite a complex procedure.

Q. The mathematical formula involved in checking the accuracy of Charts III-A and III-B is a rather simple formula?

A. For example, when I compared Charts IV-A and B, I hoped I would come out with a simple relationship rather [fol. 90] than the complex relationship that exists here. I hoped it would come out in a straight line, you know, in absolute terms or on a logarithmic basis like it showed up in Chart III. I could not do that.

So, rather than spending the time and the additional accuracy involved in fitting mathematically the curve represented by the freehand curve, it would not justify the time it would take, in my judgment.

Now, if I had the burden of actually developing this in final form the formulae that are necessary for making a cost study like this, I would probably be more precise and probably for future use it would be more needful to reduce this thing to a mathematical formula for purposes of future use. But for my purposes here this is sufficient and is a reasonable approach to the problem or a reasonable solution to the problem.

Q. I take it the lines on Charts IV-A and one on Chart IV-B also are not intended by you to be symmetrical, either one of them?

A. No, no, it is just drawn so that it would follow the data such that the deviations from those data would tend to be normally distributed about the line.

[fol. 91] Q. And the shape of that line does not fit any commonly known mathematical shape, such as a parabola, or anything like that?

A. No, that would probably come out in terms of an exponential curve. It would be quite complex and probably difficult to fit. Incidentally, this technique of freehand drawing to represent data that have an underlying complexity in terms of mathematical formula is a well-known and well-used technique. It is used all the time.

Q. Is there any method of testing whether this is a more reliable or reasonable approach than taking a simple average?

A. Yes, yes. I could take the observations from this curved line I have drawn in there, which are in statistical theory the expected values, and then take the actual observations from them, as observed by the dots on the chart, those deviations, and then I could figure out what the standard error is.

Q. Could you by such a procedure tell whether the measure of error from this chart was more or less than the error would be if you used just a simple average?

A. Oh, sure.

[fol. 92] Q. But I take it you have not done that?

A. No, I have not done that because I don't think it is necessary in this case, because I can tell from my own past experience—I can do it if you want me to, but from my own past experience, I did not do it for myself because I could see from the nature of the scatter diagram that it is within the reach of the realm of reason and probability.

Q. Let's look at Charts III-A and III-B for a moment. You have a formula or formulae for III-A and III-B which, I take it, are the mathematical equivalents of the line which was drawn there?

A. Yes, sir.

Q. And I take it the figures in the parentheses on Chart III-A, over the Vi, are intended to indicate an exponent of that number?

A. That is right.

Q. Now, if you were to prepare a formula with your IV-A and IV-B, would it be a formula with some kind of an exponent like that involved?

A. Probably not. It would probably be an exponential where V would be the exponent and the base would be some constant term, if you catch the significant difference [fol. 93] between the nature of the two curves in terms of the scales and the fact I am using semilogarithmic paper here.

Q. Yes. Now, without taking the same time as I did with the Chart IV, it is true with respect to Chart III and Chart III-A and III-B, is it not, that if there were a change in the slope of the line—we will assume it is going to be a straight line in any event—that would change the figures on this whole series of charts and change the conclusions?

A. Yes.

Q. This is one of the basic parts of your development which if changed would change everything that followed?

A. That is right, where applicable, of course.

Q. Pardon me?

A. Where applicable, although I think this particular one is really basic to everything else.

Q. I think this one really changes everything else.

A. Everything else hinges on this. (indicating)

Q. If there are any exceptions to that, we can identify them later, but I think we would identify a whole series of columns and tables if we went through the whole series the way we did the other?

A. I think you are right. Everything else would change. [fol. 94] Q. III-A affects the independents and III-B the chains. Then either would affect any comparison made?

A. Yes, that is right.

Q. Now, do you have any opinion as to the degree of accuracy of the lines in III-A and III-B?

A. I worked out the standard error, the correlation coefficient and degree of significance for those two lines.

Q. Well, Charts III-A and III-B are charts that you did revise when you went over the material the second time, aren't they?

A. Yes.

Q. Maybe you have your computation of the degree of accuracy of the original form of Charts III-A and III-B?

A. Oh, yes, here they are. (indicating)

Q. Which do these pertain to, the original form or the revised form?

A. This is the revised. The ones as they appear now are in your corrected chart. Now I computed the correlation coefficient.

Q. Which are we talking about, III-A and III-B?

A. Well, particularly right now I am talking about III-A, [fol. 95] independent stores. I computed what statisticians term the T test, which is the ratio of the parameter itself to the standard error of the parameter and also determined the significance through using the Z test, as a measure.

Now, that is all Greek to you boys, but without getting into a lot of detail, that is what it came out to be. Now, that resulted in a level of—well, maybe Mr. Havemeyer

can guide you on this point; the value of Z came out to be 3.876.

Q. Would you give me the figure again?

A. 3.876. Now, let me give you the correlation coefficient so you will know what that is. That is .99914 where perfection is unity. So that gives you a rough idea of how accurate this is. The value of T, that is the ratio of R to its standard error or R, came out to be 104.8, of which the probability of its occurring by chance, on the basis of any probability table is so close to zero that it simply means certainly that this is the real relationship.

The same conclusions are obtained from the Z test, which I started to give you to start with, where the value of Z was 3.86.

[fol. 96] Q. I thought you said 3.876.

A. Yes, I did. The ratio of Z to the standard error of Z is 16.9 for nineteen observations, is still so small its probability of occurring by chance, you would have to accept the fact that this is reliable.

Q. What was your last figure?

A. 16.9, the ratio of Z to its standard error.

Q. All right. Now, would you give me the same figures, if you have them available, for the original form of Chart III-A. Did you make a similar test for that?

A. I don't think I ran the test on that because I knew from experience that this scatter diagram was so small it did not require for my particular purposes originally to have to run it.

I did this later because I figured on depositions you would probably ask me this question, but for my original purposes I did not need it, in my judgment.

Q. Mr. Woolley, are any of these tests - —

A. Pardon me; I might complete this thing by taking the chain stores. Now, the chain stores over in Chart III-B you notice have a little wider scatter diagram, I mean, the dots are further apart, as compared to independents. It would look to be less reliable as such.

[fol. 97] All right. The correlation coefficient for the chain store relationship is .994. The T test came out to be 35.4, which still is so large as not to be due to chance, so the relationship even of that scatter diagram is significant.

Then the Z test came out to be the ratio of Z to Sigma Z, and is 9.8 or 9.76.

Q. 9.76?

A. Yes, and that T test with the Z value is so large as to be beyond the realm of the probabilty of such a large value occurring by chance and, therefore, the relationship is to be considered real.

Q. What is the figure?

A. Well, it is less than six-ten millionths chance of occurring by chance.

Q. Let me be sure I have got comparable figures. The correlation coefficient for III-A is .99914?

A. Check.

Q. And for III-B it is .9914?

A. Check.

Q. The T value for III-A is 104.8?

A. Yes.

Q. And for III-B is 35.4?

A. Check.

[fol. 98] Q. The value of Z for III-A is 3.87?

A. Yes.

Q. And for III-B, 9.76?

A. No, I did not give you the value of Z: 2.94.

Q. 2.94?

A. I carried it out to five places, but you just don't need more than two decimal places. And the ratio of Z to itself —is it?

A. No, to its standard error.

Q. In III-A it is 16.9 and in III-B it is 9.76?

A. Right, or if you want to carry the other one out, it is 16.89.

Q. All right, just to put all these things in somewhat more simple terms, you did find that III-A was a more accurate presentation—or you correct my language if it isn't the right terminology, but it was a better picture than the III-B in mathematical terms?

A. Not significantly different, no.

Q. Well ——

A. These tests that I have just given you on reliability are testing for the probability that this relationship from these data actually did occur or did not occur from chance. In other words, if you drew another sample, you may or

[fol. 99] may not get the same relationship. This is the probability that if you drew another sample you would get that relationship.

Or, put it the other way around: This correlation coefficient is significantly different from zero, which means that it is real and does exist and is all the magnitude indicated.

That is all these tests declare, that this relationship does exist and is of the form indicated.

Q. Well, now, just ——

A. Just because there is a minor difference between the correlation coefficient between the chain stores and the independent store case of, oh, 005 or .005 per cent—no, not per cent—is really meaningless, really. I would not draw that conclusion necessarily.

Q. You say the difference in these answers is not significant, they are both sufficiently accurate to be relied upon?

A. That is right, they are both sufficiently accurate within themselves to be acceptable.

Q. Well, now, just so we understand, the direction which tends to give more favorable answers, I understand your position is that both answers are favorable, but I take it that .99914 is more favorable than the .994 answer?

[fol. 100] A. Only in a minor way.

Q. But it is in the direction of being more favorable?

A. It is in that direction, yes.

Q. And the 104.8 answer is in the direction of being more favorable than the 35.4 answer?

A. But both are favorable.

Q. What answer with respect to the T figure would be sufficient to be favorable? What figure would have given you cause to be concerned that it was not a satisfactory test?

A. Oh, if the probability that T exists was less than—I used the value of less than two per cent, I mean, greater than two per cent. Excuse me.

Q. Greater than two per cent? How would that be expressed in figures which are comparable to 104.8?

A. That is difficult to say because you have a matrix table here which you have got to take into account. For this particular size of sample, which is twenty observations here, minus one degree of freedom, nineteen, you would [fol. 101] have—I don't recall what the exact figures are,

I would have to look it up in the book in the table; but it would be down around the neighborhood of 2 to 1 ratio.

Q. 2 to 1 ratio?

A. Yes. You see, T represents the ratio of R to its standard error.

Q. In other words, that 35.4 is a 35 to 4 ratio?

A. 35 to 1 ratio.

Q. Oh, 35 to 1 ratio? The T 104.8 is a 104 to 1 ratio?

A. That is right.

Q. And you said as long as it is above a 2 to 1 ratio you would be satisfied?

A. Yes. It would depend upon the number of degrees of freedom, in other words, the size of your sample. That really governs it, mainly, and the probability level you want to select as your dividing line.

Mr. Jinkinson: Off the record.

(Discussion had off the record.)

Mr. Stevens: Go back on the record.

By Mr. Stevens:

Q. Can you tell me with respect to the value of Z, what [fol. 102] the minimum value that would have been satisfactory to you would have been?

A. You mean the ratio of Z to its standard error? You see, Z is merely a means of converting R, the value of R, into another figure, which is more normally distributed. When you get into measurements of correlation coefficients with respect to small samples you get an askewed distribution and the reliability tests, the T test is not really applicable for small sampling of R.

Q. So this value of Z to 3.876 is not itself a test, it is merely a step to making subsequent tests of the ratio?

A. So you can use normal probability. Incidentally, that it why you get a lower value of the ratio of Z to its standard error as compared to the ratio you got when you compared R to its standard error. The difference is in the degree of askewance as it has affected the value of the tests for R, as compared to the normal tests for Z. It is still significant.

Q. What figure is comparable to the figure of 16.9, which you have for the ratio of——

A. I could not answer that. I would have to look it up.
[fol. 103] Q. Do you have any rough approximation?

A. At the moment I could not give you any answer. I would not try it. It is much smaller than this, I mean, it is at least one-tenth of that.

Q. Then if it had been that much smaller, it still would have satisfied you that the data had the significance which you attach to it?

A. Yes. In other words, these levels are so far beyond what would be the dividing line between acceptance and non-acceptance that you just have to accept them, or at least I do as statistician.

Q. Now, my next questions are about the exponents in either III-A or III-B?

A. Yes.

Q. I take it that there could be some modification of that exponent which would still permit your line to meet and satisfy the various tests which you applied to it?

A. Oh, yes, that exponent is subject to a standard error, too, because all those constants in those equations are derived from the basic data and any variation in the basic data in existence will also be reflected in the constants of the equation.

[fol. 104] Q. Now, do you have any notion of what degree of fluctuation you would find permissible in the exponent?

A. No. I did not work that out, but it could be done.

Q. Do you have any even approximate notion of what it might be?

A. Oh, let's see. On the basis of these figures it would probably be down around—I am just guessing now, an educated guess, so to speak—well, the value is .92 in round numbers.

On the basis of this degree of significance found in the correlation, I would expect the standard error of that value of .92 to be within one per cent or maybe two per cent. One or two per cent or not more than five per cent of that figure.

Q. Not more than five per cent of .92?

A. That is right.

Q. May I express it this way for simplicity: If we assume that the figure were 100, 1.00, that it would be not more than 1.05 to 95?

A. That is right, point nine five.

Q. But you might find that degree of variation in the exponent and still have the equation fit your tests of accuracy which you have described?

A. That degree of variation would not change the slope [fol. 105] significantly.

Q. It would not change the slope——

A. It would change it, of course.

Q. But to a very trifling degree?

A. Very slight.

Q. Now, in your original calculation of—let's take Chart III-B, for example. You did make a change of just about that amount, did you not? You changed the exponent from 1.09, with some additional numbers, down to about 1.04, and so forth?

In other words, you did make the degree of change you have already indicated?

A. Now, we are talking about two different things here.

Q. Well, aren't we talking about a change in the exponent?

A. You asked me about what the change might be. I assume you meant chance which was measured by the standard error.

Q. Oh.

A. In other words, if you took another sample of similar size, you would expect within five per cent to come up with a similar value of that, plus or minus. The kind of change you are talking about now is due to a bias which is not within that reach of the sampling here. That is entirely a [fol. 106] different thing. That is due to error of calculation or error of judgment, or whatever you may call it.

Q. In other words, in your original calculations, there were some things which required reexamination about the data and your sampling which caused a change in your conclusion of about five per cent of the exponent?

A. But that is not due to sampling.

Q. I understand.

A. That happened to fall within the sampling range or area, yes. It just happened. It might have been large or it might have been small.

Q. So that that particular change in the sample happened to cause that particular amount of change in the exponent? What you are saying, if I understand what you are now

saying, is just as a matter of chance in a purely random selection out of a very large sample you might find that much variation in the exponent?

A. It is possible. It may be five per cent. It probably would be less than that: I mean, that is an outside figure, just on the basis of this data on there.

Q. Well, now, isn't the effect which these charts and all the calculations derived from these charts have on your [fol. 107] cost study produced entirely by the fact that there is a slight difference in the slope of the line on III-A from that on line III-B?

A. Entirely?

Q. Yes.

A. No. That is only part of it.

Q. Well, from the fact that there is a slight difference in the slope and also that the slope of the line on III-B tends to go up at a higher rate than the slope of line——

A. Well, that is the reason for the slope; I mean, the slope causes that.

Q. But the fact there is a difference in slope together with the direction of the difference in slope is what produces the cost effect which you have described in prior charts?

A. You mean the cost difference between the chains and independents?

Q. No, produces——

A. Oh. It governs the estimate of the number of cases and the number of glass containers upon which it is based, yes.

Q. Well, let me put it this way: If the two lines were [fol. 108] parallel?

A. Then you would have a constant difference.

Q. Then you would have a constant difference and there would be no——

A. Constant ratio difference.

Q. Then the use of the lines would not have tended to produce a cost difference in high volume which is advantageous to the independents, which your figures now tend to prove?

A. If you were to take and superimpose these two charts, keeping in mind the scales in proper relation to each other, you would find that the relationship of chains—this rela-

tionship for the chains crosses the independent's relationship at a around, I think, five or six hundred or maybe eight hundred units.

Q. Wouldn't you find it would cross about two hundred fifty? Bear in mind you would use a different scale on III-A from III-B.

A. No, it is the same scale but different position.

Q. I mean, a different quadrant, or whatever you call it.

A. A different position.

Q. Position.

[fol. 109] A. The same scale. Let's see, I did this once. It is difficult.

Q. Can't you find it by looking at Table—what is it, 13?

A. Well, we might do it that way.

Q. Or wouldn't Table 14 show it?

A. One hundred units of points delivered to an independent would produce about seventy containers—would be delivered in seventy containers. Now, for a chain, a hundred units would be around fifty. So it is greater than that.

Q. May I suggest you look at Table 14 and look at the number of all containers for independents shown in Column 2 and the number of all containers for chains shown in Column 4. Wouldn't the approximate place where those numbers tend to become the same be the place the lines cross?

A. It is around one hundred seventy something.

Q. Well, now, it is about two hundred fifty, isn't it? You have 157.34 for independents and 157.35 for chains.

A. Oh, yes, you are right.

Q. So that the lines would cross at about two hundred fifty points?

[fol. 110] A. That is right.

Q. Now, do you have any notion of how much data you have for independents over the point where the lines cross, namely, about two fifty, or about how many dots are there on Chart III-A over that point?

A. Two observations or one observation. Two classes, put it that way.

Q. Then how many dots do you have on the Chart III-B dealing with independents below the point where the

lines cross—dealing with chains, excuse me, below the point where the lines cross?

A. Twelve observations over two hundred there,—rather, I mean, sixteen observations over two hundred.

Q. Well, let's take below the two hundred there.

A. Below two hundred for the chains?

Q. Four observations there, aren't there?

A. Eight observations.

Q. Eight observations below two fifty?

A. Eight stores upon which the data are based.

Q. Eight stores below two fifty?

A. Eight chain stores.

Q. Eight chain stores, and they are represented by five dots on the chart, are they not?

[fol. 111] A. Yes.

Q. And the three at the extreme left lower end of the line on Chart III-B each represents an individual store, do they not? Is that correct?

A. Yes, sir.

Q. And is it not correct, Mr. Woolley, that if those three dots were not on the chart that the slope of the line would be different?

A. Oh, sure, if you remove any of those dots it would change.

Q. Do you know this to a mathematical certainty that if you took those three dots off, or moved them, the slope of the line would change?

A. Well, sure, because I took those into account in drawing it.

Q. And you gave each of those——

A. That is true of any observation.

Q. You gave each of those dots the same significance as each of the other dots which are portrayed in Chart III-B in drawing that line, didn't you?

A. Certainly, because as far as I am aware, those are the only stores you have down there in the chain category and, therefore, they had to because they represent the popula-

[fol. 112] tion. They are not a sample.

Q. So is it not true, Mr. Woolley, that for the purpose of predicting the number of containers the chain stores would use when they are taking, say, over twelve hundred points per day, that your conclusion on that subject is

determined in part by what happened in those three individual cases which are shown in the left-hand side?

A. No, not for the higher classes, no. That only governs the lower end of the scale.

Q. But if it governs the direction of the line, it necessarily governs your conclusions at all volume levels, does it not?

A. Well, naturally, all the data taken together governs the direction of that line; not any one set.

Q. And if those three stores—It is therefore correct that those three stores are influenced——

A. Wait a minute, now. Let me get myself oriented. You are talking about on Chart III-B?

Q. III-B.

A. Those three lowest points, right?

Q. Right.

A. All right. Remove those and I would not change the [fol. 113] line at all.

Q. Well, Mr. Woolley, you know to a mathematical certainty that the line would be changed if you removed those, don't you?

A. No, not necessarily, because, look, if you removed these three lines—just ignore them—it would change it only slightly. It might change the slope slightly.

Q. How much might it change it in terms of the exponent to V?

A. I don't know.

Q. Might it change it as much as five per cent?

A. I don't know. I have not done it. I would have to recalculate it.

Q. But it is clear, is it not, Mr. Woolley, that removing those points would tend to raise the level of the line at the left portion of the chart and lower the level of the line in the right-hand portion of the chart?

A. It might have that effect. I don't know how much.

Q. Well, if it produced any change it would produce that change in that direction?

A. Oh, sure, it is possible. It might do that. It probably would.

Q. Well, I mean, it definitely would, wouldn't it?

[fol. 114] A. It probably would. I don't know. I would have to check it out to see.

Q. Well——

A. I would not say definitely it would. It might even shift the curve up or it might even rotate it in the other direction. It is more likely to change in the direction that you have indicated.

Q. Well, the answer to this question can be determined by arithmetic calculation, can it not?

A. It can be determined by an arithmetic calculation, but in view of the fact that three stores are part of your population, I would not do it.

Q. I understand that, but these three stores had an effect?

A. Oh, of course, all the observations have an effect upon that line. Remove the upper four of them and you probably would get a different line, too. Remove the middle four, one, two, three, four middle top ones there. Take any set of combinations of those four points you want and you will change the slope of the line or change the position of it, one or the other.

Q. Now, it is correct, is it not, Mr. Woolley, that in your study you came to the conclusion that at certain very high [fol. 115] volume levels it would be more expensive to serve a chain store than it would to serve an independent store?

A. On the basis of this data, yes—these data, I should say.

Q. And isn't the principal factor which led you to that conclusion the fact that the line which is portrayed in Chart III-B has a slightly higher slope as it goes up than the line which is portrayed in Chart III-A?

A. Yes.

Q. That is the principal factor in the development of the data which led you to the conclusion it would be more expensive to serve a chain store than an independent of comparable size at a certain high volume level?

A That is right. That is the principal source of the change in direction.

Q. And that is because the way you have plotted the lines or the conclusions your data led you to cause the lines to cross and become farther and farther apart as they came to higher volume?

A. It is the nature of the data involved here. That is [fol. 116] the way the data itself shows up.

Q. Now, that conclusion would not have followed if the two lines had been parallel?

A. No.

Q. Now, if——

A. I mean, I agree with you.

Q. That it would not have followed if the lines had been parallel?

A. That is right.

Q. Now, if the exponent in Chart III-A had been one rather than .986, and so forth, and if the exponent on Chart III-B had been one rather than 1.04, and so forth, then the lines would have been parallel, would they not?

A. Yes.

Q. So the entire basis of this development as to it being cheaper to serve an independent at higher volume level than a chain——

A. From this source.

Q. (Continuing) ——from this source is based on the fact that there is this deviation from the exponent one in Chart III-B and the deviation in the other direction from the exponent one in Chart III-A?

[fol. 117] A. That is right.

Q. And if a correction of the exponent by less than five per cent had been made in each case, you might have had both of the exponents as one?

A. No.

Q. The direction of five per cent in III-A?

A. III-A, will not produce one.

Q. You add five to ninety-eight and you get one hundred three.

A. Ninety-eight? Ninety-one.

Q. You are looking at a different one than I. Oh, pardon me, you are correct. You would have to add eight per cent.

A. You would have to add more than your standard error in order to do it.

Q. You would have to add eight per cent?

A. You would have to have a different sample or a different reason for changing the data.

Q. But an error of eight per cent in the exponent on Chart III-A and an error of 4⅓ per cent in the exponent of the Chart III-B——

A. Your standard error would not be subject to that much error from these data.

[fol. 118] Q. I think you indicated earlier that by merely the random sampling you might find as much as five per cent?

A. I said five per cent. Now, you take five per cent of 92, and that is only four-tenths of one—that is only .004, not eight. You don't understand what I mean by percentage.

Take this figure, take five per cent of that figure as the standard, then add it to it. That would be your maximum range.

Q. Well, five per cent of——

A. Of 92 is .004.

Q. .045?

A. No—oh, wait a minte. Five per cent.

Q. Well, let me ask you this.

A. You are right; you are right. All right, the maximum you would get would be 96 on this basis.

Q. So you would acknowledge it might be as high as .96 merely by the random sample, whereas, Chart III-B might be as low as .99 by the random sample?

A. No, no, no; 1.04.

Q. 1.04 is what it is after revision.

A. No, 1.04 is what it is now.

[fol. 119] Q. Right.

A. Wait a minute. Which is which?

Q. See, you originally had on III-B an exponent of 1.09 which, due to changes in the data, was reduced to 1.04.

A. I have got both here. All right, I am with you now.

Q. Well, a little simpler——

A. You still get a deviation as far as that is concerned.

Q. Putting it in simpler terms, if the exponent were one, you would really have nothing more than a simple average, would you? If the exponent were one, you could take your entire volume and divide it by your number of instances?

A. No, you could not, no, because this is a lo*th*arithmic relationship and if you plot this information on regular rectangular scales, you would get a curve in one case like this and in the other case like that. (indicating) That is, if they are parallel.

Oh, now, wait a minute——

Q. Take your time.

A. Let me think. You still have the constant terms to [fol. 120] deal with. Let's look at Chart III-A. If the slope were unity then the number of cases would be two per cent greater than the number of points.

Q. That is the——

A. If the slope were unity. The other would be ninety-nine hundredths. In other words, you would take the volume and multiply by .986 and you would get the number of containers from those two equations.

Q. Well, that is if the number .986 is assumed for the first value.

A. That is not the same thing as striking an everage by any means.

Q. Well, now, let me just find out if we did strike an average. Now, if you struck an average of your independent data, I take it the first thing you would do is to take the total number of containers for the independents, and I think that figure is shown on Table——

Mr. Stevens: Off record, please.

(Discussion was had off the record.)

By Mr. Stevens:

Q. Is it not true that Table 13-a does show that the total number of containers for independents studied in your [fol. 121] sample was thirty-eight thousand, eight hundred —excuse me, 32,838.

A. Right.

Q. And then the total number of containers in which those points were sold to the independents studied in your sample is shown on Table 12-a.

A. That thirty-two thousand is the number of containers.

Q. Oh, that is the number of containers? But the number of points—excuse me—the number of points shown on 12-a is 47,283.2.

A. Yes.

Q. Now, to take a simple average, you would divide one of those figures by the other, would you not?

A. In terms of ratio, yes, to get a given average ratio, yes. That is what this constants term represents.

Q. And an average ratio in this case, according to Mr.

Havemeyer's figures, would be .694; in other words, for every hundred points sold independents, 69.4 containers? For each hundred points it would be 69.4?

(Discussion had off the record.)

By Mr. Stevens:

Q. So to get the ratio for independents, we divide the figure 32,838 by 47,283.2, the former being the number of [fol. 122] containers and the latter being the number of points?

A. That is the average ratio.

Q. We come up with an average ratio of .694 for independents?

A. Yes, but that is not the same thing, assuming this is unity. That would not be the same thing.

Q. If you then sought to portray that average on a chart similar to Chart III-A by means of a formula similar to the one you used, is it not correct that the fomula would be, substituting in your equation, N_i equals .694 times V_i to the first power?

A. Sure, if B comes out to be unity, yes.

Q. Then that could be plotted——

A. Now, remember that both of these constants in these equations are derived from the same set of data and they are dependent upon one another. The only time B will be equal to that is when B happens to come out to be unity. If B is not unity, then this constant term in here is different from what this average will be.

Q. Now, in other words,——

A. The only time my constant in this equation here and your constant is when B is equal to one.

[fol. 123] Q. If it is equal to one then the first figure would be the one I described?

A. That is right.

Q. Now, similarly, for chains we could use the same data which you used and the same figures from Charts XII-B and XIII-B, and I will just run through it subject to your verification later—we would take the total number of containers for chains, 21,813.5, divide that by the total number of points per chain, 33,31.4, and according to Mr. Havemeyer's calculation, get a ratio of .65.

Then if we assumed unity as the exponent in the formula and substituted that data for the formula on IXI-B, and subject to the reservations you have made, the formula would then be on III-B, N. equals .66 times V. to the exponent one?

A. That is right.

Q. Now, it would be possible, would it not, Mr. Woolley, to use those formula and plot lines on charts on which you had placed exactly the same dots which you placed on your Charts III-A and III-B?

A. But they would not fit the data.

Q. Then after you plotted them it would be possible to [fol. 124] make the same kind of correlation tests which you made to determine whether or not they were within the degree of tolerance which you find to be required?

A. That is right.

Q. Now, subject to your review at——

A. I think you would find that it would be quite different in terms of degree of reliability than what we have here. It would not fit the data in the statistical sense. I am just forecasting that, but I believe that would be the case.

Q. I want to show you a chart which Mr. Havemeyer made, which I have marked with a red pencil "A" and I have crossed out the title he gave us because I do not think it is applicable. This is his attempt to draw the lines in the manner in which we have been discussing it.

I will ask you what your reaction is to that?

(indicating.)

A. In other words, you have combined the chains and independents together?

Q. I don't believe so.

A. And drawn your chart accordingly?

Q. He put them both on the same chart.

A. That is unfortunate.

[fol. 125] Q. One of the lines represents the chain line——

A. Just what I thought would happen, too.

Mr. Havemeyer: The scale is matched, by the way.

By the Witness:

A. The difficulty with this is, I would say this is not a good fit, even by looking at it without running any statis-

tical tests, because down here below you have all your independents above the line, above fifty units, well, except the class; all your independents are below the line roughly, and the disparity gets larger and larger and larger the larger you get.

So that would be a very poor fit for these data. The same is not quite true for the chain stores, but that is to be expected, because their computation is so close to unity, anyway.

Q. Well, isn't it true, Mr. Woolley——

A. I would not accept the independents, that as a good fit for the independents.

Q. Isn't it true that the extent to which your charts have significance is dependent upon the extent to which they are more accurate than this particular calculation?

A. Surely. That is the problem any statistician has—[fol. 126] judging from what has been used.

Q. Isn't is true that your doubts about the validity of Mr. Havemeyer's presentation are dependent primarily on the fact that it appears to you that independent stores in the volume ranges below fifty units per store appear to you to use a larger proportion of containers than this chart indicates?

A. Yes. It overstates the actual situation, or whichever way it is. The actual situation is greater than what your estimates would show. The purpose of fitting curves to data is to measure an underlying relationship if it exists in such a way that your residuals from that estimated line or expected values will be randomly distributed about that line, so that if you have any equation which you are fitting to data which have concentrations of data in one area of the line above or below, in other words, you get what we call bias in the fit.

When you get below a certain level you get all those above, and above a certain level you get all those below it. That is not a good fit of the data at all, because you are not normally distributing. You have got a bias in there and deviations.

[fol. 127] In the first place, your deviations will be too large. Your standard error would be too large, which would destroy the reliability of your line.

Q. Well, isn't it true that the difference between your

chart, insofar as it portrays independents, and Mr. Havemeyer's chart is primarily caused by the location of the points for the small independents, namely, those below fifty?

A. Yes, because I am using the least squares method of estimating this equation which normalizes the deviations about that line. It fits the line to the data in such a way the deviations would be normally distributed, with minimum variation.

Q. And if those——

A. This is the only line with which with that data you could fit mathematically that would minimize and give you the smallest variation about that line. Any other line you fit for that line with that data would give you a large deviation automatically.

Q. If those lower volume independent stores were omitted, is it not true that your chain line and your independent line would tend to be more nearly parallel?

A. On the independents? Not on the independents it [fol. 128] wouldn't. Are you talking about the chains only?

A. No, there are no chains below that. If the data for small stores, stores under fifty points a day, were just omitted entirely from your study so that you merely compared chains of over a volume of fifty with independents of over a volume of fifty——

A. If you take a partial sample you could get any results you wanted.

Q. Well, I am not asking that, but wouldn't the effect of that be on your study to make the lines more nearly parallel?

A. Probably. I don't know.

Q. And to reduce the amount of differential between the chains and independents at the higher volume level?

A. If it had that effect, yes, of course, the result would follow.

Q. Now, have you in your study of the milk industry, apart from the calculations you have made, found any reason to believe that a large independent store will more nearly resemble a small independent store insofar as the proportion of containers to points it uses than it would resemble a large chain store?

A. All I can say is from what I have seen from this data [fol. 129] is that there is a difference in relationship of the number of containers that you draw from the same volume delivered in terms of points.

Q. You feel that on the basis of the calculations——

A. I assume that this data represents an adequate sample of a representative dairy in the industry.

Q. Do you feel that on the basis of the data which you have compiled that you could predict the number of containers which an independent store would take if a new independent opened and it did a volume of business of fifteen hundred points?

A. I think that on the basis of this data alone I would be willing to use it as a basis of estimation, yes.

Q. And you could do so for chains as well?

A. Probably, until some other information came along to change the relationship, which means another sample, another study.

Q. Well, to what degree could you in your own judgment properly extrapolate from your own line?

A. You mean with the reliability we have involved here?

Q. Yes.

A. Surely. That is the reason why I would use it, be- [fol. 130] cause it is such a high degree of reliability that it enhances the probability of extension beyond the actual observations.

Q. My question is to what volume level would you be willing to extrapolate from these lines in order to think we have justifiable——

A. I have taken it up to the thousands here, and that is as far as I would care to go. For this purpose that is all you need to go to.

Q. You would go to a thousand for independents?

A. I think so.

Q. And why would you stop at a thousand?

A. Well, it is just an arbitrary stoppage point.

Q. It is necessary, is it not, to make some exercise of judgment as to what point your figures may be relied on?

A. You could not go up to a million, but within the reach of your data a thousand is not too far in the terms of the whole range of data that exists.

Q. Do you think it is good statistical treatment to go up

to a figure which is higher than any figure which you find in the data which you have actually used?

A. Yes, if the probability of the data itself is sufficiently [fol. 131] justified. That is done every day.

Q. Now, isn't it the real question in determining the significance of these charts whether or not your judgment is sound that the deviation from the exponent one in each case actually exists? Isn't that the real question?

A. Yes.

Q. And that is a question which you have not answered by the various tests you have employed here?

A. I can answer it if you wish me to. I did not think it necessary for my purposes because I am satisfied with the general appearance of the data and the results I found in the statistical significance and degree of correlation we get here, that I know from working from these formulas heretofore that with that high a degree of reliability and high a degree of correlation—because the standard error of that parameter is a function of that correlation it would be very small.

I am satisfied even if I did calculate it, it would probably be less than five per cent.

Q. Of course, you only have to change one of them to five per cent and you would get an exponent of unity.

[fol. 132] A. Well, one of them, but the other one isn't. That is still enough to give a significant deviation at those levels, if that is what you are worried about. I mean, from the independents you won't be able to lower—well, no, you would not even get up to one, either.

Five per cent on top of that is .96, and that is a lot different from one when you are dealing with this range of data.

Q. Of course, it is possible, though, is it not, that the change of only a handful of stores might produce that much of a change in the exponent?

A. It is possible. Anything is possible.

Q. And it is also correct, is it not, that with respect to Chart III-B if we eliminate the three smallest chain stores in the sample we would tend to make the lines more parallel at high levels, and if we eliminated the small independent stores below fifty points per day on Chart III-A, we would again tend to make the lines more parallel?

A. It is possible, but you would have to have a justifiable reason for doing so.

Q. So that the deviation of the lines at high volume [fol. 133] levels is significantly influenced by what you found at the low volume levels?

A. I would not say significantly, no, because I don't know how much they were changed. I just say they would affect it, yes, but would not necessarily say significantly.

Q. Did you make any tests to determine whether there is a difference in the relationship between points and containers in low volume independent stores than there is in high volume stores?

A. That is shown here on this chart.

Q. What is shown here?

A. These charts. These two charts show it. They show the effect of volume on that relationship.

Q. Do they show that the low volume independents tend to use a relatively larger number of containers than a high volume independent?

A. Well, let's see. The independents take this unit class down here, ten units. You get a half a container. That is five hundredths of a container per unit or half a container per ten units. A thousand units, you get 8 10ths of a container per hundred units. It shows the difference.

[fol. 134] Q. Now, Mr. Woolley——

A. I mean, that is what these two charts are reflecting, is those differences that do exist in the actual data.

Q. Now, if Mr. Havemeyer's calculation is found to be acceptable, would that not reflect an element of saving in costs of serving chains as contrasted with the cost of serving independents which has not been reflected in the Bowman study?

A. No, I would not say that.

Q. I mean, if you accepted the curve as he plotted it—I understand you have objected to it——

A. My understanding is in his cost study for January, at least, he has reflected on an average basis the differential percentage discount on the percentage of fiber glass versus glass containers; fiber versus glass.

Q. Mr. Woolley, I am merely talking about the relationship between number of containers and number of points independently of the glass-fiber problem.

A. Oh, excuse me.

Q. Isn't it true if the simple ratio of exponent of one were an acceptable method of studying this data, that chains use relatively fewer containers than independents?

[fol. 135] A. Yes.

Q. His figures would indicate that?

A. Would indicate that.

Q. But that is not something which the Bowman cost study tried to take advantage of?

A. Oh, that particular feature?

Q. That particular feature?

A. This particular source of difference is not reflected?

Q. Right.

A. I see. But I think the effect of fiber and glass is the same.

Q. I understand that, but as to the container—point problem, this is in effect a refinement beyond anything which is done in the data presented, and if your refinement of it is a correct analysis of it, it tends to minimize the cost differences in higher levels, whereas, if Mr. Havemeyer's analysis of it is correct, or at least the way it is described on the chart, it would tend to justify an even greater differential?

A. It would add something to it.

Q. It would add something to it.

A. Well, I am not so sure about that because the way [fol. 136] he calculated it, if I understand your fiber-glass ratio the way you incorporated it into these number of containers, that average figure you are reflecting there is reflecting that average difference right there. I think it is because—look, this is only one step and the total difference resulting from the two type containers, take these two schedules and multiply it by those percentages we have been talking about on Chart IV, you come out with a net figure.

Now, his, when you take an average percentage of glass containers, this difference that we are talking about between containers is already reflected in your average, I am pretty sure, because you used actual data to determine it.

Q. Well, now, actually on any of these charts—let's stay with Charts III-A and III-B for a moment; the points, unless only one store is involved, and in most of the most of the points there is more than one store involved—the

point is really an expression of the method of summarizing more than one point, isn't it?

A. The effects of more than one point.

Q. Now, are there other methods of summarizing data for calculations of this kind other than summarizing them [fol. 137] in points and plotting the points?

A. I suppose there are a variety of ways you could do it.

Q. Well, didn't you describe one such method in an article which you wrote and referred to in the proposed rebuttal material?

A. Well, that is a different approach to this problem, yes.

Q. Is that a more accurate approach than the approach which you adopted here?

A. It might be.

Q. Did you employ it at any stage of your work here?

A. No, sir.

Q. But, I take it, it might have produced a higher degree of accuracy on these various charts than the accuracy which you did attain?

A. Well, I am not sure about that, because I have not run those kinds of tests on that other theory. Incidentially, that other theory is only applicable to a straight line relationship, anyway.

Q. Well, when you talk——

A. It might be applicable to these two charts here, but——

[fol. 138] Q. It might be applicable to III-A and III-B?

A. It might be.

Q. Might it be applicable to Chart I?

A. No—well, yes, on an alternate basis, possibly.

Q. Did you plot Chart I on a logarithmic scale?

A. A double logarithmic scale?

Q. Yes.

A. Yes.

Q. Do you have available the work sheet that you used in plotting it on a double logarithmic scale and, if so, may we be permitted to look at it?

A. Let me look for it.

Mr. Stevens: We might as well just take a short recess at this point, then.

(A short recess taken)

By Mr. Stevens:

Q. When you plotted the data that is portrayed in Chart I-A on a logarithmic scale, what was the shape of the line?

A. Straight.

Q. Higher at the left and lower at the right?

A. Declining straight line.

Q. A declining straight line?

[fol. 139] A. Yes, just the opposite from the ones we have been dealing with here.

Q. Now, the dots which you used for the purpose of plotting and eventually drawing the line are drawn from the portion of the data which pertains to customer service time given to customers on the occasions when they took customer service, is it not?

A. Yes.

Q. And it does not include any time spent—excuse me, it isn't time spent, but you excluded from your calculations the points delivered to customers on occasions when they did not take customer service?

A. That is right.

Q. Now, in adopting this approach, did you assume that there was a difference in the cost of rendering customer service between these two examples, which might illustrate my point:

Assume in one instance that a customer is given fifteen minutes of customer service every Friday and he gets five deliveries a week, and in another instance, a customer receives three minutes of customer service on each of five consecutive deliveries.

A. This is on a per day basis?

[fol. 140] Q. On a per day basis, and assuming the same volume of points delivered to each.

A. Per day?

Q. Per day.

A. This reflects the volume delivered per day per customer?

Q. Right. Assume, let's say, each of them receives ten points per day.

A. All right.

Q. Fifty points for five deliveries. In one instance a customer receives fifteen minutes of customer service.

A. Per day.

Q. On the fifth day and none during the first four days. In the other instance, the customer receives three minutes of customer service every day.

Now, in your judgment, is there a difference in the cost of serving those two customers?

A. For those specific customers there would be, yes.

Q. And the answer is there would be a difference in cost?

A. Yes, if that difference in time per unit is reflected in your cost study, there would be, yes, fifteen for five against three for five, unless I misunderstood you.

[fol. 141] Q. No, I think I better state the example over again.

A. All right.

Q. Let's assume——

A. Keep it on a per day basis and it will make more sense to me.

Q. Well, on a per day basis they each receive three minutes of customer service per day, but the manner of giving the customer service to one is that the three minutes is in fact given every day, but with respect to the other, the manner of giving it is that every fifth day fifteen minutes of service is given and no service is given the other four days.

A. I think it is figured on the time he actually receives the service.

Mr. Stevens: Would the reporter read me the answer, please?

(Answer read by the reporter.)

By the witness:

A. (Continuing) It is chargeable at the time he receives the service, otherwise it is not chargeable.

By Mr. Stevens:

Q. My question is whether you have assumed that there [fol. 142] is a difference in the costs of serving those two hypothetical customers?

A. Not at the time they are receiving the customer service. At the time one does not receive the customer

service and the other does, yes, but not when they both receive it.

Q. I mean, over a long period of time. Say this is a pattern that can be established by a sufficient amount of data to say that this is what really happened, that one man gets three minutes of customer service every day and the next man buying at the same volume level gets fifteen minutes of customer service every fifth day, and no customer service on the other four days.

I want to know whether——

A. Well, on the day he did receive the customer service, of course it is more costly because he spent fifteen minutes there.

Mr. Long: I assume this is purely a hypothetical question unrelated to any part of the Bowman cost study.

By the witness:

A. (Continuing) It is obvious if it only takes three minutes to perform a given amount of service to a given [fol. 143] customer, and on another day he spends some other service or more service, obviously he would have to render more service to the customer to get fifteen minutes on that one day he did receive customer service than he did the other customer who only receives three minutes a day.

Mr. Long: I think the record should show that as far as the Government is concerned, Mr. Woolley's answer on this is going for his credibility and his expertiese, then I think the answer is probably all right, but if it is developing something that the Government does not know about Bowman's cost study, I think the record ought to show this is something outside the record.

Mr. Stevens: I will explain the purpose of the questioning is to understand the method by which Mr. Woolley made the calculations reflected in Table 10-A and Chart I-A. I think you understand what I am interested in obtaining.

By the Witness:

A. (Continuing) You had a set of customer services [fol. 144] which are to be performed, and the frequency

is immaterial for this purpose, at a given store or set of stores. This table and the chart reflects that when they do receive this service, this amount of time that is spent with respect to the different sizes of stores involved, that if a store of a given size does receive this compact amount of service which is rigidly defined here, I assume, then at that level of volume that is the average rate of time that it takes to perform that service for that level of volume at that store.

By Mr. Stevens:

Q. On the occasion when he gets customer service?

A. When he gets it.

Q. But now——

A. The fact he does not receive it at another time is irrelevant to the question of measuring the amount of time it takes the driver to perform that service at that store when he performs it.

Q. Mr. Woolley, I am not trying to debate or disagree with you, but——

A. That is why I merely say I have eliminated all stores who do not receive customer service.

[fol. 145] Q. Well, is it not correct then that you have in effect made the assumption in the method by which you used the data on Table A and plotted the dots on—that is, Table 10-A, and plotted the dots on Chart 1-A, that there is a difference in the cost of serving a man who takes fifteen minutes of service every fifth day and the cost of serving a man who takes three minutes of service every day?

Your position is there is a difference in cost in serving those two customers?

A. Oh, sure. That is true there is a difference in the amount of service performed; otherwise they would take it at the same time. Frankly, I think your example is a very poorly constructed one because it does not represent the basic assumption here.

The basic assumption is the driver is going to perform the same kind of service to both classes of stores, and if that be the case, how can he spend more time with one than the other, other than the question of volume? I don't see the validity of your analogy.

Q. But, in any event, you did—just so we are clear on this—you did assume in your development that there was a difference in costs between those two situations?

[fol. 146] A. Well, I did not have those particular situations in mind when I did this.

Q. But if those two examples had been before you, they would have been treated differently in the method by which you used the data?

A. If they were the same—if they received the same service for the same size of store, then they would be averaged together if their time of performance was different; yes.

Q. Well, now,——

A. I assume that there are variations in the time to perform this bulk or package of customer services, so-called. I assume in the performance of that service at any given store at any given time, the driver may take five minutes at one store and at another store ten minutes, and so forth.

Now, we are here developing what the average is, not what it is at any specific store necessarily. We are using a sample here to develop an average pattern for stores of similar size to see what the effect of that size is upon the amount of time it takes per point delivered to perform that service. That is what this chart demonstrates.

[fol. 147] Q. Well——

A. Now, the question of what costs what I did not even consider. It might be implicit, but that is beside the point as far as I am concerned.

Q. Well, now, let's assume you have five customers each of whom gets fifteen minutes of service on one day and no service on the other day. One gets the service on Monday, the next on Tuesday, the next Wednesday, the next Thursday, and the fifth Friday.

Now, in the manner in which you used your data, let's assume that the time study was made of those five customers, it happened to be that you picked up one of them on the day he got the service and none of the rest came up, which is what would be expected.

A. Yes.

Q. Now, I take it you would have used that data in a

way which was different than if you had assumed that each of them got the equivalent of three minutes per day.

A. Well, I am sorry, I don't understand your question. You have five customers each being served on different days?

Q. No, each being served every day but receiving cus-
[fol. 148] tomer service.

A. That is what I mean, each on different days?

Q. On different days.

A. All right. Now, each customer is treated as an independent observation and his time measurement of that customer service together with his volume is reflected in the sample in respect to the size class into which he would fall, together with the time spent.

Q. But I am correct, am I not, in saying you did not treat that kind of data in the same way as if you assumed that each got the equivalent of three minutes of a day?

A. No, no.

Q. So——

A. I did not classify this by size, the amount of time spent per point. This is classified by volume.

Q. Now, what you do, though, is to plot your data by excluding the days on which no customer service was performed?

A. That is right.

Q. And treated the data as though it showed fifteen minutes for the kind of customers we have been talking about, rather than an average of three minutes?

[fol. 149] A. No, no. That does not follow.

Q. Well, let's look at the first line on Table 10-A, and find out just how you went about it.

A. Because I don't see how you could get a customer that way.

Q. Well, may I direct your attention to Table 10-A?

A. All right.

Q. Now, on the first line you are dealing with stores who take between one and five points——

A. Units in this case, units.

Q. Units per day.

A. Units.

Q. And you found there were twenty such stores?

A. That is right.

Q. Which took a total of fifty-five units.

A. Yes.

Q. And you found on your sample days five of the stores took customer service and the others did not.

A. That is right.

Q. Is that correct?

A. Yes.

Q. All right. And then——

A. And then they had eleven units delivered to them.

[fol. 150] Q. They had eleven units on an average per store delivered to them?

A. Oh, wait a minute; no, no, no. Five received the services.

Q. There were eleven units delivered to those five and the average delivery of each of those five was 2.75.

A. Of the twenty customers, five of them received customer service that day.

Q. And those five took a total of eleven units?

A. And they spent a total of three minutes. There was a total number of minutes involved with all five of them performing that service of three minutes.

Q. Three and three-one hundredths minutes.

A. Right.

Q. All right. Now, what is Column 6?

A. Column 6 is the average number of units per store.

Q. In other words, that is the figure in Column 4 divided by the figure in Column 3, eleven divided by five?

A. That is right.

Q. And Column 7——

A. Is then the number of minutes divided by the number of stores in Column 3.

[fol. 151] Q. In other words, that is the figure in Column 5 divided by the figure in Column 4?

A. That is right.

Q. And that produced a figure——

A. Converted to one-hundredth of a minute.

Q. Right, 27.55, and that is the dot way up at the top of Chart I-A, right?

A. That is right.

Q. All right. Now, then what did you do—I take it then after you drew your lines and made your equations, you reduced that to 21.66?

A. Remember now, this 27 reflects——

Q. That is the actual point on Chart I?

A. That is the actual point with respect to the actual location of the average within that class.

Q. Right.

A. This class ranges from one to five. That 27 is plotted at two.

Q. And what you did——

A. Twenty-one six reflects the extrapolation of that average curve of all the points.

Q. After you made all your calculations and all your plotting, and had drawn your curve, then you read 21.66 [fol. 152] off the curve?

A. Right, for one unit. That represents the amount of time it takes to deliver one unit of product.

Q. All right; now what do we find in Column 9? What is 13.04?

A. This is only for purposes of comparison of my data with your data to show the effect upon the ultimate conclusions. I don't accept the proposition but that is what I have done.

Q. Well, turning back——

A. I will tell you what I have done. You will see it better I think by referring to Chart I-A. Now, Chart I-A, the first one where the actual scatter diagram is at the actual level. Now, your average of thirty-three hundredths of a minute per point is the total time spent in performing this customer service of all these independent stores, divided by the number of units delivered to all stores, whether they took it or not.

So, in order to have my curve represent that same condition, all I had to do was deflate the curve so that, since your thirty-three hundredths reflects the amount of time at the average store, all I have to do is adjust my curve [fol. 153] downward to the point where thirty-three hundredths on my curve will fall at the average size of the store, which comes up to be 55.8, I think.

So, in other words, all I have to do is deflate all the calculated values on Column 8 there by the ratio of——

Q. 3.3?

A. 3.3 over whatever my average, weighted average, of my actual data came out to be.

Q. In other words, you multiplied the figures in Column 8 by this constant relationship?

A. Yes.

Q. 3.3 over 5.48 is what we have.

A. Whatever the actual average is.

Q. Now, by multiplying by a constant ratio, did you not assume that there was a constant relationship between the frequency of occurrences of customer services at all volume levels?

A. Probably in terms of ratio.

Q. Well, you had to in order to use the same figure at all volume levels?

A. Yes. Of course, now, remember what I am doing here. [fol. 154] I am reflecting merely another adjustment. Now, I have abstracted this information now from the particular example itself. I am using it now as a theoretical curve and I am adjusting it for another set of conditions which prevail in a comparative table, namely, your own. That is all I am correcting this table for. I am not making any other assumptions than that.

Q. Well, but you did make the assumption that there was the same frequency of customer service at all volume levels in making the corrections from Column 8 to Column 9?

A. Frequency has nothing to do with it, as far as I can see.

Q. Well, what exactly does this ratio of 3.3 over 5.48 indicate?

A. An average.

Q. An average of what?

A. An average ratio of your time, average time to the average of my time.

Q. And what is the difference between the Bowman time and the time figure you used? In what respects are they different?

A. Mine does not reflect the stores which—my original [fol. 155] calculations do not reflect the stores that did not take the service.

Q. Yours did not reflect the stores or the occasions on which the study showed no customer service, but it might have been the same store took customer service one day and no customer service on the next day and it would not reflect the occasion when he did not take customer service?

A. That is right.

Q. And isn't it true that the purpose of making this conversion from Column 8 to Column 9 was to take into account the occasions on which no customer service was rendered, as well as the occasions on which customer service was rendered?

A. Yes, more or less as an average rough adjustment.

Q. And this adjustment, using a constant figure for all volume levels, is valid only if the number of occasions on which customer service is taken, that is, relatively speaking, —is the same at every volume level in this table 10-A; otherwise, you would have to use something other than a constant, wouldn't you?

A. Well, if the ratio to one another is similar; it would not have to be identical.

[fol. 156] Q. Well,——

A. For the purposes of this chart that refinement is not necessary, I don't think.

Q. Now, isn't it true——

A. However, it could be made.

Q. Isn't it true that in your ultimate conclusions in the higher numbered tables toward the end of your presentation that you based all those calculations and conclusions on the data in Column 9 and not in Column 8?

A. Yes.

Q. So you did take into account in those conclusions in this manner the occasions on which customer service was not rendered?

A. Only for purposes of comparing with yours.

Q. Now, in fact, your Chart II demonstrates that customer service is rendered more consistently, that is, with more regular frequency, at higher volume levels than it is at low volume levels?

A. Yes.

Q. And that the occasions on which no customer service is rendered occurred in the sample more frequently at the low volume levels?

A. That is right.

[fol. 157] Q. All right. Now, is it not true, Mr. Woolley, that the method which you followed in Table 10-A of first excluding the occasions on which no customer service was rendered and making the calculations in Chart I-A, then

later bringing them back in by using the constant that we have described, in order to calculate Table 9, produced a curve which was more sharply—which is a greater curve and less of a flat line than if you had averaged in the occasions on which no customer service was rendered from the beginning?

A. I don't know.

Q. Well, let me just—

A. Because I have not done it that way.

Q. Well, just take the first line again as an example. If instead of excluding the occasions on which no customer service was rendered, and limiting yourself to Columns 3 and 4, then dividing later on in Column 7, dividing Column 5 by Column 4, which gave you this figure 27.55, gave you the top dot on your line; if, instead of doing that you had simply divided the figure in Column 5 by the figure in Column 2, you would have gotten a very different point, would you not?

A. Oh, surely.

[fol. 158] Q. It would have been lower than the point you did get?

A. Surely.

Q. And isn't it true that—

A. Likewise, way down here at the lower end of the scale you are dividing by—Yes, you would have gotten roughly the same figure there.

Q. Isn't it true in the low volume levels you got points which are higher than you would have gotten if you included the occasions on which no customer service was rendered; whereas, at higher volume levels, that is, over the average figure used in your constant, the tendency would be the reverse?

A. Possibly. It probably has that effect.

Q. So the tendency of using the approach which you used—

A. For the adjustment purposes.

Q. That is, of using a constant for adjustment purposes, rather than taking averages at all levels, was to produce points with higher values at the left-hand end of Chart I-A and points with lower values at the right-hand portion of Chart I-A?

A. There is that effect in there, yes, but I do not think [fol. 159] it is the sole effect.

Q. And isn't that precisely what I was talking about earlier?

A. The point is the shape of that curve would tend to be modified, yes, but not completely flattened out.

Q. Well, have you tried to plot all the points you would get by merely dividing Column 5 by Column 2 and seeing what the curve would look like?

A. No.

Q. It would look quite different, though, would it not?

A. This extreme value here would be reduced, but there would still be a curvature in there, I am sure. It would be interesting to see. Maybe I will do it when I get back to the office.

Q. And isn't the approach which you followed comparable to a situation which we were talking about earlier when Mr. Long suggested it was purely an assumption and hypothetical, of treating a man who receives fifteen minutes of customer service on the fifth day, and plotting him way up at the top as you did over on the left, whereas, if you treated him as though he received three minutes every day for five days, then the line would be at a much lower point? [fol. 160] That example fits what we have been talking about?

A. Well, if you average in the days that he did not take the service, sure.

Q. So that the effect of not averaging them in by a procedure which would merely divide the figures in Column 5 by the figures in Column 2 is to assume that there is a difference in the cost of serving a man who takes, for example, fifteen minutes every five days as contrasted with another man who takes three minutes every day?

A. No, no, because when you average the one you come out with the same answer you would get with the other.

Q. If you did average the fifteen minutes in, but you in fact did not follow that practice?

A. Well, I did in a general way, but it is not as refined as the way you are suggesting.

Q. You followed a practice which would give a radically different result for those two different customers?

A. I followed a practice which did not compensate com-

pletely for what it purports to do. Yes. It does compensate to some extent, but not to the extent that you are thinking of.

[fol. 161] Q. Well, on the example we have been talking about, if you assume on each daily delivery he takes ten units with an average of three units per day, then if you follow the procedure of dividing Column 5 by Column 3, you would assume .3 minutes of customer service; whereas, if you followed the procedure you followed you would take fifteen and divide it by ten, that is, number of units, and get one and a half minutes of customer service.

A. To get this line down at the bottom of the chart.

Q. Right, which would give you one and a half minutes of customer service, so you would then correct by your constant of 3.3 over 5.48, and end up with a figure of about nine-tenths of a minute of customer service, which is three times as much as if you simply averaged them together?

A. It is possible.

Q. All I am trying to illustrate, Mr. Woolley, is that your difference in the method of handling the figures will produce a curve which has a different shape from the one which would have been produced if everything had been lumped together?

A. A slightly lower level at the smaller-sized stores.

Q. Well, at the higher level it would tend to bring the [fol. 162] line up?

A. No, it would not affect them too much because your proportionate relationship there is not too great, I don't think.

Q. Well, for example, look at the bracket from 180 to 200. If you merely divided the figure in Column 5 by the figure in Column 2——

A. From what to what?

Q. From 180 to 200.

A. Oh. I see. You have got the same numbers in both columns.

Q. There is no change, so it would be 5.96, the figure that ——it would end up on your Chart 1. That would not change Chart 1-A, it would change 1-B, wouldn't it?

A. That is the trouble. You are going back to a sample for one purpose and I am using it——I have already abstracted the sample out of this, and this represents a gen

eral condition. I expect in these classes where I actually observed the samples, the same number—I mean, no stores that did not take it, there may be stores that did take it all the time and there may be stores that did not take it all the time, I don't know, but as far as the use of my data is [fol. 163] concerned, I don't have to worry about what you are talking about now, because I have already abstracted my generalization from the basic data.

From there on it assumes that if a store takes it, the probabilities are they will get this kind of a time test. If they don't take it, then it will be averaged to this extent.

Q. It assumes, does it not, Mr. Woolley, that there is a difference between a store that takes ten minutes every other day and a store that takes five minutes every day? That is an assumption which is made in your development?

A. It probably is in there, I suppose.

Q. And if that assumption is invalid, it would affect the use of all the figures which are at least in part predicated upon the calculations in Column 9 of Table 10-A?

A. That particular curve, yes. I recognize the fact that that exists, but I am only using the curve for purposes of comparison.

Q. But that is all you do in the whole study, isn't it?

A. That is right.

[fol. 164] Q. I understand earlier in your testimony you indicated you don't subscribe to the study as a whole, you have merely presented it as an improvement upon the Bowman presentation?

A. That is right, or as indicating directions in which improvements can be made.

Q. Yes. This may have been covered by Mr. Ball's examination, but in your proposed testimony in rebuttal, did you make the assumption that the drivers influenced the volume of fluid milk being sold to the chain stores?

A. I did not say they did, I just said there is a possibility that they can. They have opportunities to do so.

Q. But you did not make an assumption as to whether they did or did not?

A. No, or at least I did not intend to.

Q. All right. Then in Table 15 there are a couple of footnotes I want to ask you about. Footnote 9.

A. Table what?

Q. Table 15, Footnote 9 says:

> "I excluded drivers' time spent on collection and delay to collect from independents for comparability with [fol. 165] costs of billing and collecting to chains submitted by Bowman which is unavailable."

Would you explain what you mean by that footnote?

A. Well, this collection and delay to collect reflects or is supposed to reflect the cost that it takes Bowman to make these collections through the driver from independents, which I understand do not do so for chain stores.

I understand from the record that the chain store comparable collection procedure is handled through the Central Office, is not in the hands of the route drivers, and that that latter costs of collection from chain stores on a billing basis is not included in the study and, therefore, to include one item of cost and not another makes for a bias in the results to that extent.

Q. Now, if.

A. So, therefore, this should either—either both should be excluded or both included.

Q. Now, if the costs of billing chains is offset by the cost of computing discounts payable to independents at [fol. 166] roughly the same procedure you have gone through for both and they tend to offset one another, would you still feel it appropriate to do what you did in Footnote 9, namely, exclude collections and delay to collect time?

A. Well, that is a question of fact I would not know. It is a question of fact. Whether they do offset it or not, I don't know. I am only going on the basis of the records before me.

Q. It isn't that you deny the existence of an actual cost element under collection and delay to collect, but you have taken sort of a rough method of

A. Correcting for bias that I feel is in the data, because there is no information in this data to add on the other side of the equation which has been added only onto one which I see is avoided. I don't know what the reason for it is. That is something else again.

I mean, as the record stands now, as far as my information is concerned, the inclusion of this is an incomparability.

Q. Now, does the same explanation apply to Footnote 1 on Table 16-A?

A. If I remember rightly, yes.

[fol. 167] Q. That is about solicitors.

A. Yes. There is nothing about costs of solicitation to chain stores in there.

Q. You don't share the misconception that Mr. Sawyer shared that the Bowman study failed to charge the chains for any portion of the costs of the solicitors' wages? You appreciate that——

A. No. My understanding is that that solicitor's wages—No, I agree with you in terms of your formula that there is a portion of that charged to the chains, but my view is that it is improperly charged, because my understanding is the solicitors deal solely with the independents and that their corresponding activity is handled through Central Office personnel.

Q. But you would agree with me that Mr. Sawyer's proposed comment on this particular point reflects a misconception of the Bowman study?

A. If that is the view that he is stating, surely.

(Discussion had off the record.)

By Mr. Stevens:

Q. What do the various exhibits in your portion of your material which deals with the bulk wholesale, in other words, Tables——

[fol. 168] A. Well, it will be Tables 19 on.

Q. 18 through 30 and Exhibits M through Q in Folder C. What is all that supposed to show?

A. Well, the conclusion is that there is no cost justification for these price differences that exist between them as of March, '55.

Q. Do you feel that you have applied sound accounting principles in analyzing the cost differences?

A. Within the limits of the data available, to the best of my ability.

Q. Did you make the same kind of study of bulk as you did of——

A. No. The two are entirely different.

Q. Why did you follow a different approach?

A. I did not have to.

Q. Pardon me?

A. I did not feel that I had to because, taking your own data, using your own data, and without any modification for any cost study, or anything like that, I have sufficient information at least to bring me to the conclusion the prices are not justified to the extent shown on Tables 18-A, B and C.

Q. All right. Now, your reason for following a different [fol. 169] approach on bulk than you did on store was not because the same kind of data was not available with respect to bulk, but rather that you did not feel it was necessary to use it; is that right?

A. In the first place, I think it is true from reading your Exhibit 42, Bowman Exhibit 42, wherein you outline your cost study for the bulk wholesale customers, my understanding is essentially you use the same theoretical approach modified to meet the precise conditions that you find in bulk wholesale.

Essentially it is the same approach in terms of principle and theory that you used. So my conclusion is whatever deficiencies are normally found in the formula which make that theory inapplicable would also be in the bulk, so, therefore, I came to the conclusion all I need to do is examine your results from the cost study as they exist, to apply them to the individual product which you do not do, for each of the restaurants, and compare them with the specific prices for each of the products with the corresponding pairs of restaurants, which you did not do, in order to see how the price differences that are involved in that charge are justified or not for these particular costs as you de- [fol. 170] veloped them.

Q. Well, just a very simple point I want to make. First of all, you did request some additional data to help you make your store study, and you got the data that you asked for?

A. Oh, yes.

Q. But the fact you don't go into the same detail with respect to bulk is not because Bowman failed to give you what you wanted?

A. No.

Q. It is just that you did not feel it was necessary to ask for it?

A. I did not ask for it because I did not feel I needed it.

Q. So there wasn't an effort made to ascertain whether the same kind of detailed study could have been made?

A. No.

Q. You just did not feel you had to do it?

A. I did not feel I had to do it with the results that came up with the data that I had.

Q. Well, now, do you feel that you did apply sound accounting principles in coming to the conclusions which you did come to?

[fol. 171] A. Within the limits of the data that I had available, and that I knew you had, without putting you to a lot of work, I realized that—well, excuse me.

Q. Well, now, in making your study, one of the problems you had to cope with was to separate the cost of delivery of non-fluid milk from the cost of delivering fluid milk, was it not?

A. That is right.

Q. And by what procedure?

A. That is indicated on the Table, 19, I believe.

Q. Basically what you did, was it not, was to take the aggregate sales price of the non-fluid product, the aggregate sales price of the fluid product for each customer, and find a percentage, then assume that the percentage of delivery costs would be related to the percentage of sales price?

A. I realized at the outset that that was not a precise method of doing it, and if I had the basic data to do it I would not do it that way; I mean, that is all I had available.

Q. Well, you would agree that that is not a sound method of proportioning delivery costs, would you not?

A. I would not say it is not a sound method, but it is [fol. 172] not necessarily the best method. It is a suitable method.

Q. Well, can you think of a better way to do it?

A. Oh, without getting into analysis, detailed cost analysis—actually what should be done, your initial cost study should not be developed in terms of an overall package deal, but you would have to go and analyze the costs you came up with, delivery costs for each of these products and

allocate the transportation costs on all these items to the individual products that are carried, which you did not have to do with the wholesale customers, because here the problem is different. The price structure requires it.

Really, what should have been done, the delivery costs should have been analyzed by product, not just stop with what you got for a total like you did here.

In other words, my difficulty arises from the lack of refinement in your cost study that you had to start with. Without putting you to a lot of work, I just used this system to get around it. This is an aggregate way of doing it but it is really not the best way.

[fol. 173] Q. Now, isn't it possible that a change in the division between fluid milk and non-fluid milk would in turn—might in turn produce a change in the delivery costs of each of the items of fluid milk which you were in fact analyzing?

A. Oh, yes, sure. Any time you change the composition whole, the composition of a whole that you carry, that would change the cost accordingly.

Q. And every time you would change such a cost that might in turn result in a change in the comparison of the cost of delivery of that product to that customer, with the cost of delivering a comparable product to some other customer?

A. Oh, surely.

Q. So the method of allocating delivery costs as between fluid and non-fluid products might cause a large number of differences in your ultimate results of how many instances of cost justification and how many instances of non-justification?

A. It is possible.

Q. And how many such instances there would be you could not determine without making some other analysis?

A. That is right. I could not make a more detailed [fol. 174] analysis from the data I had available.

Q. Well, what more data would you have needed to make a more appropriate analysis?

A. Well, I would have to have gone into the details of cost study to get the basic data and do a considerable refinement, which I think frankly you should have done to start with, in order to ascertain the costs and allocate them

to these various products that are carried on a truck. That is really the way it should have been done.

Q. Now, in dividing your cost of delivering non-fluid products——

A. Pardon me. Furthermore, your costs there would have to be some method of ascertaining the effect of container size upon these costs, also.

Q. In other words, I take it what you are suggesting is that you also employed an unsound method of apportioning costs on different fluid milk products?

A. That is a rough measure. I think that is not too unreasonable.

Q. Because you did that simply upon a gallon basis when, in fact, I take it——

A. Oh, I expect the costs of delivery—I don't know, I [fol. 175] have not investigated to see, but it is possible that the cost of delivering a half pint of cream might not necessarily be directly proportional to the number of units of half pints in a gallon, as assumed in this work here.

Q. But in your work you made the assumption it would be?

A. I had to make that assumption for lack of information. Obviously, as a technician employed by Bowman or Borden either, for that matter, I would have gone into that question if I were faced with that kind of a problem.

Q. If you had not made that kind of assumption, but had made some other assumption, you would have gotten different cost figures for the various products and you might have had some of the relationships which now seem to be cost justified that would appear to be not cost justified, and vice versa?

A. Surely. Any change you make would alter the end result. I made the best, reasonable assumptions I could from the data I had available.

Q. Well, by "had available," is the data that you actually did request and use?

[fol. 176] A. That is right.

Q. But you have not made an effort to determine what additional data you would have needed to do an accurate job?

A. Well, frankly, I did not think that question of accu-

racy of job was necessarily my function. That is the function of Bowman, it seems to me.

Q. But you did do a lot of adding and subtracting and preparing of tables here, and I assume they are intended to perform some function?

A. To raise doubts of the validity of a defendant's work here.

Q. Now, you started in approaching the problem of apportioning the costs as to one customer with certain cost data which showed the costs of the transaction with respect to specific customers that had been prepared in the Bowman studies?

A. Yes.

Q. And the material which you worked up here was not intended to question the accuracy of the transaction costs which were used by Bowman but, rather, to go on and use them for further refining and show that

A. The using of these data, the end conclusion is con [fol. 177] trary to what Bowman claims.

Q. Right, but you both started with the same data, the data as to what the cost of the given transaction was, and then you went on from there?

A. With the reservation, of course, that I do not accept the costs per se as being a correct representation, but assuming they are, what will the result be if you apply this data as they say they have applied it to the price structure.

Q. Right, but the subsequent development which you found in your chart is not intended to be a demonstration of any weakness in that, in the cost of particular transactions?

A. No. That is implied by the nature of the development itself, that you have done.

Q. Yes.

A. That had all been taken care of.

Q. Now, you may have answered this, Mr. Woolley, but I am not sure. I want to give you an opportunity to, if you haven't. Have you told us—Paragraph 25(e) refers to the fact your work was instead of a more correctly conceived cost analysis by products—have you told us how in your judgment it would be appropriate to compare the [fol. 178] cost of each——

A. What page is this? I am sorry. Pardon me.

Q. Page 29.

A. On Page 39?

Q. Yes, Paragraph 35(e).

A. Excuse me.

Q. (Continuing) —how in your judgment it would be appropriate to compare the cost of delivery in respect to each individual product?

A. I have not outlined any detailed procedure for it, no, and without going into the details of the cost analysis and the route structures, and all that sort of stuff, I at the moment do not have any suggestion.

Q. I have a couple of questions on competition. I am sure it won't take too long.

(Discussion had off the record.)

By Mr. Stevens:

Q. Now, I am returning your attention to the other group of exhibits.

A. C?

Q. I think A is the other one.

A. Folder A?

Q. Yes. What in general are those exhibits intended to do?

[fol. 179] A. They are intended to show the extent to which people shop around for their fluid milk products at Bowman stores and other stores, any of these sample stores that were put into the prima facie briefs.

Q. Are they intended to make the point that given individuals who live in that area buy fluid milk from a variety of sources?

A. Yes, yes. Now, of the Bowman stores as well as non-Bowman stores.

Q. Now, are there any charts or graphs or exhibits in this Folder A which are intended to show the extent of competition between any one of the sample stores, such as Goldenstern's, for example, and any other of the sample stores, such as the Kroger Store, at 7260 Wentworth Avenue, for example?

A. Yes.

Q. Which of the tables is intended to show—Let's keep the same example: The extent of competition between the

Goldenstern's Market and—did I say the Kroger Store—the Kroger Store at 7260 South Wentworth? Which are the tables?

A. Not specifically by identification of these particular pairs, no, but they do exist and they are summarized in the [fol. 180] general information on Table 7(a), the next to the last table.

Q. Now, first of all, is this the first table or the only table which——

A. No, some of this information is summarized on Table 3, I think.

Q. Table 3.

A. The last column shows the number of customers not receiving home delivery, customers who buy from at least one pair of these sample stores.

Q. Well, can you tell by looking at Table 3 or by looking at Table 7(a) how many customers purchased milk from Goldenstern's and also from the Kroger Store at 7260 Wentworth?

A. No, you can't do that. All you can show from Table 7(a)—you can say that Psomakos' store out of the nineteen customers who were sampled on that date—well, I am sorry, I am looking in the wrong column. Strike all that.

Of Psomakos' sixty-seven customers——

Q. Mr. Woolley, may I interrupt? I was asking about Goldenstern's and Kroger. I will try to stay with the same sample.

[fol. 181] I am sorry. On Table 7(a) it is shown with respect to Goldenstern's, forty-three customers who were sampled on that particular sample day of your survey.

A. And who responded to the milk questionnaire. Of that forty-three, four of them bought milk at Goldenstern's and either A&P or Kroger's.

Q. Now, where do you find that?

A. Because the heading says, "Bowman chain and independent sample stores only." So these four bought at Kroger, which is an independent, and one or the other or both of the A&P and Kroger.

Q. But now, does that column include instances where the people bought from some Kroger or some A&P other than——

A. No, I said sample stores only. They are people who

I observed, when you take their return questionnaire, they will have only two stores shown. These people will have a Goldenstern's shown and an A&P or Kroger, or maybe both.

Q. But now are you saying that they will have the particular A&P or the particular Kroger?

A. These particular A&P's I have got listed here, that [fol. 182] is what I mean by sample store for this group. That is exactly what I mean by definition. The sample stores by definition for these six stores here and none of these customers, and on the questionnaire itself only for this particular group of at least four, five and six, the questionnaire relating to them only included Goldenstern's, A&P and Kroger as those sample stores they were going to identify as trading at.

Q. And you are saying that that figure four indicates that there were four people who bought at Goldenstern's, and they also bought at the A&P store on Wentworth Avenue or the Kroger Store on Wentworth Avenue?

A. Or both.

Q. Or both?

A. Or both.

Q. Well, our review, just so you will know it, our review of the material which you supplied us does not support that.

A. Well, I think it is there.

Q. I think we will have to get together on that.

A. I think we will have to get together then, because I am pretty sure it is there.

Q. Now, it is correct, isn't it, that in your questionnaires that you sent out, you included questions about chain stores [fol. 183] other than the sample stores?

A. We asked them to list other stores if they did not buy at any of these or if they bought at others in addition to these listed, they would include those and identify by name and address.

Q. Well, now, didn't your questionnaire itself list other chain stores?

A. Oh, yes, it did. Well, that is all right. It is still faulty, because in my definition I included only those and these four are those only which out of those listed stores there in which A&P and Kroger on Wentworth are identified here That is Store E and Store A, and Goldenstern's down here some place, P.

When I got the questionnaires back, those are the questionnaires which showed either Goldenstern's or Kroger or A&P.

Q. Now, Mr. Woolley, I did not mean to mislead you, but I was quite sure you made a mistake. I want to call your attention to this. Look on Table 7(a), Footnote 4. You notice the four we have been talking about over on the right.

A. All right.

Q. Which is a quarter mile area which is included [fol. 184] within all areas obviously. That footnote says:

> "Includes those customers trading also at the Kroger Store at 6914 South Wentworth."

A. Well, that is in the trading area. It is still a chain store.

Q. Yes, it is still a chain store but——

A. I mean, still a chain store and Bowman store.

Q. But you would modify your answer, would you not, on the basis of that footnote? It is not one of the sample stores.

A. Well, to that extent, yes.

Q. So that——

A. How many are there? Which one of the four is in that category? I don't know. I would have to check them.

Q. Well, whether all of them are in that category.

A. What?

Q. You cannot tell from the table whether all of them might be in that category?

A. If you would like that point clarified, I think we can do that.

Q. Well, the only thing I want to make clear is that [fol. 185] except for the possibility of this column, which I had not understood to indicate this, there isn't anything in these charts which shows the extent of competition between the specific sample stores which are included in the study.

A. Well, this column is intended to do that.

Q. But this column is not broken down to show the extent of competition between any two pairs of stores?

A. No, not specifically. I did not think I had to. I did not think it was necessary.

Q. But, for example, in Line 5——

A. To my thinking it is immaterial as long as you can demonstrate that there are customers who have responded to the effect that they did trade at these stores. Of course, the specific stores, if you want them identified, that can easily be done.

Q. Well now, the A&P store on Line V there, apparently the customer who shopped there shopped at only one other sample store. You only found one other customer from the A&P?

A. Yes. That was Goldenstern's.

Q. So presumably he may have shopped at Goldenstern's, or he may have shopped at Kroger, for all those shows?

A. No, this has a chain and independent store combina- [fol. 186] tion.

Q. I see. And there is one at the Kroger Store apparently who also shopped at Goldenstern's?

A. That is right.

Q. So you found one instance of a man who shopped at Kroger and Goldenstern's and one instance of a man who shopped at both A&P and Goldenstern's?

A. That is right.

Q. Your other two instances under Goldenstern's apparently are the other Kroger Stores?

A. No.

Q. Or something else?

A. These are entirely different individuals. This one up here is not included in the four above, and the one down below is not included in the four above, and the one in No. 6 is not the same as the one in No. 5. (indicating)

Q. Now, for the purpose of your example, your label on this last column, Column 7(a), is Goldblatts treated as a chain or independent?

A. Chain.

Q. So that you have not made any effort to determine the extent to which people who shop at the A&P also shop [fol. 187] at Goldblatts, or vice versa?

A. No, because it was only between independents and by definition Goldblatts was part of the chain picture.

Q. Well, now, did any of the other tables show anything about the extent of competition between these sample stores?

A. No. The tables do show the extent to which——

Q. People shop around?

A. People shop around, and among Bowman, chain and independents generally.

But this last column only deals with these specific stores identified on the left.

Q. I take it, Mr. Woolley, you did not make any comparability tests to determine whether the people who responded to mail questionnaires were comparable to those who did not respond?

A. No.

grocery store?

A. They usually indicated when that was the case. They indicated that on the questionnaire.

Q. Did you make any tests to determine the people who responded who had their milk delivered at home, as to whether that milk was delivered by a dairy or a retail

Q. How would they indicate it?

[fol. 188] A. They wrote in the name of the dairy.

Q. But those who merely checked "home delivery" without writing the name of a dairy, did you make any effort to determine how many of those had their milk delivered by a dairy and how many had it delivered through a grocery store?

A. Well, they had it delivered by a dairy, period. Otherwise they would not have checked that they had home delivery.

Q. How do you know that?

A. Because that is what is called for. Home delivery is dairy-delivered.

Q. That is what you intended?

A. That was the intent of the questionnaire and that was what was understood by the people who did respond.

Q. Let me put it this way. Apart from the questionnaires themselves, you have no information as to whether the people who checked home delivery had their milk delivered at home by the grocery store or by a dairy?

A. May we go off record for a moment?

Mr. Stevens: Off the record.

(Discussion had off the record.)

[fol. 189] By the Witness:

A. I think the question is clear enough by itself. The question is, "Do you have your milk delivered at home?"

Well, now, any man who receives milk at home, ninety-nine times out of a hundred, it is going to be by a dairy. That is the common, ordinary sense of the question. Groceries don't make deliveries unless you specifically request it.

Q. Did you make any effort to ascertain whether Psomakos or Goldenstern's or any of these chains make deliveries in the areas which you were studying?

A. I know the A&P doesn't.

Q. How about Psomakos and Goldenstern's?

A. I don't know about Psomakos.

Q. How about other independents in the area?

A. I don't know about those.

Q. You do know that there are grocery stores in the City of Chicago that deliver milk?

A. I do know that the average individual reading that question would immediately think in terms of a dairy delivering at homes in the first place, a group of people if they are going to go to an independent, they usually go by themselves. They very seldom have it delivered. They are a [fol. 190] class of people that would not think of that. They are not used to having service like that. I am pretty sure these small independents would not want to have the cost to themselves of making that delivery.

Q. Do you have the questionnaire which was sent to the people in the Psomakos group and also the questionnaire that was sent to the people in the Goldenstern group?

A. Just a sample of it.

Q. I mean the form of questionnaire?

A. Yes.

Q. I wanted to ask you why the different question was asked for two different groups?

A. Oh, I was afraid you would ask that. That is nothing more than bureaucracy involved. These forms—incidentally, that is one of the troubles with these forms, they are not in the original form that I intended them to be but that is the way they came back to me from Washington approved.

Q. Did Washington direct you to ask different questions of the two different groups?

A. They approved the first one and that was six months earlier, and the second one they had no reference to the [fol. 191] preceding one. In other words, it was just another questionnaire they had to approve and they did not even think about the preceding one. So they just made the changes on the second one according to their own current thinking, or whatever they happened to be thinking about at the time.

Q. Which was the first one and which was the second one?

A. The Psomakos group—wait a minute, now.

Q. The Psomakos group, as I understand it, was asked the question——

A. I am sorry, that was true of the Borden because we had a repetition mailing. That is what happened there.

Q. But that isn't the explanation of the difference in these?

A. I am sorry, these went to Washington and back again at the same time. The first questionnaire is identically the same as far as I can see.

Q. The question to which I have reference is:

> "If you buy milk from the following stores, indicate with an 'X' the frequency of your purchases."

which is the question asked of Psomakos and Goldblatts. [fol. 192] The question which is asked and substituted in the other group is,

> "Indicate with an 'X' the frequency with which you buy milk from the following store or stores——"

A. Yes. Frankly, I have no explanation for the difference.

Q. Well, you notice the significance of the differences might be that the latter form of question asks for the frequency of purchases of milk, whereas, the former question asked of the people who went to Goldblatts merely asked for the frequency of purchases without saying purchases of what.

Presumably, the people who shopped at Goldblatts may buy quite a variety of items.

A. No, because the covering letter says this:

> "With respect to your purchases of milk, would you therefore kindly check the appropriate answers to the questions in the attached list and return your answers in the enclosed envelope which requires no postage."

That should be clear enough as to what is intended. The [fol. 193] same thing applies to the other because the letters are practically identical except for the stores involved.

Q. Well, in other words, you do not have any explanation for the difference in the form of questions?

A. No, it just happened that way. I don't have any explanation. To me it does not make any difference anyway because it was taken care of by the letter.

Q. Well, was it intentionally taken care of by the letter or do you now think it probably was taken care of?

A. No, it was. I intended them to indicate the extent to which they purchased milk. This whole thing is directed toward milk and I wrote that paragraph intentionally that way.

Q. Well, I am sure you so intended, but I am just trying to find out the areas in which you may have failed to accomplish your intent by a slight change in wording, or something like that.

A. I did not intend any change in concept merely because Question No. 2 in the two different questionnaires happened to be worded differently. That is an unfortunate circumstance that they were. I did not intend any different inference to be drawn.

[fol. 194] Well, now, look at Table 4 a minute, if you will, please. See, the last column on the right talks about one pair of Bowman chain and independent stores. I take it the figures in that column are not necessarily based on sample stores?

A. The last column?

Q. The last column on the right.

A. No. That includes the sample stores plus all other Bowman customers who picked up in writing the store names they included on the questionnaire when they responded.

Q. Let me go to that Footnote 4 again where you indicate a purchase at a different Kroger Store. What was the purpose of including that instance in that?

A. If I remember rightly, that is on the same route as these other stores. I think this store was included in Schedule 3 where we listed—I think it is Schedule 3—where we listed our sample of routes. I think that was one of the stores. I think it is also on the map, included on the map as one of the stores within the competitive area. It was a chain store.

Q. Now, on Table 7(b), we have got a lot of percentage figures. Do you have any percentage figures in that table which are intended to reflect the data in the last column to the right on Table 7(a)?

[fol. 195] A. Yes, the last column. See, each one of these columns refers to the corresponding column of 7(a), or are supposed to.

Q. Well, you have got a figure opposite Goldenstern of 32.6 per cent in that column?

A. That is right.

Q. That is 32.6 per cent of what?

A. Well, of total of customers there which is reflected as a hundred in the first column with the customers with no home delivery.

Q. How many customers are you talking about?

A. Oh, forty-three.

Q. In other words, roughly a third of the forty-three customers did what?

A. No, that does not look right. That does not look right. Wait a minute here. That must be an error.

Q. Pardon me?

A. That must be an error. That has to be an error because there were only forty-three customers to start with and there are only four in that category.

Q. Are you sure, Mr. Woolley, that that percentage column isn't intended to reflect the figures in the next to the last column on the right in Table 7(a)? It has the [fol. 196] same label as the next to the last column.

A. No, it should not have been. If it was, it was a mistake.

Q. Well, you see, you notice——

A. It is not intended to be.

Q. In Table 7(a) your next to the last column——

A. Bowman independents and non-Bowman stores, but there is no relationship between the two.

Q. Then you have got—That is the same title that appears on the last column in 7(b). The next to the last column on 7(b)——

A. Oh, oh, wait. I see what you mean. This last column on Table A, 7(a) has been omitted from 7(b) by typographical error. (indicating)

Q. That is omitted?

A. The percentage calculation has been omitted. Oh, I see what you mean. Yes.

Q. So that——

A. That will have to be rectified.

Q. Yes. The only column on Table 7(a) or at any place in all these exhibits which is designed to show the extent of competition among sample stores is the only one you excluded from Table 7(b)?

[fol. 197] A. Well, I did not exclude that by design.

Q. It was a typographical error? I see.

A. A typographical error. That will be replaced. I will have the girl type a new page or new table. I had not noticed that. I will have to do that table over.

Q. And your percentage calculation which you will make will be—just to look at 7(a) again—will be taking the very top column, the ratio, for example, well, that will be four to forty-three?

A. In the case of Goldenstern's?

Q. Yes.

A. Yes.

Q. Which, of course, includes that other Kroger Store there?

A. Yes.

Q. But taking examples where they are not included, they go to the very top of Groups 4 to 6, 6 to 124. It would be about five per cent, or something like that.

A. Yes, average.

Mr. Stevens: I think that is all I have.

[fol. 198] Redirect examination.

By Mr. Long:

Q. Mr. Woolley, you have been asked by Mr. Stevens to adopt your testimony in respect to many questions asked by Mr. Ball which Mr. Stevens did not want to repeat, and you have done some amplification.

Now, I wonder if you would care to state whether you have any recollection—this is responsive to a question of Mr. Ball:

Do you have any recollection of any facts or figures you transmitted to Messrs. Taggart, Taylor, and Sawyer that either were not facts of record in these two cost studies, Bowman and Borden, or something that had been communicated to you by counsel for the defendants of their representatives?

Mr. Ball: I object to the question as not the best evidence of the facts, since the best evidence lies in the documents, including the written comments of Mr. Woolley, which you have refused to turn over to us for inspection.

By the Witness:

A. The answer is, to the best of my recollection, that is true.

[fol. 199] By Mr. Long:

Q. Mr. Stevens has asked you, and been gracious enough to preface his questions that they were hypothetical, with respect to these samples, with respect to the customer service.

Do you know, Mr. Woolley, whether there were any of these Bowman stores, independent stores, that were not shown to receive customer services on the days that——

A. There are stores that did not receive them.

Q. Do you know whether they later received or on other days received customer services?

A. That customer survey was conducted for some routes on one day only, on other routes on two separate days. Apparently a repetition. From the data that I have seen and studied on that survey, there were stores who did

receive the customer services on both of the sample days when they were taken.

There were others that received it only half the time, that is, on one of the days and not on the other. There were stores that received it on neither day.

On the routes that were sampled only once, there were [fol. 200] some stores that took it, that is, received it, and some stores that did not receive it. That is the nature of the survey that was made.

Mr. Ball: Is it understood, Mr. Long, that this last answer relates solely to the Bowman Dairy?

Mr. Long: Oh, yes.

By Mr. Long:

Q. Did any of the data show the time involved in serving a store which was served only, say, once on a sample day and not served at all on another sample day?

A. The data they collected was the number of units delivered on the day that the survey was being made to the store and recording the amount of time it took to perform that customer service to the store when it was performed.

Obviously, for the record of the stores that did not receive it, they merely collected the number of units for other purposes, of course, but, of course, they made no recording of the customer service because it was not performed.

So the time shown reflects only those stores—is reflected only for those stores for which the customer service was [fol. 201] actually performed.

Q. Now, do you know out of that group of stores that the sample did not show received the customer services on either day of the survey, do you know whether the services were made available to them?

A. No, I do not—that is, as an alternative you mean?

Q. Yes.

A. No, I do not.

Q. You don't know that?

A. It was not revealed to me in anything I saw in the cost information that was presented by their documents.

Q. Your answer would be the same for Borden?

A. The same for Borden.

Mr. Ball: What do you mean?

The Witness: That these customer services, as I understand it—I have no information from either of you as to whether or not these stores were advised that they may or may not have received this customer service.

Mr. Stevens: Are you through?

Mr. Long: Not yet.

[fol. 202] By Mr. Long:

Q. Mr. Woolley, do you recall from either the Bowman or the Borden cost study whether the chains, the units of the chains were offered the customer services or not?

A. My understanding is, according to Bowman's declarations in their cost study that they were not, that is, as specific instructions they were told not to approach the matter.

Q. What is your recollection of the Borden cost study?

A. I think it is the same in Borden's, if I remember correctly. I am not too sure about the latter, but it is my impression.

Q. You are not certain whether there were costs that were allocated to the chains in reference to customer service in the Borden case?

A. Oh, in the Borden? In the Borden there were some allocations which implied that some of the chain stores did receive then. Which ones they were, I don't know.

Q. Do you know whether the others were told of the availability of the services?

A. No.

[fol. 203] Recross-examination.

By Mr. Ball:

Q. I don't understand your reference, Mr. Woolley, to what the Borden survey showed. Do you have reference to data sheets, or what information?

A. Well, on your summary tabulations where you list the individual work elements and show their allocation across the page into the various class of customer, there are certain of those items—Now, when I use the terminology "Customer Service," I am using Bowman's definition.

Some of those items which they term as customer services are also identified separately and allocated separately by you. I observed that a few of those—I can't offhand name them but probably could point them out—appear to be allocated to the chain stores along with——

Q. But what I am getting at is, you do not refer to any facts that you understand from any data except that which is already tabulated and included in the pretrial order already entered?

A. Oh, that is right.

Mr. Ball: That is all.

[fol. 204] Recross-examination.

By Mr. Stevens:

Q. May I ask you this on a general subject, Mr. Woolley. More or less as a statistician, if you have a service element, such as customer service, and if you had a situation in which there was a substantial group of stores which took the service, for example, every third day, but not necessarily the same day, not necessarily every Friday; some took it whatever day it was convenient for the driver or customer, and you took a sampling of that group of stores, would you expect to find that about a third of them would show up as taking customer service on the day which the sample was taken?

A. I am not sure about the particular ratio, but——

Q. I'm not trying to pin it down precisely, but there would be a substantial number?

A. Let's put it this way. If you had a total population representing all the days of the year in which deliveries were made reflecting all stores, and these stores had either regular or irregular reception of the service, scattered through the year, you would expect a certain proportion of those to be represented in your sample if your sample is drawn in such a way as to obtain a representation, adequate [fol. 205] representation.

Q. Now, the data which you did examine in the Bowman time study, I take it that is not inconsistent with the hypothesis that there are a substantial or substantially all the Bowman customers took customer service on at least

some day with varying frequency, all the Bowman independent customers, of course, I mean?

A. Well——

Q. I appreciate what you have said before.

A. Well, if you consider anywhere from 25 to 70 per cent of the customers did take it all the time, which would be an average of around, say fifty, as a rough guess, as substantial, I suppose that would be true.

(Discussion had off the record.)

Mr. Stevens: All right, Mr. Woolley, thanks very much.

(Whereupon the deposition hearing in the above-entitled cause was continued sine die.)

[fols.205a-205b] Notary public's certificate. (Omitted in printing)

[fol. 205c] Stipulation as to signing depositions (Omitted in printing.)

[fol. 1] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA,

vs.

THE BORDEN COMPANY, ET AL.

The Deposition of Albert Joseph Bergfeld, taken before Paul A. Ruhe, a notary public in and for the County of Cook, State of Illinois, on Thursday, September 6, 1956, commencing at 1:00 o'clock p.m., at Room 754, U. S. Court House, Chicago, Illinois, pursuant to instructions by the Court in the above entitled action pending in the above named court.

PRESENT:

Mr. Earl A. Jinkinson, Mr. Bertram Long, Mr. Elliott B. Wooley appeared on behalf of the Government;

Mr. Edward L. Hart, Jr. and Mr. John T. Stevens appeared on behalf of the Defendants, Bowman Dairy Company and Ridgview Farms, Inc.

[fol. 2] COLLOQUY

Mr. Jinkinson: I assume we agree, Mr. Hart, that this deposition is being taken pursuant to the instructions of court?

Mr. Hart: Yes.

Mr. Jinkinson: It constitutes cross examination of your expert who made the cross study submitted by Bowman?

Mr. Hart: Well, I don't know that I will stipulate to that. I will stipulate it constitutes discovery, in connection with the submissions. I think the Court had pointed out that the actual cross examination, in so far as you were not willing to agree to the stuff after the discovery was to be held before the Court.

Mr. Jinkinson: Is that it?

Mr. Hart: I think that is it. I have got a transcript of that.

Mr. Jinkinson: Well——

Mr. Hart: —around here. I checked that just after you called me about this. I think I have got the pages marked that cover it. Yes, that is it. There is a prior one that I have marked where we discussed the same thing.

Mr. Jinkinson: It really amounts to cross examination and redirect examination?

[fol. 3] Mr. Hart: It was argued to me and to you to who ever was here on your behalf. I am not certain you were here that day.

Mr. Jinkinson: No, Kerr was there.

Mr. Hart: Here is the same general scheme of things in the prior hearing.

Mr. Jinkinson: The understanding was we were to take Mr. Bergfeld's deposition for discovery here and that you will make no examination when we get through here?

Mr. Hart: I think that is right.

Mr. Jinkinson: And that you will make a further examination of him when he is presented, if he ever is, on behalf of the defendants?

Mr. Hart: No, I doubt very much if I will make any examination of him at that time, assuming we stipulate to the material contained in the various studies that we have submitted. Except for the conclusions, why I would not make any direct examination but, as I understood it from both you and Mr. Kerr, you wanted the right to cross examine him in reference to his conclusions and it was that part of it that I was talking about in these two transcripts.

Then, the Judge in that last one, in talking to you,—this is the transcript of 6-15-56 and I am reading from pages 14 [fol. 4] and 15.

We were discussing the fact it was unfair to make the submissions to you and then not have any opportunity to prepare the particular points that you wanted to take up by way of cross examination.

And then you said: "Is this in connection with taking the depositions?

"The Court: No, no. The field is open on depositions. This is Court time."

Mr. Jinkinson: Yes.

Mr. Hart: "On depositions. The sky is the limit. How can you be prepared to say what you will stipulate to?

"Mr. Jinkinson: We will make this statement after we take the deposition.

"The Court: Certainly, certainly. This is a cross examination before the Court."

Mr. Jinkinson: Then the status of this matter here is that you have submitted these certain studies to us. We have not as yet agreed as to the validity of them. We are testing the validity of them here to determine whether or not we will eventually agree to the cost studies.

Mr. Hart: Yes.

Mr. Jinkinson: I see.

[fol. 5] Mr. Hart: In addition to that you will have the right to cross examine him before the Court and I would have the right to examine him on redirect.

Mr. Jinkinson: Well, the examination at this time will be confined to the four studies that you have submitted which have been marked for the purpose of identification as Defendant Bowman's Exhibit 1. That is entitled "Manual for Establishing and Testing Store Discount Schedules." And that the Defendant Bowman's Exhibit No. 2 is the discount schedule Test marked 1955; and Defendant Bowman's Exhibit 3 is a cost and price study of certain bulk wholesale customer transactions, plus the supporting data heretofore submitted by Bowman Company in support of Bowman Exhibits Nos. 1 and 2.

Mr. Hart: There are two additional ones that we have not mentioned, one dated November of '55 and the other dated November of '56.

Mr. Jinkinson: I don't think at this time that we are going to go into the two additional ones we have marked at this time. In checking the record we find out that——

Mr. Hart: Then, 1 is your basic manual for this purpose.

Mr. Bergfeld: 2 is the discount test.

[fol. 6] Mr. Jinkinson: Discount test.

Mr. Hart: Discount test of what date?

Mr. Jinkinson: March of 1955.

3 is the cost and price study of certain bulk customer transactions of March, 1956.

Mr. Hart: Restaurant.

Mr. Jinkinson: Yes. Then in addition we are going to use the supporting data which you furnished us on May 17, 1956.

Mr. Hart: That is the collective board.

Mr. Jinkinson: Well, we have numbered all of them. They go from 4 to 8.

Mr. Hart: 4 to 8.

Mr. Jinkinson: Yes, and these are subsidiary numbers for the different sheets.

Mr. Hart: Earl, there is just one thing: This isn't one that you said you were going to talk about now but this does bracket the discount plan which we have submitted.

Mr. Jinkinson: Dated what date?

Mr. Hart: Dated, discount plan dated December 26, '55.

Mr. Jinkinson: Yes.

Mr. Hart: Also dated as November, '55, on the actual letter of transmittal that is contained in there it has November 20, 1956. That should be November 20, 1955. [fol. 7] I thought we better correct it before we pass November.

Mr. Jinkinson: All right. We are probably going to. Here, it is November, 1956.

Mr. Hart: We are probably going to.

Mr. Jinkinson: Have to have Mr. Bergfeld back for examination.

Mr. Hart: That is perfectly all right.

Mr. Bergfeld: It is your numbers 1, 2 and 3.

Mr. Jinkinson: Yes. In checking the record we find——

Mr. Hart: I will tell you, that isn't going to work out with our exhibit numbers.

Mr. Jinkinson: Do you have some exhibit numbers already set up?

Mr. Hart: Yes. Use it as 1, 2 and 3 and 4 to 8 of this date. We will number them back on the basis of the other exhibits we have gotten because in that stipulation that we submitted to you why we have numbers that run up to 15, I think, already.

Mr. Bergfeld: Your No. 1 would have been that No. 6.

Mr. Jinkinson: Let us then identify these as Bergfeld Exhibit No. 1.

Mr. Hart: That is fine.

[fol. 8] ALBERT JOSEPH BERGFELD, having been first duly sworn, deposeth and saith as follows:

Cross-examination.

By Mr. Jinkinson:

Q. Please state your name.
A. Albert Joseph Bergfeld.
Q. Where do you reside, Mr. Bergfeld?
A. Stamford, Connecticut.
Q. Incidentally, Mr. Bergfeld, before proceeding further, you will waive the signing of the deposition?

Mr. Hart: Yes.

By the Witness:

A. What do I just waive?

By Mr. Jinkinson:

Q. The signing of the deposition. After it is taken and typed you have the opportunity to read it if you so desire.
A. Yes.

Mr. Hart: With the understanding that if we find some errors in the thing we will just arrange by calling with you to correct it.
Mr. Jinkinson: Off the record.

(Discussion had off the record.)

By the Witness:

[fol. 9] A. I did not quite understand what I waived.

Mr. Hart: All you waived is that ordinarily the reporter has to transmit the deposition to you and have you examine it and then you have to acknowledge it before a notary public and so on that that is a true and correct transcript.
The Witness: I understand.
Mr. Hart: Now, all we are saying from a procedural standpoint we will achieve the same thing without all that formality.
The Witness: If that is the preference of you gentlemen I will accommodate you.

By Mr. Jinkinson:

Q. Did I ask you where you resided?

A. Yes, Stamford, Connecticut.

Q. By whom are you employed?

A. Stevenson, Jordan & Harrison.

Q. What business is Stevenson, Jordan & Harrison in?

A. They are in the business of management engineering and consultants.

Q. As such you make studies similar to those submitted and identified as Bergfeld Exhibit 1 which I believe you have before you?

[fol. 10] A. I do and I have.

Q. Have you made similar studies for other industries?

A. There are always some differences among our studies but if I may answer you in general, yes.

Q. Then you have made studies which can be designated as cost justification studies in other industries?

A. As cost justification other than the Robinson-Patman Act?

Q. Yes.

A. No.

Q. This is the only one you have made?

A. That is right, only in this instance.

Q. The only one that you have personally made. Do you know whether or not your firm has made such studies?

A. That I would have to check.

Q. As far as you are concerned this is the only one you have made?

A. I have participated to some extent years ago in a somewhat similar study.

Q. What was that study?

A. Morton Salt.

Q. Morton Salt?

A. Yes.

Q. Have you made any similar studies just such as Berg [fol. 11] feld Exhibit No. 1 with respect to other dairy companies, either in Chicago or in other cities?

A. For Robinson-Patman?

Q. Yes.

A. Trial purposes?

Q. Yes.

A. No.

Q. When were you or your firm first employed by the Bowman Dairy Company to make the study reflected in Bergfeld Exhibit No. 1?

A. Let me go back to your previous question. I am answering that in terms of material actually to be used for litigation under the Robinson-Patman Act?

Q. That is right.

A. Is that what you want me to answer?

Q. That is what my question was.

A. I am differentiating here carefully, I hope, to your satisfaction because frequently for matters of internal managerial policy we make these studies and this is to my knowledge in the milk industry the only case in which such studies have actually been for purposes of submission of depositions in the case. Excuse me. Your last question I am afraid I have forgotten.

Q. My last question is: When were you or your firm [fol. 12] employed by the Bowman Dairy Company to make the study ultimately reflected in the Bergfeld Exhibit No. 1?

A. My first work for the Bowman Dairy Company, although not directed specifically toward your Exhibit 1 at that time but that work at that time did provide some of the background ultimately to be used in Exhibit 1 in about 1947.

Q. 1947?

A. Yes.

Q. Do you remember the time, approximately?

A. Yes, I think. Do you mind if I refer to notes on that?

Q. Yes.

A. Bob, do you have—I believe it was about October, '47, as our billings appear. That might mean that somewhat previous to October but billed in October as our records show and this is a little bit beyond the length of time that the records are kept in great detail, about October of '47.

Q. Now, to your knowledge, were you the only one from your firm who had charge of the work which ultimately resulted in Bergfeld Exhibit 1 or was there someone previous to that who came out and did work for the Bowman Company?

[fol. 13] A. Not to my knowledge or not to my memory I should say. I think that at one time or another others of my associates had talked with the Bowman Dairy Company. You see the period is a little hard for me to say who and

when and to what extent it wasn't of my then concern. It might have been been during my Navy turn of service.

If you want a precise answer to that I would like to check it. There might have been some of my associates do something during that period of time I didn't know.

Q. You didn't know about?

A. That might be that someone of my associates or staff.

Q. But if your associates were here, do you know whether or not they were engaged in the type of work which ultimately resulted in the Bergfeld Exhibit 1?

A. If I can give you an opinion on that?

Rather than have you accept it as a matter of fact I would say that I would doubt that. Had any of my associates worked with Bowman Dairy Company in advance in '47, my opinion, my judgment would be it was not directed towards Exhibit No. 1.

Q. You did some work in 1947. Can you state whether [fol. 14] or not it was the type of a matter which resulted in Bergfeld Exhibit No. 1 or was it a different kind of work?

A. No. It was not—it was a kindred work. I haven't come—I have not come with a break down or a log of just what each of these assignments were. There have been many since October of '47.

Q. What are some of those other assignments other than your cost justification study?

A. When you say other than the cost justification study, they were really all related. For example——

Q. What I am trying to differentiate is any work done of the nature of an engineering study which resulted in internal improvement in the method of distribution of milk which I am not particularly interested in.

You say you are an engineering firm. I assume that you make studies of the method of operation of the Bowman Dairy Company looking towards possible suggestions in improvement in distribution. I assume that would have no effect upon your justification, cost justification study?

A. No, sir. That is why I am having to answer you pretty carefully. The same techniques of measurement, the estab- [fol. 15] lishment of standards for things to be done are fundamental to working out methods of improvement, to working out better internal cost controls as we call it. If

you will they are the same fundamental element that we give, irrespective of their end use.

Mr. Hart: Well, if I can interrupt just a minute, I think I can clear it up, what Earl is talking about, off the record.

(Discussion had off the record.)

Mr. Jinkinson: Getting back on the record:

By Mr. Jinkinson:

Q. Is it fair to say you did make some studies which ultimately resulted in your determination that all platform costs to all classes of customers were the same? You used that as the basis for that premise in Bergfeld Exhibit 1, is that right?

A. Not quite. The principle on which Exhibit No. 1 is based, among others, is that the kind of costs, technically speaking, to be used here are standard costs rather than actual costs, and are predictive standards instead of actual costs.

There are two kinds of general costing practice that have been used one way or the other in industry. There are three or four but there are only two that I think ever have been [fol. 16] tried at Bowman's. One is to wait until after a period of accounting has been closed and then to go back and refigure costs of products on the basis of what expenditures, payrolls and so forth were incurred for that actual segment of production for that accounting period.

That is the cost principle, a cost philosophy that was fairly prevalent throughout most of the industry. I would say more prevalent throughout most of the industry in the early '20's than it has been in recent years, because it was a post-facto kind of thing. It was of less use to management than the cost principles that we have worked with in No. 1.

There what you do is to determine the cost of your individual products on the basis of the methods and the cost that should be incurred when the operations are being properly controlled and managed. So the products then, under these standard costs and calculations and principles don't have attached or assigned to them a lot of chance costs. For example, breakdown costs or something springing a leak and delay. All of those things are standardized in the standard cost approach.

Now, the advantage of that is, of course, obvious; that [fol. 17] you begin to say what your product should cost you if things are well handled.

And then you can start in advance to work out some of your policies but if you have to wait until after the close of September's books until sometime late in October or early in November, to get your actual cost to know what you——

Q. Should have been doing?

A. —should have been doing before, is the principle that is fundamental in here. So that it isn't just a matter of the cost studies previous to the immediate work on Exhibit 1 being a matter of determining whether or not all products cost the same at the platform.

That was not the primary objective. The objective was to try to get over onto what is considered to be a somewhat more useful and somewhat more modern concept for determining unit product cost.

Q. Did you accept the second method when you first started?

A. When we first came, as I remember, —this goes back to '47—when we first came their cost accounting philosophy was the post-facto type.

Q. The first type you described?

A. Yes. The first type I described when they took the [fol. 18] actual cost for the past period, they don't know up until too long in the period to get any good out of that.

Q. You attempted to correct that?

A. Well, I think one of the first things they asked us to do was to check certain—in those actual product costs through the plan was to check certain factors that they thought were probably inaccurate. I think there was still, as I remember the first assignment, and I will be very glad if you would like to have me make up a more detailed answer to this because I am depending upon memories as best as I can here.

Q. Do you have some record to refer to, some memoranda, or something you have written?

A. Well, again it goes back so far I don't know—I am sure I couldn't, couldn't promise you any specific document; but I think I can go back through probably notes or files and look for it, too. I am pretty sure that was no small part of our beginning with Bowman.

You see, we got all sorts of possible inaccuracies in an

average cost system and it periodically has to be reviewed and this was somewhat periodic in that sense.

Q. State whether or not, state who you first discussed the [fol. 19] Bowman problem with of cost studies.

A. I am trying to go back to the very first beginning for you. It seems to me one of the first people I ever met from Bowman was a Mr. Gullans. This is a long time ago. I believe he was—I can't remember whether Bowman agreed to this or not but it seems to me they were asked—yes, they did. This goes back before '47 on this particular point.

This was not for the Bowman Dairy Company. That is the technical difference between what I answered before and what I am answering now but you now ask me what was the first one I ever talked about these problems with at Bowman and that answer is this:

Before '47—I am sorry I do not have the date. Again I shall try to get it for you. I was asked to make a comparison of paper and glass costs. Well, the cost created by packaging and delivering milk in glass bottles as compared with packaging and delivering milk in paper bottles.

I was asked to do that by some members of the glass industry. And I believe my first discussion of costs with Bowman, with a member of the Bowman company management was in connection with that kind of a survey and we did make, not for the Bowman Dairy Company, but by their [fol. 20] courtesy they were used as an example and I am sorry I cannot tell you the exact date of that.

Q. That discussion had nothing to do with your cost studies?

A. I think it did in this sense: I think at that time Mr. Gullans was rather interested in these other principles of costing in his professional or his folks will. It was talked about. I think we talked about the various principles that one could use in dairy products costing. I think we did have an exchange of opinion, you know, as one will in an informal discussion between some of the problems he was having with the actual cost system and some of the things that might have been different if he were on a standard cost.

Q. Was anything said about cost justification under the Robinson-Patman Act?

A. Cost justification under the Robinson-Patman Act?

Q. Yes.

A. No.

Q. You really began your study, you made that study for the Bowman company, the first study that Mr. Gullans asked you?

[fol. 21] A. Mr. Gullans did not ask for that. Mr. Gullans was willing to be used as a guinea pig for us. That was not paid for by Bowman. Bowman didn't hire me for that. I was hired by glass manufacturers to go to Bowman and see if they would be willing to stand as an example for my calculations. This was pretty far back.

Q. Getting back to when you first went to work for Bowman, that was in October?

A. Yes.

Q. Who did you talk to first, October of 1947?

A. I don't remember exactly who was the first person I saw.

Q. How soon after?

A. I believe it would have been—again an opinion, if you don't mind, as best my memory serves me, I believe it was Francis Kullman. Is there any objection to my smoking?

Q. No. Well, how long after you talked to Mr. Kullman, or did it happen in the first conversation, was anything said with reference to your doing any work on cost justification for discounts granted the various classes of customers of the Bowman Dairy Company?

[fol. 22] A. As I remember it, not very long thereafter.

Q. What, in your best judgment, how long?

A. I am sorry to keep you waiting.

Q. That is all right.

A. I am trying to remember conversations, and these things, I mean, were, frankly, I was always anxious to see them consider the standard costing principles. I think I was tempted to talk about it any time and every time I was given a chance. That is why I am having a little bit of difficulty just when he first mentioned this to me. I think it must have been early in '48.

Q. Early in '48?

A. Yes.

Q. Now, did you know at the time——

A. Let me just say this: It must have been at least by the end of '48.

Q. At least by the end of '48?

A. That he came down to the specific—you are asking me about how do our costs rank among customers? That was your question?

Q. Yes. Were you aware of the fact at that time that the Bowman Dairy Company had a discount schedule in effect for its various classes of customers?

[fol. 23] A. Although my emphases were these cost problems, product and delivery both, I believe by late '48 or early '49 the relationship of these cost determinations to discount prices was discussed. And again I believe, I have no records that I can give you on that as a statement of fact.

Q. Let me raise the question this way: When were you first apprised of there being in existence a discount schedule for Bowman, the various classes of Bowman customers?

A. I honestly don't remember.

Q. Was it prior to the last part of 1948 or first part of '49, or was it at about that time?

A. I really can't remember just when. I am sorry.

Q. Having been apprised of that fact, the fact that they did have a discount schedule in effect, did you make any study personally of the existing discount schedule?

A. Yes.

Q. Well, what did you do?

A. I think we did.

Q. What did you do in connection with that study?

A. We determined—we went to the determination of searching out of these costs, these standards, these meas-

[fol. 24] urements.

Q. Did you arrive at any conclusion as to the validity or the legality of the Bowman discount schedule then in effect?

A. Well, I don't think that I have ever felt that I have arrived at a decision as to the legality. I think it is a little bit beyond my competence, frankly.

Q. I will phrase it another way: Did you ask the Bowman Dairy Company to show you these statistics or the supporting material which supported the then existing—when I say "then existing," I mean in 1948 and '49, the schedule then existing which supported that discount schedule?

A. Did I ask them to show me the supporting statistics and costs supporting that discount schedule?

Q. Yes.

A. I don't believe I did.

Q. So, is it fair to say then that you did not bother yourself with ascertaining whether or not the discount schedule as then set up was based upon any study made with reference to cost justification?

A. Well, these are memory exercises and are a little hard for me to put together. Let me say this:

Q. I appreciate that, Mr. Bergfeld. You appreciate also [fol. 25] I was not there.

A. Yes, sir. I appreciate that.

Q. Yes.

A. I—well, while we were talking of these standards as a philosophy and principle of costing, I had also as I think was somewhat generally known, been encouraging clients to consider the management advantages and importance of equity pricing. As is fundamental in this costing, these costing principles, were also many discussions of equity pricing as a management affair, as being good business.

Q. When you talk of equity pricing are you talking about discounts granted various classes of customers?

A. No. What I am talking about is this: In the long run it was one of my management philosophies that the soundest price structure to have between any buyer and seller was a price structure in which there was a somewhat uniform amount of margin between price charged and cost created, because, as a business principle I was interested and still am in the fact that if there are, from a management standpoint, serious overcharges or differences in those margins or charges that create a substantial larger margin on some customers than that margin which prevails among other [fol. 26] customers that it is bad business in the long run to have it be that way.

So, comparisons that were made at that time between their discount schedule and these costs that were then being developed, it is difficult for me to say to what extent I was interpreted as talking my equity price principle which I think is sound business and to what extent that is to be construed as a pure test of legality, because on the legal side I do not feel again, as I say, competent to do it; but there were those comparisons, as I remember it, in '47 and '48 between the amounts being charged and the cost being created.

Q. Do you think they went back as far as '47 and '48?

A. I think it is very possible that some of those figures may, oh, yes.

Q. Were you apprised of the discount being granted to the chain stores, and particularly the A&P in October, 1947, when you were first employed by the Bowman Dairy Company?

A. Was I apprised in 1947, October, 1947? I think I was, somewhere in '47 and '48, that is, I am having a little difficulty saying how was it first set and when was it set. I [fol. 27] think there may well have been, although I don't have those working papers with me. There might well have been some playing back of those figures into '47. I would think yes that it entered into the discussion. Whether it was an equity discussion or a matter of legality I don't honestly remember.

Q. Well, the record in this case shows that in 1947, at all times in 1947 and during the time you first became employed by the Bowman Dairy Company, discount granted A&P 11 per cent.

A. Yes.

Q. 11 per cent discount continued through 1948 up to March 7, 1948, at which time a discount was dropped to 3½ per cent.

My question is this: Were you consulted with reference to the change in the discount from 11 per cent to 3½ per cent and if so, with whom did you consult and what did you recommend or state with reference to the change of discount which occurred on March 7, 1948 from 11 per cent to 3½ per cent?

A. During that time these principles of equity pricing were being talked about and these cost determinations were being made. Just what the specific ones were at each one [fol. 28] of these dates I don't know. I don't remember any direct questions about the 3½ per cent discount as to whether or not I thought it was the right amount.

Q. Did you have any—did you make any—go ahead.

A. But it has always been my role with them to develop these facts for their consideration and I think it is also fair to say that those facts developed have always been a part but by no means the only things considered in deciding the courses of action and I don't remember of any literal rec-

ommendation to them that the discount schedules should be changed in any particular case at that time.

This particular thing, back in '47 and '48, where they literally, literally said "We shall follow exactly what you say." I do not know the extent to which my judgments and calculations have led to that or any other change in the discount.

Q. Am I correct in my understanding then that your duty was to make the studies, furnish them to the Bowman Company, and they were to make the decision whether or not the discount schedule moved up or down or changed?

[fol. 29] A. Yes, my role was purely advisory.

Q. All right. Can you recall any studies you made between the 11 per cent discount which was changed on March 7, 1948? Do you recall any studies you made and presented to the Bowman company which was a basis for their action in changing the discount from 11 to $3\frac{1}{2}$ per cent at that time?

A. Well, at this sitting I can't remember anything quite as formal as you are asking in the questions. The difficulty I am having in answering you precisely on this is that these were constant discussions that have always gone on between myself and a client and the facts were developed from time to time and we would have meetings and discussions.

More frequently than that they were not formalized in the specific written reports. They were very often not written up in that form simply because of the time or delay that would be involved. They were discussed and then, therefore, the discussions were so many——

Q. In putting——

A. I don't—I can't remember all of them and I don't remember how many of them got formalized into specific [fol. 30] reports and recommendations.

Q. Putting it another way then: You can recall making no such study as you later made and as is reflected in the Bergfeld Exhibit No. 1?

A. I can recall no equally formal printed study as comprehensive as that.

Q. Can you recall any similar study, that is to say, any study whereby you sent foremen or trained personnel out to clock the stops and the various drivers at chains and independents which was ultimately used as the basis for

making a report which was used by the dairy company in changing the discount from 11 to 3½ per cent?

A. Oh, time studies were taken way back there in '47 and '48. If I say '47 it was early '48, back in that early period. Time studies were taken by supervisors.

Q. Were these—I will withdraw that question.

A. I think in there we say that.

Q. Bergfeld Exhibit No. 1, you have it. Bergfeld Exhibit No. 1, not that I don't want to show you this, I am reading it myself.

A. That is all right.

Q. Bergfeld Exhibit No. 1.

[fol. 31] The Witness: Bob, will you see what reference, and if there is no reference here as to the time when some of these time studies were taken here in '47—I think it will be one of these pages.

By Mr. Jinkinson:

Q. This is my next question. Maybe I can straighten this out. I know that Bergfeld Exhibit No. 1 is not dated or if it is dated I have not been able to find a date.

When it was prepared, can you state the time that Bergfeld Exhibit No. 1 was prepared?

A. Bergfeld Exhibit No. 1 is a compilation of these principles developed over a period of time.

Q. Well——

A. And some of the time standards in it I am sure go back as far as '47. Let me say the early periods of '47 and '48 or late '48.

Q. All right.

A. I am having to remember a little bit from the names of the men I had on the job and what they did. So I think——

Q. I refer you now to page 9.

A. Yes, sir.

[fol. 32] Q. It is acceptable time standards?

A. Yes, sir.

Q. As the first requisite, standards derived by conducting time studies for deliveries and so forth?

A. Yes.

Q. When were those time studies made which appear all through Bergfeld Exhibit 1?

A. Well, I think, as I remember it, the earlier periods of '47 and '48 time studies were made and that is right. The list will probably show that. I don't have the list in front of me.

Q. I may have been misinformed with reference to it. I thought they were all made in 1949.

Mr. Hart: '48 I think.

By the Witness:

A. You see they were done over a period of time, some of the original ones getting—when you take a time study particularly—the two things you have to watch, first of all you don't introduce into the environment of the person being observed a lot of confusion and upset that will defeat the thing that you are trying to measure. And as I remember it there were some practice time studies when the people assigned to the time study were obviously having to go through a training period. Then, I think there were more [fol. 33] studies later that were made by those same people.

By Mr. Jinkinson:

Q. Of course I am in error with reference to the position of the Bergfeld Exhibit No. 1 but it was my impression the time studies were all made on one or two days.

A. That is right, some years back.

Q. Yes, some years back. But now you have not included in the Bergfeld Exhibit 1 what practice runs you made, have you?

A. No. I think in Exhibit 1 we have not included any time studies as such. We simply included in Exhibit 1 the standards developed from the figures gathered on the time studies.

Q. Yes, but those time studies, as I understand it, were actual time studies made on either one or two days?

A. I don't again remember the number of days but I think Mr. Wooley does.

Mr. Hart: I think that is right. I think it was March 18th and 19th, 1948, if I am not mistaken.

Mr. Jinkinson: March——

[fol. 34] Mr. Hart: 1948, if I am not mistaken. I am checking my memory from something I saw.

By Mr. Jinkinson:

Q. I am trying to find out if you trained your personnel, gave them a trial run when you actually came to gathering these statistics for the basis of the time studies that constituted your basis, is that right, for your time studies in Bergfeld Exhibit 1?

A. It constitutes the basis for the time standards.

Q. To the best of your memory, when were you instructed by Bowman Dairy Company to compile Bergfeld Exhibit 1?

A. I don't think I can give you any single date on that. Each one of these, as I say, each one of these ideas, propositions, principles and techniques were developed with them over a period of time and this represents a compilation of over several ygars of working with them and compiling together, if you will, of the various techniques that individually have been in one way or another applied to many of their problems over a period of several years.

Q. Well, referring now to Appendix A, page 1.

[fol. 35] A. Yes.

Q. Of Bergfeld Exhibit 1.

A. Appendix A?

Q. Page 1.

A. Yes.

Q. The title of that page is "Standard Time Allowance From 1949 Time Studies"?

A. That is right.

Q. I assume there were no previous time studies included in this exhibit, Bergfeld No. 1, other than the time studies made in 1949?

A. I think that is right.

Q. In other words these practice runs and these other statistics you gathered were not the basis for this exhibit, Bergfeld Exhibit No. 1?

A. No, sir, I don't think they are. These actually, even back in the time when we were settling that glass paper problem, we made some time studies.

Q. They were not included in Bergfeld Exhibit No. 1?

A. I think these are from the 1941 time studies.

Q. When were you told to prepare it? Do you recall?

A. Is this by——

Mr. Hart: Are you speaking of putting it together in this form?

[fol. 36] Mr. Jinkinson: Yes.

Mr. Hart: In a book form?

Mr. Jinkinson: That is right.

By the Witness:

A. I can't remember just when we were asked to do that, honestly.

By Mr. Jinkinson:

Q. Were you ever at any time instructed to make a cost justification study?

A. As such, no, I think that when you say were we instructed to make a cost justification study I don't think we ever had instructions like that. I think we did have instructions to analyze the cost created by various customers and compare them with prices charged various customers to determine if there were inequities but I can honestly say that I don't think I was ever told to study to justify.

I think we were told to study, to analyze and to determine.

Q. Did you compile Bergfeld Exhibit No. 1?

A. I and my men compiled it.

Q. It was compiled under your direction?

A. That is right.

Q. It is undated as far as I can see.

[fol. 37] Q. Will you tell me when it reached this form in which it is submitted here?

A. I will have to look it up for you. I honestly don't know. It was done—it was done a part of the time.

Q. That is right.

A. Past information was drawn on for it and just when it all went together in this form I really don't know. I will try to look it up. I don't know of any recording, to my knowledge, but as of this date, pages from beginning to end were finished. I don't know of the recording of that. All I have——

Now, is there —I mean, is there some other way I can try to accommodate your inquiry? As far as the principles concerned here, as far as the ideas, as far as the concepts are concerned, those were going on during all of this period.

Q. Were other information or other statistics drawn upon in compiling this book that do not appear in this record or Bergfeld Exhibit 1, and if so, what kind?

A. On time standards we have a fairly broad frame of reference, having studied quite a few deliveries and in quite a few cities a few companies for many different types of [fol. 38] distribution. And we were constantly, whenever we got these time standards through, referring back for comparison with other similar time facts that appear here. We have made these breakdowns of elements. I think in total we have done something over a hundred in one way or another, working for over 100 milk companies.

Q. You don't mean to say, and I don't understand you as saying, I hope, that statistics or information gathered in other cities or in other companies were used as the basis in Bergfeld Exhibit 1?

A. No, to my knowledge we never altered whatever actually showed up in the Chicago readings, but we made the most use, as we do in all studies of any comparative data we can bring to bear on an analysis and we did, I am sure, reviewed the time values arrived at here in Chicago to be sure they were in range of other experience; but to my knowledge none of the figures from Chicago studies were altered.

Q. What you found in other cities and in other companies did not have any bearing upon what you actually found in the Bowman company?

A. Oh, yes, sir, they would have- you say a bearing. They would have a usefulness.

[fol. 39] Q. In what respect?

A. Well, where we have exactly a similar element, a time to pick up a case, and load it into a truck, the time to drive a mile under various conditions, customer density, are all physical measurements which whenever we can we make them just as right as we can because if they were glaring inconsistencies we would have had to ask for more studies to either explain the inconsistencies which very frequently

is done or, when I say inconsistencies I am not saying direct comparisons—or to find the reason for.

Q. In other words, as I understand you, what you are saying, if you made some similar study for milk company "Y", and a similar study for Bowman, which didn't come out anywhere near the same, you would make a further study?

A. That is right. We would have to have some reason why there were great differences.

Q. Yes. I would assume first your study of company "Y" was correct and the Bowman study was incorrect?

A. No, we couldn't do that.

Q. If you had five or six companies?

A. No, having, frankly, quite a few thousand individual readings on some of these elements, statistically we make [fol. 40] the most use of the information. You see this technique that we have in manual one, I think I must make this clear, was not invented for any immediate purpose of the Bowman Dairy Company. It was an application to the Bowman Dairy Company of standard cost and standard measurement technique that had been and are still being developed in the other studies we made.

So what you see here in the way of a technique in manual one is the application of a methodology and a technique about these measurements and these standards that we have been carrying on in one way or another in the last, oh, I would imagine, fifteen to sixteen years.

I should have pointed that out earlier, that these methods in manual one are somewhat orthodox methods, not only in the techniques of breaking time down into elements as we have got it here, fixed, variable and mixed, you know. That is a fundamental technique of time study applied and I didn't come prepared with some of the bibliography on this point. This is a fundamental technique of time study and time measurement.

Q. Would you say it was standard, used by every engi [fol. 41] neering firm or accounting firm?

A. Oh, I don't think it is confined—let me say standard. It is recognized practice.

Q. In your field?

A. Yes, breaking jobs down into elements and study standards for them.

Q. I am talking about the method you did.

A. That is the method, sir.

Q. This is the method which is standard by all companies, used by all companies, engineering companies?

A. Well, I can't say it is standard because standard to me is sort of a—has sort of a definitive meaning. I would say it occurs with significant frequency among, not only engineering companies but among individual private companies in their pursuit of these same cost standards. I mean, I would be willing to hazard a guess that many of the individual companies here in Chicago have time study departments who would recognize the breaking of the job down into its elements, according to variable, fixed and mixed and so forth.

As a technique at least they have considered it. Some of them may not use it. There are all sorts of other ways for [fol. 42] measuring this time and as you know, there are camera techniques and there is another way of measuring time which is built up. This I am sure I should have mentioned. You just build up from a universal set of time data that have the elements broken down into very fine where they will give you the time for moving your arm through an arc of so many inches.

What they do, they start with those smaller parts, even more universal everywhere times and build up their time values by that technique. These varying techniques are a matter of applying to the problem the one that best fits. If you have very minute assemblies, for example, you probably could build them up from some of these universal time tables.

These techniques were not anything that were invented for or by the efforts of the Bowman Dairy Company but were applied to their problem.

Q. Getting back to the discount schedule at Bowman Dairy Company——

A. What date, sir?

Q. Between March 7, 1948 and June 1, 1949, the discount remained the same at the A&P Tea Company at 3½ per [fol. 43] cent.

Now, on June 1, 1949, it was changed to 6½ per cent.

A. Yes.

Q. Can you recall any time study or any studies you made or any cost studies you made and submitted to Bowman Dairy Company which they used in their evaluation of changing the discount on June 1, 1949 to 6½ per cent from 3½ per cent?

A. I can recall that during that period we were making many studies for the Bowman Dairy Company. The period I am speaking of now which appears on my accounts is December, '48 through August, '51.

Q. Do you recall any particular study made at that time? If so, do you still have it, or a copy of it?

A. I haven't it with me and if there were any formalized reports made I believe I can find them.

I think that if would be better, if you are willing, than relying upon my memory.

Q. Yes. Will you send them to us and produce them for inspection?

A. May I be sure now? Any formalized written reports, as I understand it, Mr. Jinkinson, between December, '48 [fol. 44] and August, '51?

Mr. Hart: March 7, '48.
Mr. Jinkinson: March 7, '48.
Mr. Hart: To June 1, '49.
The Witness: March, what?
Mr. Jinkinson: March 7.
Mr. Hart: March 7, 1948 and June 1, 1949.
The Witness: March 7, '48.

By Mr. Jinkinson:

Q. And June 1, 1949.
A. And June 1, 1949?
Q. Yes.
A. Any reports, Bob, that we have made during that period, irrespective of what they relate to?
Q. No. I want them to relate to the change in discount granted by Bowman.
A. Let me look at all of them because as I say——
Q. You can look at all of them. All I want are those. I do not want all. I just want those.
A. All of these things are so inter-related I do not know if I can pull them apart. You see, my point on inter relation?

Q. Yes.

A. I mean it is just a matter of bricks and boards. You [fol. 45] use them in building various things, as you are asked to.

Q. Now, in the training——

Mr. Jinkinson: I will withdraw the question.

(Recess taken.)

By Mr. Jinkinson:

Q. Mr. Bergfeld, on page 9 of Bergfeld Exhibit No. 1——

A. Yes, sir.

Q. You say that, "As route foremen are familiar with normal methods and sequence of operations required to make delivery to stores, several were selected and trained in the procedure of recording time observations."

Were they trained by you or under your supervision?

A. By my staff.

Q. Your staff consisted of Mr. Havemeyer and other men?

A. I do[illegible]elieve Mr. Havemeyer was there at that time. It was n[illegible]r. Havemeyer. Just who it was I don't think I have as a matter of record because there have been different men worked for and with me here at Bowman.

[fol. 46] Q. All right.

Did you have anything to do with the personal supervision of the stop watch studies conducted by the Bowman employees?

A. I instructed the man who instructed the Bowman employees.

Q. And all the basic data used for Bergfeld Exhibit No. 1 was gathered by Bowman employees and not by your organization, is that right, but under your direction and supervision?

A. That is, as I remember it. There may have been some fragmentary exceptions but I don't remember any so I think probably—I would like to go back to a question on this particular point that you asked earlier.

Have we ever done any other studies regarding cost and price? I think I was interpreting your question to mean specifically Robinson-Patman milk cases.

Q. That was, of course, my question, also. I assume that was the answer.

A. That is right, we have done price-cost studies for other public agencies. For example, the State of Connecticut [fol. 47] asked us to make a study for them as to what prices should be charged by the State Regulatory Body because at that time they had in the State of Connecticut a price regulation for what could be charged for the resale of milk to stores and to consumers and this same technique that you see here on the establishment of time standards and the breaking of the day down into elements of work and of services performed, broken down into elements, that whole concept of plant standard cost, delivery standard time, and their related cost, has done a part of work in Connecticut and other places where State Regulatory Bodies were putting together a price structure that they felt was right for the industry. Whether or not in the back of their minds was any Robinson-Patman intentions, I don't know; but I have made several of those for various, and again, these same techniques were among those that——

Q. Getting down to this specific question, did you or did any of your men, that is any men under your supervision from your office, accompany any of the Bowman employees in their stop watch studies?

A. I don't believe they actually rode the trucks with the men; I think they did, however, as I remember it, meet them [fol. 48] en route to see how they were getting along.

Q. As far as you know none of them went into the store with the men who were actually making the stop watch studies?

A. Well, I don't know that they didn't go into the store. That is the best way for me to answer. They may have because our attempt was to instruct them as completely as possible.

Q. My understanding is that you say you don't know whether they did or whether they did not?

A. Go into the stores?

Q. Yes.

A. I don't know.

Q. Mr. Bergfeld, did you, or did you instruct anyone under you, to make a study of the method of delivery to chain stores?

A. I instructed men working for me to find out from Bowman employees the services rendered to chain stores.

Q. Well, from that study do you know whether or not milk sold to chain stores is delivered to the various stores and units of the chain store or whether it was delivered altogether at a central receiving station of the chain store? [fol. 49] A. From the information provided us by Bowman employees it is my understanding that individual store deliveries are made rather than central, what I would call central warehouse deliveries, which is, I believe, what you mean.

Q. Yes.

Were any studies made as to any difference between the total number of units delivered to chain stores versus units delivered to independent stores?

A. Studies were made on several occasions to determine the specific units of delivery.

Q. To chain stores versus independents?

A. To chain stores and independents.

Q. Did you find in that study some independent stores were taking as much milk as chain stores per store? That is, as many units per store as chain stores were taking?

A. Again we are talking about lots of studies.

Q. Talking about any study you made on that proposition, whether or not you discovered that some independent stores were taking as many units as some stores of the chains?

A. Yes, I believe the studies did reveal that some chain [fol. 50] stores were taking as much volume as some independent stores.

Q. And vice-versa, some independents were taking as much as some chain stores?

A. That some independents were taking as much as some chain stores?

Q. Yes. Now, did you make a study of the method of sale of milk to independent stores?

A. Well, you will have to help me understand what you mean by the function of sale. You see, sale is a fairly general term in our parlance.

Q. Referring to Schedule 6.

A. Yes.

Q. In Bergfeld Exhibit 1.

A. Yes, sir.

Q. There is an item included under salaries and wages as solicitors' wages.

A. Yes, sir.

Q. What does that refer to? What is that item?

A. My understanding from the client on that item is that solicitors are men who are out promoting and selling the product but are not involved in the actual delivery function of the product except as it may be incidental, sample-wise to the promoter. That was my understanding.

[fol. 51] Q. Did you further understand that the solicitors' wages listed in Schedule 6, Bergfeld Exhibit 1, is not applicable to independent stores only or is it your understanding that that item includes wages paid for people soliciting sales to chains?

A. I don't believe we made any differential between where the solicitors worked.

Q. Put it another way: Isn't all milk purchased by chain stores purchased at its headquarters?

A. Now, you are speaking of purchasing rather than selling?

Q. Yes. I am talking about, or if you want to put it your way, isn't all milk sold by the Bowman Dairy Company sold at the headquarters of the various chains and not to the individual stores?

A. Well, again, my understanding would be more in the direction that you had to sell it both places.

Q. Of course, that is very true. But do solicitors for which the item of wages appears in Schedule 6, does that include sales to chains or just to independents?

A. I would like to have a chance to check that point. My understanding, my understanding is that it might happen. That is what I am trying to answer carefully for you. It [fol. 52] might happen in either case but I would like to check that point on a clarification of my understanding.

Q. Have you made any study as to how Bowman Dairy Company sells A&P, Kroger——

A. If by selling you mean solicits and gets their business?

Q. That is right.

A. I have not observed any actual sale transactions, which is my way of studying it because—I have not observed any specific sales transaction nor I am safe in saying, I

think, none of my men have consciously observed any sales transaction between Bowman and the chains.

Q. Do you know who, or have you inquired or asked of Bowman who in the Bowman organization sells Kroger and A&P?

A. No, I have not because——

Q. No.

A. I have not asked who specifically sells A&P.

Q. Then as far as solicitors' wages appearing in Schedule 6, you don't know whether that item refers only to wages paid to solicitors who solicit independent chains—independent stores, rather than chains?

[fol. 53] A. I do not know whether it is exclusively for one or the other.

Q. You have made no determination as to who sells A&P and Kroger?

A. By the definition "selling" I gave you a moment ago, do you consider serving, a driver says, "Don't you want more because you need more? How about some of this today?"

Q. I am not talking about the driver delivering milk to the store. I am talking about the contract or the agreement made between Bowman.

A. To my knowledge——

Q. And to A&P buying milk and selling it in their stores.

A. Yes.

Q. That agreement.

Mr. Hart: What you are talking is who makes the contract to sell milk?

Mr. Jinkinson: That is right.

By the Witness:

A. I have not seen one of these made or broken it down into elements.

By Mr. Jinkinson:

Q. You don't know who makes the sale?

[fol. 54] A. No, sir.

Q. Do you know whether or not that sale is made by an officer of the Bowman company, such as Mr. Kullman?

A. I still don't know. I don't know who makes it.

Q. Did you make any effort to determine that in this cost study, Bergfeld Exhibit 1?

A. On Bergfeld Exhibit 1 you are asking if I made any effort to determine whether or not any officer of Bowman——

Q. Yes.

A. —consummated the transaction?

Q. That is right.

A. With chains or independents for that matter?

Q. Yes.

A. No, for this reason: That wherever possible in all of these studies, we steered to the more concrete and the more conservative measurements of the cost. The measurements of the officers' salaries and the application of officers' time to any given specialized task has always been a controversial and somewhat difficult thing to bring into precise cost calculations. This whole area of central office and administrative expense we have left out of the so-called distribution cost because to include it would be to indulge in a lot [fol. 55] of somewhat abstract and controversial allocations of their efforts and their abilities and their talents and their time.

Q. Now, you could ascertain very readily the salary paid to any officer. When I speak of officer I mean the president, the vice-president, secretary, on yearly salary, do you not?

A. I think those salaries could be ascertainable. To answer your question specifically, how much of their salary is on a post-facto entity, or the profit basis, how much could be precisely applied to an activity——

Q. Couldn't it, Mr. Bergfeld, have been possible for you to have asked whoever was negotiating with A&P or Kroger to keep a chart or a record of the time spent in negotiation?

A. I take that——

Q. The percentage of time spent in negotiating with A&P and in discussing it with A&P and then ascertain how much of these yearly salaries or of the yearly wage he received in devoting some to the A&P business?

A. I could have done that. I think I have to point out it would have been compelling to take the other accompanying [fol. 56] steps and then account for all of the rest of the time so that we were sure if we included any of his time that we made the proper inclusion of the rest of his time.

Q. Did you ever ask Bowman Dairy Company whether Francis Kullman was ever found soliciting independent stores?

A. No, sir, I did not ask the Bowman Dairy Company.

Q. But he was soliciting the A&P stores?

A. That I don't know.

Q. Assuming——

Mr. Hart: We will stipulate it is the only one in his own neighborhood.

By the Witness:

A. You see, allocating any of that central office, executive central administrative accounting and all that, to have allocated it soundly I would have allocated it all, not just a slice. I would have no way of balancing it up.

By Mr. Jinkinson:

Q. There would have been no necessity of allocating his time to an independent store if he made no solicitation of the store. You only have to figure what it costs Bowman to sell A&P, to find out how much of his time was devoted [fol. 57] to the sale of milk to A&P, isn't that right?

A. No, I don't think it is quite right.

Q. You don't think that is true?

A. I think—may I finish the answer on that other one?

Q. Yes.

A. I think I would have to have allocated some of his time to the direction and the administration of those who did solicit. Of course, then you would have to allocate that part of his time to the direction and to the driver who went to the chain stores as well as the independent store.

Q. That is what I am getting at.

A. To make any allocations I would have to make it on a total basis.

Q. Assume that this record discloses, as I think it does, the fact that no solicitor of the Bowman Dairy Company ever solicited an A&P store or a chain store and all that solicitation was done by headquarters of the A&P.

A. Yes.

Q. The headquarters of Bowman.

A. Yes.

[fol. 58] Q. Then do you think it is correct to have an item that appeared in Schedule 6 reflecting $6,000 or $3,000 spent for solicitors' wages, no percentage of the time devoted by Francis Kullman to be included in the exhibit 6, or Schedule 6?

Mr. Hart: May I make one observation there? We are treating the items "solicitors' wages" just as though the only thing that solicitor did was to solicit business. Now, a solicitor actually goes out when any store complained as to service or anything of that sort as well as asking the man for business.

Now, with that in mind I think your question is slanted at the fact that a solicitor's wages means merely going out asking the man to purchase, which is not true.

Mr. Jinkinson: Mr. Hart, do you disagree with the statement that this record shows that there was no solicitor ever approached any A&P store for the purpose of soliciting business? All the business was arranged between them.

Mr. Hart: I think that is true if you use soliciting busi-
[fol. 59] ness in that particular sense. On the other hand I wouldn't agree that he does not go to the A&P store to answer store complaints.

The Witness: That is what I said, occasionally he may carry a piece of product, something like that.

Mr. Hart: He may be holding business and not obtaining it with the A&P.

Mr. Jinkinson: I may agree to that.

By Mr. Jinkinson:

Q. The fact remains in Bergfeld Exhibit 1 there is no mention made of the amount of money it cost Bowman to sell A&P?

A. I think that is right. It is selling in the sense of the word—I mean in the meaning of the word "sell."

Q. That is right. Now, did you ascertain from an executive of Bowman whether there were any gifts or any entertainments or any other moneys paid to A&P for their business other than the discount given?

A. No. I asked them for these records that are submitted

here and I did not ask about gifts or entertainment of anyone.

[fol. 60] Q. Now, do you know how much time, you asked for how much time Mr. Kullman or any other executive spent at A&P, or that Bowman spent in securing the A&P business or Kroger business or any other chain store business?

A. I did not allocate to these costs for the purposes I mentioned before any officer's time to any specific function.

Q. Now, Mr. Bergfeld, did you make a study of the various methods of sale and collection between chain stores and independents?

A. As those were observed in the time studies before mentioned in specific elements?

Q. Yes.

A. Performed, I did not study them or observe them but as mentioned before their people did study and observe them under our instructions.

Q. They constituted a part of the Bergfeld Exhibit 1?

A. Yes, I think we show a breakdown of collection time.

Q. We will return to these specific parts of this letter.

As I understand it all the independents paid cash, is [fol. 61] that right?

A. Well, I would say that the standard practice, that is the safest to assume for independents is a cash payment. That is the concept of standard. That is the most frequent practice, as we understand it. I am trying to answer you. There might be a scattered exception.

Q. I understand that A&P pays from their central office.

A. That is what I understand, too.

Q. The independent pays cash each day upon delivery?

A. That is my understanding on this standard practice.

Q. A&P pays at the conclusion of the month or by the 10th of the next month, is that right?

A. The actual date when their payment is expected, I don't know, but I can check that.

Q. Did you ask, in making these studies, you ascertained at that time of making these studies when the A&P made payment for the merchandise delivered?

A. I don't think we went any farther than to ask whether they were because it had been standard practice in these other studies I have already mentioned whether they paid

[fol. 62] by check, periodically, or whether they paid daily by cash.

Q. Did you ascertain whether or not the A&P was granted any discount for payment within ten days after billing?

A. Did I ascertain whether or not A&P was given any additional discount?

Q. That is right, trade discount.

A. What?

Q. Trade discount.

A. No.

Q. You don't know?

A. No.

Q. When a driver collects cash at an independent store?

A. Yes.

Q. He returns to his headquarters, and that money is paid that day to the cashier or someone in the Bowman company, is that right?

A. Not quite. When you say that money is paid that day I think in effect the driver's book is kept showing what cash he is accountable for for deliveries made.

Q. When does he pay the Bowman Dairy Company the [fol. 63] money collected, how soon after he collects it?

A. The thing I am trying to accommodate in my answer is the fact that balances are kept against the drivers and from time to time, Tuesday's money collected may not be actually handed in on Tuesday. He may reconcile his book at a later date but for the specific moneys—my point is there is no physically placing of a specific customer's cash in a specific envelope but rather it is kept as a balance figure against the cost.

Q. They some day must pay the Bowman Dairy Company?

A. Yes. Occasionally, when they don't pay, I believe Bowman has a bonding program for that very reason. The drivers are bonded so that if they are short over a period of time and then leave the company——

Q. That does not answer my question. The question is this:

A. You want the expense of that?

Q. Do you know how soon after a driver collects moneys for deliveries to a Bowman store that he pays it to Bowman?

A. Well, I would think fairly soon.

Q. Do you know how soon? Is it that day, the next day, [fol. 64] or at the end of the week, once a month, or when?

A. That requires a st .istical analysis of their pay practices and their money turn-in procedures because——

Q. Did you make any determination of that?

A. As to how many days they are outstanding?

Q. And when he pays the money to Bowman?

A. No, but I can do that. I think we can, if you wait I think we could make up, you see, a frequency study of the——

Q. My question is, you made no determination of that in compiling Bergfeld Exhibit 1?

A. That is right.

Q. You don't know whether Bowman, how soon after Bowman received the money which the driver collected?

A. That is right.

Q. Now, is it possible he received it that day, the next day, or the next day, you don't know?

A. I don't know.

Q. But in any event Bowman had use of the money which these drivers turned in for use in their business?

A. I would assume that moneys turned in to them by the driver was available for further use. I don't know of any [fol. 65] restrictions to their using it.

Q. Yes.

A. There may be, but I don't know of any restrictions to their using money turned in by their drivers.

Q. And the A&P, a chain store account, they paid once a month. Bowman did not have access to that money until it was paid at the end of the following month?

A. Again, I don't know the extent to which Bowman might have ever factored the accounts receivable.

Q. There was no study made by you as to whether or not there would be any saving made to Bowman because of the fact that they received money from independents in the form of cash before they received money from chain stores, saving in the fact they had more working capital with which to work, not necessarily to borrow money, because they carry large chain accounts, or anything like that? Those studies were so made, is that right?

A. That is right. No study was made of the extent to which funds owing Bowman by anyone may have been used

as a basis for borrowing working capital or no study was made to the extent to which Bowman's working capital was [fol. 66] tied up in accounts receivable.

Q. Now, turning to your Exhibit No. 1 and particularly to page 3.

A. Let us just see, page 3 of Exhibit 1?

Q. Yes. These conclusions you reached there, if I am correct in my analysis of it, is that paragraph one, A to K, inclusive,——

A. Are both on the same page?

Q. Yes, page 3.

A. Oh, I am sorry. I was in the introduction. Yes.

Q. The elements appearing in paragraph one, A to K, inclusive.

A. Yes.

Q. Are peculiar to both chains and independents?

A. Are peculiar to both——

Q. Or applicable?

A. Applicable to both.

Q. Applicable to both?

A. Yes. Well, let us go down.

Q. They are headed "Necessary Work Elements."

A. I beg your pardon?

Q. I say the heading of the paragraph is "Necessary Work Elements."

A. Yes.

[fol. 67] Now, as a matter of standard practice—I am differentiating carefully here between standard costs and actual costs and carefully between standard practice and what might by chance occur. Those work elements, I would say, were common, or commonly required by both.

Q. The items listed in paragraph two are applicable to the optional customer service on this, to any independent stores, I would say, and is not applicable to chain stores?

A. Again, on the basis of standard practice, I answer that they are applicable primarily on standard practice to independent stores rather than chains.

Q. In the final analysis of Bergfeld Exhibit 1, the two items listed in paragraph two on page 3 are the differential between selling chains and independents?

A. They are the main difference.

Q. They are the main difference?

A. On services rendered. They represent the main differences in services rendered.

Q. What other services are used? You say there are other differentials other than the two outlined.

A. It depends on whether you are talking about a cost of [fol. 68] an individual delivery or resultant unit cost of the individual total transaction. You see, if you have differences in volume you will also have differences—it will be a factor creating differences.

Q. That appears later in the chart, in Bergfeld Exhibit 1?

A. Yes. But as a matter of standard practice these are the main differences.

Q. Now, b in paragraph two on page 3 states: "Collect cash and delay to collect cash."

A. Yes, sir.

Q. There is no delay you state in collecting cash at chain stores?

A. The delay that is comparable to chain stores is included up here in having delivery slip checked, and that is done in both cases.

Q. So that is applicable to both, here?

A. It is apt to be, that is right.

Q. Chains and independents?

A. Yes. So the delay to collect cash when you don't collect cash is not a delay to collect cash.

Q. That delay only happens, according to your study, in independent stores and the person who is delayed is the driver?

[fol. 69] A. That is right.

Q. Now, isn't it true in chain stores that the entire Bowman organization is delayed in collecting cash until they pay the next month?

A. Well, that gets back to your earlier question, and that is whether or not in anticipation of moneys received from A&P, working capital on a borrowed basis would be available to them in advance.

Q. And no study was made of that?

A. No study was made of that.

Q. Now, I notice that in this page 3——

A. Here.

Q. —in which it lists all the elements involved in delivery to chains and independents, that you have listed under "b,"

"deliver order to store," and you make a differential in the optional customer service under "a" of "delivery services beyond a sidewalk drop."

Well, do you mean to say that in "a"—what is the distinction between "a" and "d"?

A. Those services that we are referring to in summary form herein under 2.a are services which we understand are standard practice and are available to independent stores. [fol. 70] Q. Are they also available to chains?

A. No. It is my understanding that they are not considered to be a part of the transaction of the chain store.

Q. Now——

A. Did you want me to just mention what they are? You said, "What do those consist of?"

Q. I have your Bergfeld Exhibit 1 and I think it explains that.

A. Yes, I think it does.

Q. Plus setting aside bottles.

A. Yes, helping them on the inside of the store. As I understand it many chains object to that sort of activity of drivers inside the store.

Q. Where did you get that information?

A. From the Bowman Dairy Company and their staff.

Q. What were you told with reference to the practice of the chains of having delivery?

A. You mean these in-store services?

Q. For services described under "a".

A. Under 2.a?

Q. Under 2.a.

A. We were told that as a matter of standard practice the chains preferred not to have the driver doing those [fol. 71] things in the store. That, as I remember it, did create traffic problems within the store. At times when they didn't want that kind of traffic, they wanted customer traffic, and also they felt that they had in their store help provided for those things to be done at their own cost and by their own people.

Q. Were you told the reason why?

A. The reason why?

Q. Yes.

A. The reason why the chains preferred that?

Q. Yes, outside of the—were you told this? I will put the question this way:

Were you told that the chains desired to make their own display of their product in the manner they desired to have them displayed rather than to have the Bowman company make it for them?

A. I don't think we were told just that. They were told primarily they wanted—they did not want the driver to perform those in-store services as a standard practice.

Q. Into the next work element——

A. Yes, sir.

Q. —delivery to the store means just taking it inside the store, is that right?

[fol. 72] A. That is right.

Q. Is that the same thing as you refer to on page 8 as the limited service for delivery?

A. That is right. Yes, I think it is. Let me go to page 8. Which paragraph, page 8?

Q. The last paragraph.

A. That is the one you are referring to. That is right, "for delivery."

Q. Did you ascertain whether or not the independents who wanted just the floor delivery and nothing else?

A. Did we ascertain that?

Q. Yes.

A. You see, we didn't talk to Bowman customers at all. We asked the Bowman Dairy staff and employees what the service arrangements were and asked them to arrive at a considered standard practice which would be the thing expected to be done most of the time in most of the cases.

Again I get way back to the technology we talked about earlier. This is a standard costing technique where you base your cost on what is considered to be standard practice. So we didn't talk to any customers of Bowman about anything with reference to it.

[fol. 73] Q. Did you ever ask any official at Bowman Dairy Company whether or not independents had been notified that if they did not want the services provided in 2.a as listed on page 3, Bergfeld Exhibit 1, that they could get a discount comparable to chains if they took a comparable volume?

A. We did not ask that question.

Q. Do you know, have you ever seen any bulletins or any communications to independents that if they did not desire the service as listed in paragraph 2.a, page 3, of Bergfeld Exhibit 1, that they would be submitted the same discount as chains provided they took a comparable volume?

A. We did not ask for such bulletins. We did not ask to see them.

Q. You do not know whether or not independent customers had been advised that if they would dispense with that type of service they could get the same discount if they bought a comparable volume of milk per store?

A. We did not ask that.

Q. Now, Mr. Bergfeld, turning to page——

A. 9.

Q. —Bergfeld Exhibit 1, you state that standards for this [fol. 74] study—I assume for this study—were derived by conducting time studies for deliveries in Elston, Forest, Englewood and south divisions with the bulk of the study in Elston.

A. Yes.

Q. Now, the later charts which appear in Bergfeld Exhibit 1, for example Schedule 2, page 1,—Schedule 2, page 2,—are they based on studies made in the Elston Division only or are they based upon studies made in Englewood, Forest and south divisions?

A. Well, I think that, as we said back here, most of the studies were taken in Elston. Therefore, you could expect that most of these statistical data used most of it, in arriving at these times, would have more Elston content than the other locations you have mentioned.

Q. I am going to have to insist upon an answer, Mr. Bergfeld, a direct answer.

Were these studies which were made in Elston the only studies used in the chart Schedule 2, page 1, and Schedule 2, page 2, or were others used or were studies made in other divisions used?

A. Well, to give you a direct answer to that question, I will have to go back and reproduce that.

[fol. 75] Q. Referring to Appendix "A", page 1 of Bergfeld Exhibit No. 1?

A. Yes, sir.

Q. Now, were all these statistics that you arrived at and which appear on Appendix "A", page 1, Bergfeld Exhibit 1, the result of studies made in the Elston Division only or did they include other divisions?

A. Again I will have to go back and look at the actual dates. I am sorry I can't answer that yes or no as you have asked me to. I will have to go back and look at the date and see the extent to which data from those other locations had been used.

You understand how we do that?

Q. I understand.

A. We take these measurements for these elements and we see if they provide a reoccurring number on the scale of numbers for that defined element. Now, in making up the posting up sheets, I honestly don't remember whether the data from the other locations was used or not.

Q. Mr. Bergfeld, I understand that previous to this examination, Mr. Wooley had asked the Bowman Dairy Company to produce the work sheets upon which the defendant figures appear on Bergfeld Exhibit 1 were used. They have sub- [fol. 76] mitted only time studies made in the Elston Division.

A. I don't remember whether Mr. Wooley asked Mr. Havemeyer for all of the time studies or some of the time studies. I think Mr. Wooley was shown all the time studies, wasn't he?

Mr. Havemeyer: I think he was.

By Mr. Jinkinson:

Q. Would you, tomorrow morning when we resume, in the meantime, can you ascertain whether or not the result of the studies which is entitled "Standard Time Allowances Developed from 1949 Time Studies," appearing on page, Appendix "A", page 1, Bergfeld Exhibit 1, are the results of studies made in the Elston Division and if not, what other studies were included and from other divisions?

A. I shall certainly try.

Q. And also——

A. I don't know whether we can complete that by tomorrow morning or not. I do not know how far back we will

have to trace the data to see how many sources were involved but we can certainly try.

Q. And also if Schedule 2, page 1, and Schedule 2, page 2, of the Bergfeld Exhibit No. 1 were the result of studies made [fol. 77] in the Elston Division only or if studies made in other divisions were included?

A. Yes.

Q. Will you ascertain that by tomorrow morning?

A. We shall try. How far back we shall have to go into the dates I don't know.

Q. Do you recall how extensive your studies were in all divisions of the Bowman Dairy Company in securing data for Bergfeld Exhibit 1?

A. There are several ways of measuring extent and I don't have a cataloging here of how many store stops were observed and how many miles were driven but again we will——

Q. Do you know how many routes in each division?

A. Well, I think we mentioned that here, going back to the page you referred to.

Mr. Hart: Page 9.

The Witness: Page 9.

By Mr. Jinkinson:

Q. Page 9.

A. We say 55 studies were taken of 32 Elston routes from which standard time allowances were developed. To give you an answer how extensive 55 are, assuming that you would like to have us say how many stores and how many [fol. 78] readings——

Q. No, what I am trying——

A. Beyond this, what did you want?

Q. What I am trying to find is this: If you took 55 time studies on 32 Elston store routes in the Elston Division how many time studies did you take——

A. In the other divisions?

Q. On routes in the other divisions.

A. Let me try and ascertain that. This goes back some time and I am not quite sure that even our own log will show how many stores, how many routes and so forth were taken. I am assuming that the number and extent was a little hard

to determine. That is why we made this statement as we did, because it does go back some time. I think those files are pretty voluminous and I believe if that accounting had been simple we would have done it there because the point is in this whole manual, you understand, that we are indicating technique and therefore we, in laying out this technique, hadn't made all these counts too, you know.

Q. I understand.

A. Yes, you understand.

Q. You not only developed the technique here but you [fol. 79] want us to draw some conclusion from the studies finally made as the result of that technique, isn't that right?

A. That is right.

Q. Isn't that true?

A. Let us try and do that. I am sorry not to be able to say what time or how much will be involved in doing it but I think that if we can't give you the specific extent and numbers by divisions tomorrow morning we can at least tell you what is involved in getting them. Then I will have to ask the client the extent to which they want to go into that. That is the instruction I would have to have.

Q. The only thing I am trying to determine, Mr. Bergfeld, is what studies were made and in what divisions.

A. Yes.

Q. And the basis for and the final conclusion reached?

A. Yes.

Q. For example, getting down here to the customers' service page, Appendix "A", page 1,——

A. Appendix "A", page 1?

Q. Yes. This is an example.

[fol. 80] A. I understand.

Q. You finally draw a conclusion. You have .033 (average) per unit.

A. That is right.

Q. Which is very important for us to determine, whether or not that is the result of a technique made in the Elston Division only or all divisions.

A. We will be very glad to try to do that.

Q. I am trying to just find the basis for this.

A. Yes.

Q. The basis for the conclusion you reached. That is all.

A. Yes.

Q. Now, directing your attention to page 7.
A. Yes.
Q. Of the Bergfeld Exhibit 1.
A. Yes.
Q. We have the statement:

"Experience has shown that the independently-owned stores generally want the optional services."

What is the basis for the statement?

A. That again is based on our way of inquiring into what are the standard practices.

[fol. 81] Q. And that inquiry——

A. Was directed for the purpose of deciding how to differentiate——

Q. And directed to whom?

A. Employees of the Bowman Dairy Company. Again we didn't talk to their customers.

Q. You made no study. In other words you accepted the word of someone from the Bowman Dairy Company that the independently-owned stores generally wanted that type of optional service?

A. That is right.

Q. And do you mean to state then that this report is based upon the statements of people from the Bowman Dairy Company and not upon an actual survey by you?

A. Well, I mean to say that that point of establishing what the standard practices were is as I have said based on the statement of the people in the Bowman Dairy Company.

Q. And not the result of independent research by you?

A. We did not, to repeat, make the time studies nor did we interview customers as to their services.

Q. Let me ask you this question:

Who in the Bowman Dairy Company told you that inde-

[fol. 82] pendently-owned stores generally wanted the optional services?

A. I believe several there did. Just who they were on different occasions I don't know but there was a general agreement among the management that this was an assumption for purposes of studying a standard practice and method of serving the store.

Q. Now, the optional services, I believe you testified, is the big differential between cost of servicing chain stores and independents?

A. By our finding optional services are a big factor in the difference between serving the independent stores and chain stores.

Q. You say it is a big factor. Referring to Schedule 2, page 2.

A. Yes, sir.

Q. Of customer service——

A. Where are we now?

Q. Page 1, I mean.

A. Page 1?

Q. Yes. The customer service, which, of course, is the optional service——

Q. —the collections and the delay to collect are the only [fol. 83] three items which are different from the services rendered the chain stores and constitute in the end the differential as the basis for granting discounts. That is right, isn't it?

A. From the standpoint—again I have to go back to the same answer I gave to what seemed to me like a similar question: As far as the cost of an individual stop these other factors that I mentioned, of volume and so forth, must be included in as factors contributing to differences in the costs.

Q. Yes.

A. I answer it with that addition.

Q. Now, Mr. Bergfeld,——

A. Yes.

Q. I hand you Defendant's Exhibit 7, marked 7——

Mr. Hart: Bergfeld Exhibits.

By Mr. Jinkinson:

Q. Bergfeld Exhibit I guess you better put it, Bergfeld Exhibit.

A. Bergfeld.

Q. Bergfeld.

A. Yes.

Q. Bergfeld Exhibit 7.

A. This is another designation from this.

[fol. 84] Q. Yes.

A. All right.

Q. Bergfeld Exhibit 7, which contains pages 1 to 56.

A. Yes.

Q. These were submitted by the Bowman Dairy Company.

A. I mean you are calling it Bergfeld Exhibit No. 7?

Q. Just to differentiate them from Defendant's Exhibits 1, 2 and 3.

A. Not because their origin is of myself or my staff?

Q. No. Their origin from your staff. These were submitted by Mr. Havemeyer, with a letter?

A. Yes.

Q. In which he states:

> "Enclosed are individual route tabulations of the number of units delivered to independent stores which had no customer service during the 1949 time studies."

A. Yes.

Q. We have checked that.

A. All right.

Q. Added them. We have discovered that they amount to 295 stores, exclusive of chains. Those are independents?

[fol. 85] A. Yes.

Q. Which did not take customer service?

A. Yes.

Q. Now, I show you another exhibit which is marked Bergfeld Exhibit No. 8 and which includes pages numbered from 1 to 62.

A. May I again ask the origin of this?

Q. Well, the same origin.

A. The same origin. I remember talking with him.

Q. Exhibit No. 8 reflects the number of stores which took customer service and the total of both those independents, as reflected in Exhibits 7 and 8, which took customer service, those that did not take customer service, totaled, according to us, 739 stores.

A. Yes.

Q. I would like to have either you or Mr. Havemeyer verify our computation to that.

A. We will be glad to do that, meaning not now but sometime soon.

Q. You can do it either now, or later. What time is it?

Mr. Hart: Twenty after. We can take a recess for a while. [fol. 86] Mr. Jinkinson: We will take a recess to see if our computation is all right.

The Witness: Let me be sure that we make the computation verification you want.

By Mr. Jinkinson:

Q. Yes.

A. You want us to add up the number of stores?

Q. Exhibit 7, the number of stores appearing in Exhibit 8. That is all.

A. The first thing I will have to determine is if they are additive. I mean I don't know whether we are adding. Let us try and verify your computation.

(Recess taken.)

By Mr. Jinkinson:

Q. Now, Mr. Bergfeld, I show you, or look at your Bergfeld Exhibit 1, Appendix "A", page 1.

A. Yes, sir, I have it.

Q. The heading is "Standard Time Allowances Developed from 1949 Time Studies."

A. Yes, sir.

Q. Now, referring to Bergfeld Exhibit 7, page 1, which I have in my hand here,——

A. Yes.

[fol. 87] Q. The letter addressed to Mr. E. Wooley, United States Department of Justice, Anti-Trust Division, 219 South Clark Street, Chicago, Illinois:

"Dear Mr. Wooley:

"Enclosed are individual route tabulations of the number of units delivered to independent stores which had no customer service during the 1949 time studies."

Now, is it your understanding that the reference to 1949 time studies in Exhibit 7, page 1, is the same as the Appendix "A", page 1, of Bergfeld Exhibit 1?

A. You mean the '49 time studies referred to are the same?

Q. Yes.

A. That is my understanding.

Q. All right. Now, the letter states these independent stores which are attached to Bergfeld Exhibit 7 are the stores which got no customer service during that time study which is reflected in Appendix "A", page 1, Bergfeld Exhibit 1, is that true? Do you know?

A. I don't know but I am not entirely clear on your ques-
[fol. 88] tion. You understand the problem, the basic question that I am concerned about is whether or not the numbers you have added are additive, as I said before, or whether the cause of the different days in which the stores were studied, a store is being considered in more than one way.

Q. I don't know what you mean. I know that I have confused you sufficiently this afternoon. You will pardon me when I say "you." You confused me once by your saying "additive." What do you mean by "additive"?

A. That they can be added. You see, you put down a series of numbers, the sum of which does not carry meaning. You could put down the old question of adding horses and apples and if you added them together you wouldn't have a meaningful sum.

Q. You would only have 27 horses and apples, is that right?

Mr. Hart: No horses and apples.

Mr. Jinkinson: No apples, horses.

By the Witness:

A. I do not mean to be facetious. I think it will take, if you don't mind, a pretty detailed cross checking rather than just checking on the addition. I think we could do
[fol. 89] that fairly soon. But I think it will take a detail of cross checking to be sure that the figures are additive. I think Mr. Wooley will agree.

By Mr. Jinkinson:

Q. Mr. Havemeyer forwards to us a letter in which he attaches a list of stores, independent stores, which had no customer service during the 1949 time study; do you think he meant anything different than that which he wrote in his letter?

I call to your attention—first answer the question so we will have it in the record.

A. There may have been a better wording for his letter.

Mr. Hart: I submit that the only way you can get an intelligent answer is to go back to the time studies that are listed in the attached list to determine whether or not that particular time study shows, that covers both days for a stop, it covers only one day for a stop, or what it does.

By the Witness:

A. That is what I would like to do, to feel qualified to answer the question I have been asked. I would like to go [fol. 90] back and check that to be sure.

By Mr. Jinkinson:

Q. Mr. Bergfeld, I direct your attention to the attachments of Bergfeld Exhibit 7, 1 to 56.

A. Yes, sir.

Q. I direct——

A. Pages 1 to 56?

Q. Yes. I direct your attention to the heading of each one: "Summary of Units Delivered Independents with No Customer Service."

A. Yes.

Q. And it has the route number on it.

A. Yes.

Q. It has a study number?

A. Yes, sir. You understand the reason it has the study number?

Q. No, I don't. I am going to ask you that.

A. That is because there was more than one study taken.

Q. Right. And the next study is Study No. 611?

A. That is right.

Q. Bergfeld Exhibit 7-3 says "Study No. 612, Route No. 52," right?

A. That is right.

[fol. 91] Q. Well, weren't all the studies you made during the 1949 time study given a study number?

A. To my memory, I believe they were, each one was given a number.

Q. Isn't this exhibit, page No. 7-1, I mean Bergfeld Exhibit 1, or 7, pages 1 to 56, all taken from those studies made at that time?

A. To my knowledge they are.

Q. Where are they inaccurate?

A. Inaccuracy does not come—my concern about inaccuracy is not what is shown here on these individual pages.

Q. Right.

A. But what has been done to these numbers in your earlier statement where if they were added in such a way as to have the same store to be counted once as receiving and again as not receiving, the resulting sum is not an accurate reflection of the meaning I think you are looking for.

Q. Can we agree, according to Bergfeld Exhibit 7, pages 1 to 56, inclusive, that there were at least 295 occasions when an independent store did not receive customer service? You say it is one day, two days, or what?

[fol. 92] Mr. Hart: Yes, I think we can agree to that.

The Witness: Occasions?

Mr. Jinkinson: Yes.

Mr. Hart: Presuming the additions are right, we will trust Mr. Wooley that far.

Mr. Wooley: Thank you.

The Witness: Well, Mr. Hart has answered the question.

By Mr. Jinkinson:

Q. I want you to answer it.

A. Like the other answers to the questions you asked, it is a calculation I haven't made.

Q. Assuming your calculation to be correct?

A. Well, if I assume that I have in effect answered your question. It is that assumption that—I hope I am not being difficult. It is that assumption I am reluctant to make.

Q. You are not being difficult, you are just evasive.

A. No, I don't think so. You have asked me to assume a given figure was right; and, therefore, if I assumed it was right, would I agree to it.

Well, on the basis of that assumption there is no alternative, it seems to me, as I mentioned earlier, I would like to [fol. 93] check it, but I am perfectly—that would be my preference.

Q. What was your answer, that yes there were occasions, at least some occasions, when a customer, independent store, did not give customer service during the 1949 time study?

A. I am answering now the question: Do I think there were occasions when some independents did not get customer service?

Q. During 1949 time studies.

A. Yes, I think there were some occasions. How many is what I don't know, but I think there were some occasions.

Q. Mr. Bergfeld, will you point out in Bergfeld Exhibit No. 1 where there is any allowance made in your form of computation for those independents which did not receive customer service which is the basis of your differential between discounts to chains and independents?

A. I do not believe in Exhibit No. 1, if I understand your question correctly, that there is any adjustment for the fact that some independents sometimes do not take customer service.

A. Mr. Bergfeld, I hate to ask you to do all of this work, [fol. 94] but between now and tomorrow morning, can you determine how many occasions during the 1949 time study, independents did not take customer service?

A. I can certainly try.

Q. Now, Mr. Bergfeld, have you personally or any member of your organization, in making these studies, ever examined any of the route books of the Bowman Dairy Company?

A. On many occasions for many different reasons, not I as much as my staff. I have not seen many of them myself but my staff have reviewed the route books.

Q. Are you familiar with the contents of those route books?

A. Yes, generally, yes. I know what is contained, I know what is intended to be contained in the route books, what their purpose is. I have no memory of any specific entry in any specific route book.

Q. Mr. Bergfeld, I hand you a route book marked Bergfeld Exhibit No. 9, which purports to be the route No. 129 for March of 1955.

A. Yes.

Q. And I show you page 11.

A. Yes, sir.

[fol. 95] Q. Now, there is a notation reading: "No milk put away."

A. Yes.

Q. Is that right?

A. That is right.

Q. What is meant by that notation?

A. Well, the only meaning I could put on that notation is a literal one.

Q. What would that literal meaning be?

A. No milk put away.

Q. Would it be customer service? Is that the customer service referred to in Bergfeld Exhibit No. 1?

A. That is part of the customer service.

Q. That no milk—well, the other part is the delay in collection?

A. No. The other part is taking it to the back of the store, putting it in a place of his choice.

Q. Rearranging the bottles, taking the old milk out in front and putting the new milk behind?

A. Yes. Whether or not that statement means all of those things, I don't know.

Q. I show you an exhibit. I show you page 8 of the Bergfeld Exhibit No. 9.

[fol. 96] A. Yes.

Q. What is the customer's name appearing thereon?

A. As I read it, it is Charley's Market, market abbreviated as "Mkt."

Q. The address?

A. 427 West 69th Street.

Q. What notation appears on page 8 of Bergfeld Exhibit 9?

A. There are two notations on page 8 of Exhibit 9. I assume it is 9.

Q. That is right.

A. One is, "Give order," and the other is "No milk put away."

Q. That is the same as appears other places in Exhibit 9 in which appears Stenn's Market?

A. Stein's.

Q. Stein's Market?

A. No, sir, I think the opposite occurs.

Q. Milk put away. Milk put away there?

A. It is mentioned in Stein's Market.

Q. Milk put away.

A. It says they do put it away.

Q. They put it away there?

A. Yes.

[fol. 97] Q. I will show you page 9 of Bergfeld Exhibit 9.

A. Yes.

Q. The store listed there is Kroger's.

A. Kroger's. Kroger's as it appears here is 7260 West Ave.

Q. West Went.?

A. W-e-n-t.

Q. And the notation there is on page 9?

A. Two notations are on page 9, "Give order" and "No milk put away" and the third notation is "Use side door."

I think there were additional notations besides those, on other pages we referred to. May we go back?

Q. Page 8.

A. Charley's Market. It says, "Use side door and two trips." That means that we have to take a second trip back to that store.

And then shall we look for the additional notes that there might have been on the other page?

Q. What other page was it?

A. There is quite a few "Milk put away" as we go through.

Q. What?

[fol. 98] A. Quite a high incident on it. It says "Milk put away Monday only."

Q. Monday only?

A. I don't know whether that means that he only put it away on Monday.

Q. You don't know whether it means it is only serviced on Monday?

A. I don't know which meaning it has.

Q. You do know all of it appears on Monday only?

A. Yes, "Milk put away Monday only."

Mr. Hart: He can tell whether he gets milk on other days than Monday based on the charges of the book.

The Witness: I am speaking from the note.

By Mr. Jinkinson:

Q. On page 6 of Bergfeld Exhibit 9 appears, what store and what address?

A. It says, "A&P." This is really on page—yes, call it page 6, open page 6, "A&P, 6702." Again I believe it is Went. Ave.

Q. What notation has reference to what to do with the milk?

A. "No milk put away."

Q. "No milk put away"?

[fol. 99] A. The other quotation there is "Gives order." If there is anything else that is significant—let us look at some more. Excuse me.

You want to ask?

Q. Yes. On page 8 of your Bergfeld manual.

A. Yes.

Q. No. 1.

A. Yes.

Q. Bergfeld Exhibit No. 1.

A. Yes. Exhibit, page 8, Exhibit 1, right.

Q. Has a notation that, page 8, appears some of the optional services.

A. You see that is why I wanted to take a look at that additional note. Down here we say, among the optional services is this calling back later in the day. There is a case of Charley's Market—wasn't it Charley's Market?

Q. Right.

A. Where he didn't have the milk put away——

Q. He did have the milk—he did not have the milk put away?

A. He did not have the milk put away, as I remember it, and it did say two trips. And that is what we mean in this service on page 8, "Call back later in the day."

[fol. 100] Can I show you what I mean? That is another case, Charley's Market.

Q. This is Wilson.

A. Calling back later in the day, as we found in that notation of no put-away.

Q. Yes.

A. Is another additional service.

Q. Do you know what that service was?

A. Calling back later in the day?

Q. Yes.

A. Where it says two trips?

Q. Yes.

A. No.

Q. Do you know whether that was to deliver more milk?

A. I would assume that it was for some purpose. Now, whether it was for the delivery of more milk or not, I don't know.

Q. What other reason would they go back for if it wasn't for the delivery of more milk?

A. He may not have been able to get the slip signed. It may be he may not have gotten the order. If it was a regular thing for two trips a day I would assume there was some regular reason for his going back. Just what it was [fol. 101] I don't think any of us can devise from the note.

Q. I will show you page 13, open page 13 of Bergfeld's Exhibit 9 and ask you to read the notation there.

A. It says, "After serving Wilson return to Charley's Market," page 8, I believe.

Q. Yes.

A. Second trip.

Q. Yes.

A. Then it says "Collect and pick up." I don't know what that means.

Q. Cases, isn't it?

A. Yes, it might be cases. It might be cases.

Q. Well, and the occasion for the second trip is to collect and pick up the cases, isn't it? It isn't to deliver additional milk?

A. I am not at all sure that is true.

Q. Is it three trips that the driver makes to Charley's Market?

A. No. I am simply leaving room for the possibility where it says "Return to Charley's Market," that page 8, second trip, that it may be for these reasons and others.

[fol. 102] Q. It only says on page 8, of course, is Charley's Market.

A. That is right. It says two trips.

Q. It says two trips.

A. And on those two trips it doesn't say.

Q. What they are for?

A. To collect.

Q. It doesn't. Over here on Wilson's Market, page 13, Bergfeld Exhibit 9, it does say, after serving Wilson, "Return to Charley's Market," page 8, second trip.

A. Yes.

Q. "Collect and pick up cases."

A. Well, again I see what you have asked me to read.

Q. That is right. I am not asking you for an interpretation of it. I am asking you if that appears there.

A. Yes. I see what I have read.

Q. That is right.

Mr. Hart: I would certainly agree that you two gentlemen are going to indulge in an interpretation of what you find in a milk route book and you have a fertile field for imagi-
[fols. 103-104] nation.

Mr. Jinkinson: Well, off the record, I have not seen any addresses other than store addresses.

The Witness: Or any other reasons for calling back.

Mr. Jinkinson: Which leads me to believe the old theory about the milk man is much maligned.

Mr. Hart: Maybe that is the reason, Earl, for the union insisting on such premiums for store delivery as against home delivery.

Mr. Jinkinson: Let us quit now and resume tomorrow morning.

Mr. Hart: What time do you want to resume?

Mr. Jinkinson: Is 10:00 all right?

Mr. Hart: Yes.

(And thereupon the further taking of the deposition of the Witness Bergfeld was continued until Friday, September 7, 1957, at 10:00 o'clock a.m.)

[fol. 105] September 7, 1956

ALBERT JOSEPH BERGFELD, having been previously duly sworn, was examined further and testified as follows:

Cross-examination. (Resumed)

By Mr. Jinkinson:

Q. Mr. Bergfeld, you were previously sworn and you are the same Mr. Bergfeld who testified yesterday?

A. I am, sir.

Q. Now, during our intermission, have you had an opportunity to examine your records and determine whether or not records taking other divisions of the Bowman company, other than the Elston Division, were used in computing Appendix "A", page 1 of Bergfeld Exhibit No. 1?

A. We worked on that last night, as we promised you we would, and we did some checking, particularly on this customer service element. We chose that first because we thought it would be to your greatest interest.

And we did verify that the time studies of Elston were the basis provided for the customer service element listed in Appendix "A", page 1.

Now, to verify the other elements—or to determine if the other elements were based strictly on the Elston time [fol. 106] studies, I made a general review of some of the working papers. I have found no trace of these standards having anything but Elston time study readings in them.

Q. All right. So that it is agreed that all the figures—or it is agreed the basis for the figures appearing in Appendix "A", page 1, of the Bergfeld Exhibit 1, were from the Elston Division only?

A. No. I wanted to finish. I said I found no trace of figures anywhere else. And if you want to have absolute assurance of the point, I can go back and check the other elements as we did customer service.

Now, this is a service again to you. We tried to determine how long that would take to check through this one element and verify that all the data used in making it up came from the Elston time studies took about a one and a half to two man weeks. To do it with that same absolute assurance for all the other elements would take about that long.

Q. Well, is it a fair statement then to say your research last night determined, as regards to customer service,

appearing in Appendix "A", page 1 of the Bergfeld Exhibit [fol. 107] 1, all the figures used there were from the Elston Division only, and that as to the rest you do not know at this time? You could not say?

A. Not with the same assurance.

Q. You could not say with the same assurance, that would be a fair statement?

A. Could not say with the same assurance as the rest of the elements, but on that one we give you that.

Q. Now, did you make the same study of customer service in other divisions of the Bowman Dairy Company?

A. When you say "the same study of customer service,"——

Q. Yes, as it appears on page 1, Appendix "A", Bergfeld Exhibit.

A. I do not remember that we have ever done it completely for another division.

Q. You take samples?

A. I think primarily to determine the time standards.

Q. And did they vary? What did your findings show? Did they vary in other divisions, either above or below the point .033 which appears on Appendix "A", page 1?

[fol. 108] A. Well, now, I have got this down to .033 I realize——

Q. Well, wait a minute. First you answer the question.

A. All right.

Q. Did they vary any?

A. Well, we did not calculate the 033, see? For these other divisions where we time studied—this is what I did not realize until late yesterday, I don't think it has been completely understood by you folks before, is not completely explained probably to have given you that.

See, the 033 is a figure of time, divided by units. In other words, the 033 is not a pure time study reading, it is a correction of the time required for that element in terms of time per unit, not per customer.

Q. I understand that, per unit per bottle handled everywhere.

A. To all independents.

Q. To all independents.

[fol. 109] A. It is an average. Whether they took customer service or not, see, that is why I mentioned—that is

why I was recalling yesterday, you were adding up customers. I think you asked me another question yesterday, about whether or not we had corrected for customers on the matter of customer service.

Well, Mr. Jinkinson, it did not seem possible to correct on the basis of customers. And I believe I answered your question yesterday saying that nowhere in this report had we attempted a further correction by customers, because I assumed that you realized that we have had to make a correction on a unit basis instead of on a customer basis.

Now, may I go on? Is this a useful direction for me to answer?

Mr. Hart: I wish you would for me, because I am frankly confused now.

Mr. Jinkinson: I am sufficiently confused.

Mr. Hart: I wish you would show me how on 033, or .033, it is arrived at.

The Witness: Well, let me show you on the pages that were given to Mr. Wooley, we showed, as you remember, [fol. 110] independents——

Mr. Hart: Referring to Bergfeld Exhibit what?

Mr. Jinkinson: 7.

Mr. Hart: Or 8, or what?

Mr. Wooley: 7, in this particular one.

The Witness: Here were a list of those customers that on this study took no customer service. (Indicating.)

Mr. Jinkinson: Right.

The Witness: Now, this is not to imply that they never take customer service, but it simply says, as liberally as we could make it on this study, they did not.

Now, also I think—is this the same exhibit?

Mr. Jinkinson: No, this is Bergfeld Exhibit 8.

The Witness: 8. Now, here you will see that we took again customers who were observed to have had those services. And also there we list the time.

Mr. Jinkinson: That is right.

The Witness: Now, if you were to add up that time——

[fol. 111] By Mr. Jinkinson:

Q. On all time in Exhibit 8?

A. Oh, yes, sir. All time.

Q. On Exhibit 8.

A. It would come to 223275 total minutes.

Now, there is a little three minute possible discrepancy there. Now, if you don't mind me looking over your shoulder——

Q. That is all right.

A. You see, as you understand, these are pencil notations taken out in the weather riding on a truck, and sometimes a 3 looks like a 5, and a 2 looks like a 3; but overall I think we balanced out within three minutes in the 223275.

Now, those minutes were then used for the correction of customer service, not being rendered all the time, because those minutes were divided by the total, not only of these units but these units plus these units (indicating).

So we corrected on the basis of the units rather than the customer for this very good reason, is that it isn't, as I think I mentioned yesterday and these need not be additive, it [fol. 112] isn't possible for us to always say this is the customer who takes the service and this is an independent customer who does not take the service, because the customer can change his mind, and apparently has changed his mind, taking it as we dug out last night as you asked us to, how many cases where these would be double listed. And we have some findings on that which I can show you.

So instead of the cost calculations being for a customer correction, as your question of yesterday indicated, we made it as a unit correction by taking all the units delivered to the independents, divided into the time spent on these services for independents.

Q. For all independents?

A. The time spent for all independents. Of course, where there is no time spent there would be nothing to add into the figures.

Q. That is right, but for all customers?

A. That is right, for all independents.

Q. For all independents, whether they took the customer service or whether they did not take the customer service, is that right?

[fol. 113] A. Right.

Mr. Hart: One thing I would like to clear up for the record before you go on. You said, "We took these units and these units. Now, is it true that, for the purposes of

the record, you were adding the units represented in Bergfeld Exhibit 7 to the units represented in Bergfeld Exhibit 8? Are those the two, "these units," you are speaking of?

The Witness: Yes. Now, again, understand we had to work with material that is not absolutely easy to read. We are working with some manual figures here. And again I think that if you were to add these with your staff——

By Mr. Jinkinson:

Q. These figures appearing on Bergfeld Exhibit 8, if you were to add those figures, you mean the time and the units?

A. Yes, sir.

Q. All right.

A. And you would take also the units from Bergfeld Exhibit 8 and add them to units as shown on what I believe [fol. 114] you designated as Bergfeld Exhibit No. 7, you would come to a figure substantially——

Q. 66,500——

A. Substantially the same as 66,574.

Q. Right. And in that figure, 66,574, appearing in Appendix "A", Bergfeld Exhibit 1, page 1——

A. Yes, sir.

Q. (Continuing)—is included for customers who took it, independents who took the customer service and independents who did not take the customer service?

A. In that figure is included units——

Q. Right.

A. —going to customers who did take customer service and customers who did not take customer service. I keep saying "units."

Q. Units is all right.

A. That is why yesterday my answer to you on customers was a liberal answer. It was not a customer correction, it was a unit correction.

Q. Let me repeat again so I understand it correctly. The figure 66,574 appearing on Appendix "A", page 1 of Bergfeld Exhibit No. 1 represents the addition of all the [fol. 115] units of Bergfeld Exhibit 8 and Bergfeld Exhibit 7, and on Bergfeld Exhibit 7 appears to be customers who did not at one time or another take the customer service?

Mr. Wooley: And Exhibit 7.

The Witness: Exhibit 7; are customers who did not take customer service during the course of the study thereon indicated.

By Mr. Jinkinson:

Q. That is right. All right.

Mr. Hart: Well, now, what is your point in there, that they may have at other times taken customer service?

Mr. Wooley: That is recognized.

The Witness: I can't get at this from the standpoint of a customer.

Mr. Hart: Yes, I see.

The Witness: I have to say units being delivered to independent stores will require from time to time, and have required by observation, customer service time.

Mr. Hart: An average of .033?

The Witness: That is right, as these calculations read. [fol. 116] Mr. Hart: I see.

The Witness: I cannot correct on a customer basis because I am not sure the customers will stand still for me. The relationship of that to your question, Mr. Jinkinson, I have not gone through for the accompanying time studies in these other divisions a similar corrective calculation to this.

And I might also say this, too, that wherever there was any doubt about whether a figure was to be included or not, I think you will find that we consciously, deliberately steered on the side of keeping it higher, the figure, so the 66,574 I think is a good representative interpretation of the data we have used in calculating, copies of which I think you have.

By Mr. Jinkinson:

Q. All right now. As long as we are on the point, on the .033 figure, I will ask you this question: Does it assume that a driver of Bowman Dairy Company carries one case at a time, that figure?

A. Well, this particular figure is a mixture of more than [fol. 117] just carrying time.

Q. Well, I do not mean carry, I mean handle one case.

When he brings it, it also includes the time, does it not, from the time he gets it from the truck and brings it in the store and puts it in the cooler, and rearranges the bottles, or anything else he has to do with it; it represents all that time, does it not?

A. Yes.

Q. Well, does it represent that a driver is handling only one case at a time, or at independent stores where he delivers three or four cases, that he is carrying the three or four cases together?

A. Well, I think you said "assume."

Q. Yes.

A. Now, I do not believe that we have assumed here, I think we took the actual time and the actual units in arriving at this standard. And as we call this times—remember that I spoke of them here—those are direct observations from the time studies, aren't they?

Q. That is right.

A. And these units are direct observations from what was taken in?

[fol. 118] Q. Right.

A. So there is no assumption as to how many cases carried, it was simply observed cases, observed time, one divided by the other. I do not know whether that accomplishes the purpose of your question or not. But I am trying to reply to that——

Mr. Hart: Let me see if I understand that. In other words, you took the actual time. Let's assume a driver took four cases in on a dolly——

The Witness: Yes.

Mr. Hart: (Continuing)—and on your time study you were charging up a certain length of time. Now, you took the actual time that he was in that store making that four dolly delivery, and that is a part of this 2,232 minutes?

The Witness: That is right.

Mr. Long: You mean four cases on one dolly?

Mr. Hart: Four cases on one dolly, yes.

The Witness: Well, that time might have been when he was carrying one case by himself. You see, that is a different kind——

[fol. 119] Mr. Hart: The actual time that he spent in the store. Is that it? Then when you came over to determining

the number of units, this 66,574 that you were going to divide into this 2,232, there you took the number of units that were delivered on all of these studies that you made?

The Witness: That is right, as shown by the sheets.

By Mr. Jinkinson:

Q. All right. Now,—are you through?

Mr. Hart: Yes.

By Mr. Jinkinson:

Q. Well, now, do the trucks of the Bowman Dairy Company carry dollies as part of their equipment.

A. I think there is a variety as of now. I think some have hand trucks, some have dollies, I think some stores provide dollies. The thing is, there is no safe generalization on that point. I think it is a matter of pretty much individual practice.

Q. Well, referring now to Schedule 2, page 1 of Bergfeld Exhibit 1——

A. Yes.

Q. —now then, no, Schedule 2.

[fol. 120] A. All right.

Q. I don't think that is the right one. Schedule 2, page 1.

Mr. Hart: Schedule 2, page 2.

Mr. Jinkinson: No, Schedule 2, page 1.

The Witness: Schedule 2, page 1?

Mr. Wooley: That long table. Way before that. That one (indicating).

By Mr. Jinkinson:

Q. Now, you have the stores classified according to volume.

A. Yes.

Q. Now, a driver delivering a case of milk or a supply of milk to a store taking ten units per day, that is equivalent to not even half a case of milk. In all probability you would not use a dolly, you would just take it in?

A. That is right, in all probability.

Q. Now, when you get down to a store which uses a 200 unit order, which represents eight cases of milk, eight and a fraction, he would in all probability use a dolly?

A. If I were he, I would.

Q. Well, if you were an engineering expert you would [fol. 121] advise him to use a dolly, would you not?

A. I would advise him to use some carrying convenience. When you say "dolly," these hand trucks do come into proper use.

Q. That is right, anything that would carry more than one case of milk?

A. That is right. Anything that would increase his convenience.

Q. Well, now, the question is this, did you ever study the possibility that the average time per unit would be different for different sizes of deliveries?

A. The average time per unit?

Q. Yes.

A. Yes.

Mr. Wooley: Per customer service?

The Witness: Oh, per customer service?

By Mr. Jinkinson:

Q. Yes.

A. Oh, for customer service the time would be different for various sizes of delivery.

Q. That is right. To put it specifically, do you make a comparison in the time per unit for a man carrying one case in by himself at one time versus a man who carried five cases in on a dolly?

[fol. 122] A. For the customer service?

Q. Customer service, yes.

A. I think our method of calculation takes care of that. As you see, we have over here said that the .033—and again I am afraid this is part of the problem you get into when you handle this on a customer basis—the .033 is per unit.

Q. That is right.

A. So in testing how much should be allowed for an independent store stop, we do not just take so much for the customer stop, we take the .033 and multiply it by the number of units.

So that if there are a lot of units, we are assuming there will be a lot of .033's required.

Q. But 033 equals an average per unit, is that right?

A. That is right.

Q. Whether it is handled by a driver taking one case at a time or a driver taking five cases in on a dolly?

A. With or without the aid of anything, that is right.

Q. No, with the aid of a dolly or a carrying case, or whatever he uses.

A. Whatever was used when he was observed.

[fol. 123] Q. That is right. Isn't that true? Is that what 033 represents?

A. 033 represents just what I mentioned before, the amount of time divided by the number of units.

Mr. Hart: Before we go on with this, let me understand something. Now, I am going back to this Appendix "A", page 1. You have an item in here, "delivered order, 7.795 for the first case, and .295 for each additional case."

The Witness: Yes.

Mr. Hart: And then on the other hand you have this customer service thing. As I understand it, Mr. Jinkinson's questions are now phrased, why, we are treating this customer's service as though it included taking the stuff into the store.

The Witness: If that was the intention, I do not think that is correct. I think what Mr. Jinkinson was asking——

Mr. Jinkinson: No, I agree with you. I was specifically directing my questions to determine the amount of time spent under your customer's service as it appeared in Ap-
[fol. 124] pendix "B", page 3.

The Witness: Now, I think I can say that we have reasoned this problem the same way that your question indicates that you are reasoning, and that is, if you have a lot to bring in there is apt to be required more time for putting it away.

And that is again our reason for correcting on this thing on the basis of units. So you would multiply the units, you see, by .033 and have the allowance grow with the volume to be in-store service.

By Mr. Jinkinson:

Q. That is all right, but the point is the proportionate time in handling one unit versus the proportionate time in handling—I mean, not one unit, one case of 24 units, versus five cases of 120 units—well, let me give you an example of what I am trying to get at.

Assuming a driver handles one case, he brings it into the store, it takes him one minute to put it away, that 24 quarts [fol. 125] or 24 units, and he gets 1/24th of a minute per unit. Now, if he brings in five cases we assume the question—the question is, if it takes him two minutes to put it away, there are 120 units involved, of course it would take 1/60th per unit per minute.

Mr. Hart: That is the point I get confused on. I can't see the difference, if you are putting it away, putting it in an ice box, how it is going to change by the fact you are using 60 instead of 12. You are still going to be handling 60 bottles.

Mr. Jinkinson: Yes, but it isn't all just putting away. I direct counsel's attention to the enumerated Paragraph 16 in Appendix "B", page 3, under "A", where a part of the customer's service consisted of moved cases to another part of the store other than the place where the original delivery ended.

Mr. Hart: In other words, your original delivery you are talking about there is after this deliver order, charged so much for the first case and so much for each additional case. [fol. 126] Now you are going to do something after having completed that?

Mr. Jinkinson: That is right. It is all, I understand, constant. It is one of the constant elements. Here it is.

Now, the deliver order where you get the .795 for the first case and .295, that is a constant element which is both constant for chain and independents.

The Witness: No, sir, that is not quite the meaning of "constant."

Mr. Wooley: Same service rendered to both, he means, both chains and independents alike for that particular service.

[fol. 127] The Witness: I just want to be careful we don't mix up the idea of a fixed element.

By Mr. Jinkinson:

Q. No. To continue my question, then you get—the thing of my question, then you get over to this customer service.

A. Yes.

Q. Now, the question is, in moving the cases to another part of the store other than the place where the original delivery ended, did you make any study as to the proportion of time spent in moving one case versus the proportion of time spent in moving five cases on a dolly? I mean, that is the whole problem.

A. To the extent that that movement complies with 16-A.

Mr. Hart: When you say 16-A you are talking of Appendix B, Page 3?

Mr. Jinkinson: That is right.

The Witness: No, we did not make any study of the difference between in store movement per unit of stores having five cases or one case, because our problem was one of tying the customer service back to the unit and not the individual customers.

[fol. 128] Again, I do not think I have made myself clear that if we approach this on a customer basis you cannot handle it. We have not made a customer correction. We have taken it on the basis of units and we have allowed for the risk of what we know is going to be required on some independent stops that these customer services in store will have to be performed.

By Mr. Jinkinson:

Q. However, referring back to Schedule 2, Page 1 of Bergfeld Exhibit 1——

A. Schedule 2, Page 1. Yes.

Q. Your classification of customers, however, does have some effect upon the proportion of time used in moving the different volumes as appearing in the different classifications, do they not?

A. Only because of the difference in units.

Mr. Wooley: That is right.

The Witness: Only because of the difference in units.

Mr. Jinkinson: All right.

The Witness: You will have to give me a chance to say

a little more on this point later. This standard has its own [fol. 129] problems which we have solved in the way I have tried to demonstrate. And also which with this is available.

By Mr. Jinkinson:

Q. Now, do you make any attempt in your study, services between the chains and independents, to trace the billing, method of billing chains? Do you allocate an expense for that?

For example, do you understand my question?

A. Yes. I want to be sure I understand it. Did we, for example, go into the offices and make a detailed step-by-step analysis in what was involved in billing?

Q. Yes. The cost inherent therein?

A. Yes, many things at the Bowman Dairy Company. We looked at that again from a management standpoint as to procedures and methods. We did not include any of those office-differences in our suggested manual.

I do not want to get away from what was the intended spirit of this manual. We did not suggest any complication of this manual by going into those office accounts because, again, I think that it involves clerical and office operations which would in turn require complex and, I am afraid, argumentive and arbitrary allocations of office space and time [fol. 130] and everything else.

You see, there is no limit to what we could have done. The point is that we tried to keep it as clear and simple and direct and uncontroversial as possible, because we were trying to provide them with a practice which would make it possible for them to keep this equity principle we talked about, something that would be manageable from an administrative standpoint.

If we extended it into the many things that might have been done, at least in my judgment, was to take detail beyond the necessity.

Q. Well, is it true that in servicing a chain store—withdraw the whole question.

Did you make a study to determine the method whereby a chain store receives milk or merchandise from the Bowman Dairy Company in respect whether or not the manager had to O.K. the delivery?

A. No; that was driver's time and truck time again, and we tried to get the slip-signing time and the several transactions in the time study; that is right.

Q. And the manager at each chain store had to finally sign the slip presented to him?

[fol. 131] A. That was assumed to be standard practice.

Q. Now, the slip went back with the driver showing the amount of merchandise delivered that day?

A. That is right.

Q. And he turned it into the division office?

A. As I understand it, yes. The flow chart on those individual procedures is not indelible in my memory, now, but I think what you have said so far is substantially correct.

Q. And those slips representing the merchandise delivered by Bowman were then sent to the central office and posted?

A. They may be posted at the divisional level and brought up to a money total. I do not know whether then or now how far the division office goes and how far the home office goes, but one place or the other; it is reasonable to assume that was done.

[fol. 132] Q. All right. But by the end of the month they all accumulated in headquarters, so one bill was sent to A&P or other chains?

A. Yesterday you asked me about procedures for billing to A&P, and I think I mentioned then that the exact billing procedure to A&P was not a specific thing we included in our observations; that is, we did not trace through in an auditing sense the billing steps of the accounting entries.

So I want to be very careful that I don't agree to anything I don't know. I do not know on the basis of any of these observations or on the basis of the suggested managerial procedure for keeping prices equitable the billing practice that from time to time has been worked on or the billing frequency, for that matter, had from time to time been worked out between Bowman and A&P.

Q. Now, you also have an item in your study concerning special deliveries of milk to independents, is that right? I think it is on page 8 of the manual.

A. Page 8 of the manual?

Q. Yes: "Call back later in the day to deliver more

merchandise if refrigerated equipment cannot accommodate the entire order at once."

[fol. 133] Now, in your study of deliveries to chain stores, did you ever find that any special deliveries were ever made to chain stores?

A. I have not scanned the data for that particular point, but from a practical standpoint you could assume that it might have happened. I could assume that it did happen. But I think I can give you this assurance, that if it had happened with great frequency—I am reasoning now from the logical way we put our calculations together,—but if it happened with great frequency we would have included it in the standard for chain stores.

Q. I see. But you admit that it may have happened, and probably did happen, right?

Mr. Hart: There is no question about that.

The Witness: That is just a common sense answer.

By Mr. Jinkinson:

Q. Is that reflected in any place in the study?

A. You mean in this proposed manual, did we ask them to recognize the fact that chain stores might get special deliveries?

Q. Yes.

[fol. 134] A. No, I do not believe so.

Q. Yet it is one of the items which you include in Page 7 as the option service which the independently-owned stores generally want.

A. I don't think "generally want."

Mr. Hart: I don't think that is what you are talking about at all.

The Witness: I can't say "generally want." All I can say is where it occurred we took the time for it.

By Mr. Jinkinson:

Q. But you did not take it in reference to chain stores?

A. Because from the standard practice standpoint it was not considered among those things they require with frequency necessary to recognize it in this manualized attempt to anticipate what services are required.

Mr. Hart: Well, if it occurred, did you take it? I mean, if there were instances in the days that you studied of a chain store call-back, did you calculate it?

The Witness: I would like to go back through the data to see if it did get in.

[fol. 135] By Mr. Jinkinson:

Q. Well, the point is, where would it show up in the manual?

Mr. Hart: Isn't that true in Bergfeld Exhibits 7 and 8?

The Witness: Well, Bergfeld Exhibits 7 and 8 has independents only. I would like to go back and check that.

By Mr. Jinkinson:

Q. Well, here is the point I am trying to make: As I understand it, this whole study is built on the theses that the elements appearing on Page 3, Bergfeld Exhibit 1, Paragraph 1, from A to K are all applicable to chains and independents alike, that the justification for any discount is found in Paragraph 2 on Page 3, Bergfeld Exhibit 1.

Now, we turn to Page 7—Is that right?

A. Well, again we come back to what I mentioned yesterday. There are two things that enter into the differences in margin available from a chain store and margin available from an independent.

Q. Those are the two things which appear on Page 3, Bergfeld Exhibit 1?

A. Well, also the extent to which the volume taken in [fol. 136] number of units——

Q. I am speaking of each level of volume.

A. What?

Q. I am speaking of each level of volume

A. Oh, given to the same in volume?

Q. That is right.

A. All right, that will help me.

Q. Yes.

A. For similar volumes the main differences are the differences between 1 and 2.

Q. Appear in 2 on Page 3 of Bergfeld Exhibit 1?

A. That is right.

Q. Now, I direct your attention to Page 7. You say "experience has shown that the independently owned stores generally want the optional service, which may include some of the following work elements."

Then you list them. Over here you list as one of those elements, "Call back later in the day if the refrigerated equipment cannot accommodate entire order at once."

A. Yes.

Q. Now, you list that in the independent services, but you do not list it for chain stores; yet you admit that chain stores on some occasions do have special deliveries or have [fol. 137] trucks call back again.

Mr. Hart: Well now, I do not know.

The Witness: I do not think I said quite that.

Mr. Hart: There is no mention that the refrigerated equipment at the chain stores is not sufficient to accommodate the entire order.

By Mr. Jinkinson:

Q. Let me ask you this question: What does that have to do with the driver's time? He has merely got to re-deliver more milk.

Mr. Hart: If you assume that there is no sufficient refrigerated equipment to accommodate the entire order, then obviously he is going to have to make a second trip at some later time. But there is no reason for an assumption that that is true of these chains.

Mr. Jinkinson: I am not assuming about the refrigerating service in either event, whether a store does have sufficient refrigerator or not, the truck has to make two trips. [fol. 138] Mr. Hart: Well now, you are including special deliveries. As I understand this item, it does not include special deliveries. This is regular.

Mr. Jinkinson: Well, I think we are arguing about a distinction without a difference.

The Witness: I think there is a difference, Mr. Jinkinson, which is more than a word difference. You see, as I understand it, the Bowman Dairy Company does have on reserve at various divisions a service where if a customer does run out in the course of his day's business, and calls as an emergency and wants some more, it has been their ex-

perience it has been good business to go out and make a special trip with a special truck for a special delivery.

Now, that is in the parlance, I think, of the Bowman Dairy Company, and is called a special delivery, a specific definitive type of service.

Now, I think there is another type of second delivery, if [fol. 139] you want to call it that, which is the call-back by the regular truck and the regular driver because of limitations encountered or difficulties encountered in the first delivery. So that is, I think, a distinction.

By Mr. Jinkinson:

Q. Are you familiar with the bylaws of the Milk Drivers' Union, Local No. 753, of Chicago?

A. Generally, sir.

Q. Are you familiar with Section 58?

A. No, sir.

Q. It reads as follows——

A. No, sir; I would not remember that one.

Q. It reads as follows. Section 58: (reading)

> "It shall be a violation of the rule for members to make two deliveries to the retail trade dairy stores, stores included. Where members are found guilty of such violations they shall be fined not less than $10 for each offense."

(Discussion off the record.)

Mr. Jinkinson: All right, let's get back.

[fol. 140] The Witness: But we are correct that I did not admit that I had seen these occur: I said I think probably they might.

By Mr. Jinkinson:

Q. Now, let's get down to that special delivery service and a part of the question of the sale and delivery of milk. Now, did you make any determination in your analysis of delivery on the part of Bowman Dairy Company as to what stores call for special delivery, whether an independent calls more frequently or whether chain stores call more frequently?

A. I do not have any details on that here.

Q. Well, did you make it at any time?

A. I cannot remember any specific study on that point, where the company as a whole made an analysis to see who and what size and what kind of customers required special delivery.

Q. Well, the accounting for time for special delivery does not show up in Bergfeld Exhibit 1?

A. That is right.

Q. That is right, you say?

A. Yes.

Q. Now, Mr. Bergfeld,——

Mr. Hart: Well, is that correct or is that in the general [fol. 141] cost?

The Witness: Well, he said the time.

Mr. Hart: Oh, the time. I see. Well, how about the money.

The Witness: Well, the accounting—let's go back to where we have the money.

Mr. Wooley: Schedule 6.

Mr. Jinkinson: Last page.

The Witness: In the accounting records as they are shown here, I think you will see that any special breakout is not a part of their regular accounting procedure, or at least a listing of these expenses.

Now, again it is a matter of how far one would go. For example, I want to ask your patience on the point, that to break down each one of these items, depreciation, gas, oil and so forth by each individual truck, whether it would be a special truck or a regular truck, and to break down some of these items as to just the amount which might have been created because of this accommodation of special delivery is, I think, not only laborious but in some cases impossible, [fol. 142] because locked in the past are those facts not so analyzed out.

And I think it is very probable, and that is why I was trying to answer your question before on this relative point, study might be required to see if there were any traces of this in the dollars involved. It would be a tracer-type of study.

Now, how much of the depreciation it is and whether or not the special delivery truck was an old one or a new one.

and whether it was a gas eater or whether it was the same as the other trucks, and all those things, is again a demonstration of what we are trying to do here, we are trying to give them something that is practicable for them to follow in this equity pricing objective of ours and not have them go beyond what seems to be practical in the way of cost of doing it.

These individual, more detailed analyses are, I am afraid, more laborious than it would appear. As a matter of fact, [fol. 143] to get the data up to this point has been quite a job in terms of man days.

By Mr. Jinkinson:

Q. Now, I am going to refer to Schedule 6 in Bergfeld Exhibit 1. Now, the first item represented there—incidentally, this is for November, 1954, the month of November?

A. Yes.

Q. The first item represented there is auto expenses.

A. Yes.

Q. Depreciation, I assume, means depreciation on all trucks used in the Elston Division?

A. Yes.

Q. Gas and oil represents gas and oil purchased for the use in those trucks?

A. Well, I think it really means probably more gas and oil used. They may at some time inventory those, I mean, just whether they are on an inventory or cash basis on gas and oil would be the only qualification to agreeing with your observation.

Q. Insurance represents the insurance on those trucks for those months and the license represents a proportional share for that month for licensing trucks used?

A. Yes.

[fol. 144] Q. Repairs and supplies I assume means just what it says, repairs and supplies of your trucks?

A. That is what it means.

Q. And repair and upkeep. Now, there was no rent. Now, that totals $9,894.35.

A. Yes, sir.

Q. And that is approximately six or seven per cent of the total amount?

A. Yes. Actually, well, it is better than ten.

Q. Between ten and eleven?

A. 99.85. I mean, you make your own choice of the figure.

Q. Just so it is approximate. Now, the salaries and wages, they represent delivery wages. Is that the cost of delivering the merchandise in that division for that month?

A. Those are the wages paid for the functionings from an accounting standpoint that they call delivery. It is not to be confused with a more precise definition of delivery or carrying that we refer to over here (indicating).

See, these are the natural accounts. That involves the payroll wages of people involved in the general function, and here the "Delivery" word means that general function.

[fol. 145] Q. And what does milk room wage mean? What people would be included in delivery wages beside the drivers?

A. I am trying to scan these other accounts, but I would think that there would be some relief and probably some supervision and some accessory indirect labor functions that would go with it.

Mr. Hart: That would include your assistant foreman, your foreman, your relief drivers.

The Witness: That is what I mean.

By Mr. Jinkinson:

Q. Your special delivery drivers too?

A. Yes.

Mr. Hart: That is a possibility too. It might in some instances include loaders.

The Witness: Well, the milk room here is a separate item, you see.

By Mr. Jinkinson:

Q. Does it all relate to drivers who drive on the route?

A. I would think they would be related, yes.

Mr. Hart: Well, that is the point I was making about loaders. Now, there is a jurisdictional fight between 753,

[fol. 146] which is the Drivers' Union and 754, which is the inside dairy workers Union, as to who will have jurisdiction of, for instance, loaders who load trucks within the building.

Now, in November, '54, I cannot tell you whether loaders were under milk room wages or under delivery wages, but they might well have been under either one of them, that is just a matter of time.

At the present time they are under 754, but it is my recollection that they were at one time under 753.

Mr. Jinkinson: Well, I take it that a driver does not load only his own truck then?

Mr. Hart: Many of them do, but some of them do not. I mean, there are some trucks with long hauls that are preloaded for them. I am not speaking particularly of Elston. I am speaking of general experience.

The Witness: I think it varies too from time to time.

By Mr. Jinkinson:

Q. Now, Mr. Bergfeld, state what milk room wages are. What does that represent?

[fol. 147] A. My understanding of that is that milk room wages involves the divisional milk room activities accessory to delivery.

See, that division—this is true of the Bowman Company—that division is a distributing division, as I understand it, and the milk room wages would involve all those working in the milk room activities.

Q. Doing what, for example?

A. Oh, handling cases and——

Q. Would it be filling bottles also?

A. No, no.

Mr. Hart: Not at Elston.

By Mr. Jinkinson:

Q. Putting them on the platform?

A. Yes.

Q. Anything else that you can think of that that would include?

A. Well, there are a great many things. I am just

wondering if it would not help you if we got a definition of the chart of accounts where all these questions would be answered in the way they are handled as entries in the books. I do not happen to have the chart of accounts with me. But that would give you an explanation in the great [fol. 148] detail you wish for each one of these accounts involved, the instructions, you see, as to where to post these various activities.

Q. Well, what does solicitors' wages include?

A. Well, the pay they were given.

Q. For what?

A. For whatever they did, whether they went out on an emergency call or whether they went out on a promotional call or a complaint. This is a total of wages for anything they did.

Q. And office salaries and wages include what?

A. The same thing, for their work.

Q. Now, vacation wages is included?

A. There again I think the chart would show how that was included.

Q. And personnel benefits include what?

A. Well, again, the usual benefits being paid to those receiving these salaries and wages.

Q. Now, what is the item "Total Commissions"?

A. Those represent commissions paid by commission agreements.

Q. Paid to drivers?

A. Yes.

Q. Now, the milk bottles, the bottling expenses. Item: [fol. 149] "Bottle Deposit."

Before going into that, what is the basis for calculating these total commissions?

A. That I think is in the most recent agreement. Again, it is based on the man's load. There is no commission, as I remember, for the first so many units of his load. Then there is a rate of commission after so many units and then an increased rate of commission later for additional units.

Q. In other words, based on the units he carries?

A. No, not entirely. As I say, the first units of the load are not considered commission units. In other words, there is no commission——

A. A unit is the measure used?

A. Only in the way—have we got a copy of that, because I think if we had a specific reference—I have not got a copy of it.

Mr. Hart: The Union agreement?

The Witness: Yes, on how the commission is to be paid.

Mr. Long: It is right here (indicating).

The Witness: See, that contained in there what you want. You see, it isn't really on units, it is on points. May I look over your shoulder?

[fol. 150] Mr. Jinkinson: Yes.

Mr. Hart: Points.

Mr. Jinkinson: Points.

The Witness: Well, it isn't on all of those.

Mr. Hart: Some things don't carry points and some things do carry points.

The Witness: It isn't all on points. The first points——

Mr. Hart: Some of them don't have any. Up to a certain point they do not carry any commission.

The Witness: That is right. I think that is stated in there.

By Mr. Jinkinson:

Q. It is stated there. Now, in the bottling expense you have an item, "Bottle Deposit." What does that represent?

A. Well, again, this is an account carried here on the deposits of the bottles themselves. See, this whole bottling expense, the division as we understand it, is charged for the bottles that they are given to work with, and they [fol. 151] are expected to return them. And in those calculations the bottles are given a value, and sometimes there will be more bottles or less bottles go back to the stores than originally went to them.

I mean, the bottles, losses, as such, —well, you are familiar with what happens to milk bottles sometimes. Sometimes they are not brought back and sometimes they are brought back.

And this is the ebb and flow of the surge of that old circuit of bottles in circulation. And money calculations for responsibility purposes are counted against Elston for what their ebb and flow was.

I assume you do not want me to get all the complexities of bottle trippage and loss.

Q. The item Bottle Loss, their expenses include bottle loss. Now, you have an item, Bottle Expense. What is the difference between Bottle Loss and Bottle Expense?

A. Well, I still wish that we could answer those from the chart of accounts.

Q. What is represented by Bottle Allowance?

A. Well, that again is this accounting for the allowances that are made for these various losses incurred in handling.

Q. That bottle expense represents $4,465.87, which is [fol. 152] approximately what, a twentieth of the total expense of the Elston Division, November, 1954?

A. Yes.

Q. Now, dropping down to other expenses——

Mr. Hart: I might say in connection with any of these, we are perfectly willing to exhibit the books for the determination of the exact items that go into these various things any time you want to look at them.

The Witness: The point is that it constitutes such a long answer, the only way to give a definitive answer is to read from the chart of accounts.

Mr. Jinkinson: For my examination, I am not questioning the accuracy, I am just trying to lay a predicate for questioning.

By Mr. Jinkinson:

Q. Now, can you answer this question: Does this bottling expense happen to be computed on the basis of so many cents per bottle involved in each store?

A. In each store, no. Again, it does not mean each store. It means of the total bottles.

Q. Used by the Elston Division?

[fol. 153] A. Yes.

Q. Now, dropping down to the other expenses, there is also sales contest expense, $800.

A. Yes.

Q. Then there is an advertising expense, $1,903.95.

A. Yes.

Q. There is building repairs, $48.30.

A. Yes.

Q. Is that at the headquarters of the Elston Division, do you know?

A. The Elston Division building, yes.

Q. Depreciation; that is on the building?

A. Yes; and in there there might be some other depreciation too, you know. It may include building appurtenances. Again, I will have to get back to the chart of accounts. It may be building appurtenances or furnishings, what is considered to be depreciable of the facilities used at Elston other than this depreciation up here (indicating).

Q. Other than the depreciation appearing under "Automobiles"?

A. Yes.

Q. Then you have an item "Equipment Repairs." Is [fol. 154] that on the equipment of the Elston Division?

A. Yes.

Q. Then you have Ice and Refrigeration. Is that at Elston Division headquarters, ice furnished drivers?

A. All these were given to us as being at the Elston Division.

Q. And you have an item of Insurance. Is that insurance. Yes, insurance, $5.71. And Laundry, seven, sixty-nine.

I assume that is for laundry at the Elston headquarters?

A. That is our assumption.

Q. And licenses, $268.58?

A. Yes.

Q. Is that State or County or local license of some kind?

A. Again, the chart of accounts would tell us exactly, but that would be my understanding.

Q. Miscellaneous expenses, eight forty-nine, twenty, covers almost anything?

A. Anything except for other items specifically enumerated.

Q. O.K. You have office supplies and expenses, $22.95; Operators' Supplies, fifty-six seventeen; Rentals, $10; [fol. 155] Taxes, $423.30; Telephone, two sixty-six fifty-three; Trade Expense, one sixty; Utilities, sixty-nine seventeen; Vending Machine Expense, $42 and Store License, $6.

Those items appearing under other exhibits total $6,613

even. That represents approximately seven per cent, is that right, of the total expense?

A. I have not calculated the percentage but it represents approximately whatever it is.

Q. Do you know whether or not the bottle expense represents losses incurred at the store as well as at the division headquarters, as well as bottle allowance paid to the various stores for bottle returns? Do you know that?

A. There again I would have to assume that it did for that reason, that when a bottle is gone it is very hard to decide where it's gone. All that is accountable is that it is not there. Well, I think you see my point.

Q. Now, I direct your attention to Schedule 2, Page 1 of Bergfeld Exhibit 1.

A. Schedule 2, Page 1.

Q. As I understand, it is the ultimate culmination of all of the studying you have made in your manual, Bergfeld [fol. 156] Exhibit 1, is formally used?

A. These are the standards, yes.

Q. Now, in looking at this Page 1 of Schedule 2, Bergfeld Exhibit 1, how many items appearing thereon are taken into account in finally determining the total time of delivery for independents?

For example, "Get Order." That is included in the independents?

A. That is right.

Q. Delay to get order, customer service?

A. Yes.

Q. Make up order slip?

A. Yes.

Q. Have slip checked?

A. Yes.

Q. Route bookkeeping?

A. That is right.

Q. Collect is included?

A. That is right.

Q. Delay to collect is included?

A. That is right.

Q. Drive on route?

A. That is right.

Q. Load cases at plant is included?

[fol. 157] A. Yes.

Q. Select merchandise is included?

A. Yes.

Q. Unload order is included? Sort bottles also is included?

A. Yes.

Q. Pick up empties?

A. I think you skipped a column.

Q. Delivery? All right. "Delivery" is included?

A. Yes.

Q. And sort bottles also is included?

A. As shown here?

Q. Yes. Pick up empties?

A. Yes.

Q. Load empties on truck is included, right?

A. Yes.

Q. Arrange loads is included?

A. That is right.

Q. Unload cases at plant is included?

A. That is right.

Q. Of all these items which are included in the independents' calculations, what are not included in determining the ones formerly used by the chains?

A. Well, that goes to the points we have mentioned [fol. 158] before.

Q. Well, name them again. Customers' service?

A. Yes. Those are the items that——

Q. And collect and delay to collect, is that right?

A. Yes.

Q. Now, returning now to Schedule 6 now, what is the figure appearing in the next to the last line, or the item appearing at the next to the last item, which reads, "Number of Route Days"? Now, what does that figure represent?

A. That represents the number of routes operating extended by the days they operate.

Q. For the Elston Division in the month of November?

A. That is right, yes.

Q. November, 1954?

A. Yes.

Q. Now, that figure is one thousand five hundred and seven, is that right?

A. One thousand five hundred and seven.

Q. Now, that is divided into the $84,657.55 which represents the total expense of the Elston Division for the month of November, 1954, does it not?

A. Yes.

[fol. 159] Q. And you get an item entitled, "Cost Per Route Day" of $56.18, is that right?

A. Yes.

Q. Now, on Schedule 2, Page 2, Exhibit 1, is an item appearing, "Total Delivery Cost (15 cents per minute)." Now, how is that arrived at?

A. Well, that is arrived at by going back to the number of minutes used in direct—let me see. Let's go back, Bob, can you help me find the page I am looking for. I am just looking for the page in which we showed where the productive time on the routes is divided by the amount per route day.

Mr. Havemeyer: Page No. 5 of the manual.

The Witness: You see, what we say there is that for each of these routes there is a combination of two things. There is "Make Ready," and "Personal Time" and "Time for Customer Service."

And we explain there that some of these things the driver does is preparatory and personal rather than of direct service. And it is the direct service time which we use here to determine in this demonstration on 5 the calculation for each route, the quotient of the cents per minute [fol. 160] of customer service time—see, that is a fairly common practice again in costing.

By Mr. Jinkinson:

Q. Go ahead.

A. You see, in almost every sort of a task there is a preparatory and make-up time which does not produce any end service or product.

And so the cost for the end service or product has to be reckoned on the productive time required to provide it.

So we have divided the cost of the route day by only those minutes found to be available for the direct providing of services, in search of a more accurate value for those service minutes, in search of a more accurate value for those service minutes than if we have this thing mixed

up with all these incidental things that are not direct services.

Q. Now, I understand that Page 5 is merely an illustration of how you arrive at this fifteen cents per minute which appears in Schedule 2, Page 2?

A. That is right; that is another part of this manual.

Q. That is right.

[fol. 161] A. I would like to get some water in a minute, if I may.

Mr. Jinkinson: Let's take a short break then.

(A short recess)

By Mr. Jinkinson:

Q. Well now, Mr. Bergfeld, you use, I notice, on Page 5, down here in your example, the figure fifty-six eighteen. The same figure appears on Schedule 6, isn't it?

Mr. Hart: Yes. Now, the last figure in 6.

The Witness: You say "in our example."

You understand this manual is all an example. This is a demonstration of technique, this is a manualization of procedure, and we submit it as an example.

By Mr. Jinkinson:

Q. Why did you arrive at the total delivery cost as fifteen cents a minute, as on Schedule 2, Page 2? Is that an example or an actual figure?

A. No, see, that is another example. These examples given in this manual are an attempt to formalize specifically these procedures.

[fol. 162] Q. Well, let me ask you this question then. Appearing on page 5 in your example, how did you measure the 417.3 which you use as a denominator in the division of 5618 and 417.3?

A. This is to be an example of how the time standard can be applied to a route for the determination for the 417.3. That is, in other words, we take the total of the customer service of the elements defined as customer service as they would be predetermined and required for the customer mileage and product content of the route and determine its time content.

Q. In accordance with these formulae which appear on Schedule 2, Page 2?

A. These time drivers. I will wait until Mr. Wooley finishes because I want to be sure we are talking about the same thing.

Q. Did you use the formulas which appear on Page 1 of Schedule 2 and Page 2 of Schedule 2?

A. Yes. That is not quite a formula, but those standards are the things used.

Q. Appendix A would be the formula. Those standards were used?

A. I think I can explain it in this way. Here we have got a man doing many things during the course of a day. [fol. 163] Through his functions the company is providing products and the company is providing services. And this whole cost is a combination of products and services.

Now, to make them additive we have to reduce them to a common denominator that will measure the miles compared with the slips signed and compared with the cases carried. We have to get them all back into something where we can relate them one to another so we can get at them for costing purposes.

Now, I do not want you, for my own professional good. I do not want you to think this is an experimental procedure. That is very common in manufacturing and distribution functioning. I mean, when you are measuring the output of a group of men in manufacturing activities, they may be making a great many varieties of things and doing a great variety of jobs during the course of a day.

Well then, to get back to the measurement of the cost, you have to get them in common terms, and that is what this whole thing is a demonstration of, a very well established technique taking the time equivalent for the task at a rate per unit of time to determine its cost.

Probably a good part of that wasn't necessary. I just [fol. 164] wanted to give the principles and the application of established practices in exhibit 1 here that we are trying to get demonstrated. This whole thing, Exhibit 1, as we referred to it, is that demonstration.

Q. But they are related in this formula appearing on Schedule 2, Page 1 of Schedule 2 and Page 2 are related to the Schedule 6, that the formula appearing——

A. Schedule 6?

Q. Yes. In that formula, it is applied against the total expense of doing business in the Elston Division.

A. The figure 5618 from Schedule 6?

Q. Yes.

A. Is brought together with calculations similar to that on page 5 and demonstrated on Page 5 to determine the cost per customer service.

Mr. Hart: As I understand it——

The Witness: That is shown here on the page, see? The number 5618 is divided by the 417.3.

Mr. Hart: But the time and example on 5 are purely arbitrary examples?

The Witness: Yes, the whole thing is an example.

Mr. Hart: I mean, those do not come from some actual [fol. 165] happening, they are just some figures that somebody picked up to show the example?

The Witness: That is right; that is right; we are demonstrating the technique. You see, within the Bowman organization there have been parts of these things that we have talked over with parts of the organization, depending upon their responsibility and their cognizance. Now here is the pulling of all those advisory discussions together.

By Mr. Jinkinson:

Q. Now, in reality then, it works this way: The procedure in applying the formula, you apply the work element formula as it appears on Appendix A, Page 1——

A. Appendix A, Page 1? Yes.

Q. You apply the work element formula appearing under Appendix A, Page 1, to each store, each route, to determine the total driver time spent in each store, is that right, for the day?

A. The effect is substantially that, yes.

Q. And, 2, then you total, you take the sum or total of all such drivers' time for all stores and routes to obtain the total time for the purpose of—or for the Elston Divi- [fol. 166] sion, and this represents—the total represents this 417 appearing on Page 5?

Mr. Wooley: By way of example.

By Mr. Jinkinson:

Q. By way of example.

A. Yes, that is the idea.

Q. Which are used to obtain the cost per minute used in Schedule 2, here? (indicating)

A. Demonstrated in Schedule 2 for arriving at a money value for the time units so covered?

Q. That is right. And that would be the total that appeared?

A. There are some little qualifications I could make, but in general that is the idea.

Q. That is the way it works?

A. Yes.

Q. Now, that means, does it not, that in the fifteen cents which appears as an example on Page 2 of Schedule 2, that a percentage of that fifteen cents is represented by whatever percentage the total items on Schedule 6 is to the figure of $84,000, the total cost, for example?

A. In considering the cost per minute, the expenses——

Q. A proportion of that fifteen cents is the same proportion as to what the various items, for example, auto ex-
[fol. 167] penses on Schedule 6 is $9,894, which is about ten per cent——

A. May I look at your book?

Q. (Continuing)—which is about ten per cent of the total of $84,657.55? It is approximately ten per cent?

A. Well, that arithmetic seems sound. That is, of the fifteen cents, if you wanted to get those expenses back in terms of expenses per minute, and you went into the distant decimal places for each one of those in the fifteen cents you would rightfully expect that they would constitute of the fifteen cents the same proportion that they constitute of the total.

Q. That is right; and that would be about ten per cent of the fifteen cents?

A. Well, whatever they would be, but I think we understand one another. The fifteen cents is that quotient.

Q. That is right.

A. And the same thing with reference to the bottle expense.

Q. Would be the same proportion to the fifteen cents,

percentagewise, as it is to the $84,000 which appears there?

A. As it is demonstrated there.

[fol. 168] Q. Yes. The same thing is true of other expenses which total $6,615, would be the same proportion to the fifteen cents as the $6,000 is to the $84,000, which appears in Schedule 6.

A. Yes, I think we understand one another on that. That is the technique. That is the intentional desire, if you will.

Q. Now, the column appearing on Page 2, Schedule 2, represents the drivers' time or total delivery time, isn't that right?

A. As designated?

Q. Yes, as calculated for each classification per store volume?

A. Yes, that is the intention there, that is the total of the detail that precedes the total on left to right.

Q. Now, you take the fifteen cents and multiply the total, the total drivers' time, which is in the first example, I mean, the first line, 12.232, and you get 183.480, is that correct?

A. It is intended to be an extension.

Q. Yes. And it is extended all the way down that column, every number appearing under the total delivery time, multiplied by fifteen, you get the result, the total delivery cost as appears in the adjoining column?

[fol. 169] A. That is right.

Q. Now, in effect what you are doing is taking the proportion——

A. Is that Schedule 6?

Q. Schedule 6; the proportion of drivers' time or delivery wages as appears in Schedule 6, and applying that percentagewise——

A. The time doesn't appear on Schedule 6, the money appears.

Q. I mean the money, the proportion of it, whatever $31,608 is to $84,000. I am just asking about the first item, $31,000. You are taking whatever percentage the $31,000 is to the $84,657.55 appearing in Schedule 6 and applying it to the drivers' time in each instance. In other words, it is a part of the fifteen cents?

A. Yes, that is right.

Q. And you do the same thing with each of the items appearing on Page 6?

A. That is the object.

Q. Of Bergfeld Exhibit 1?

A. That is the idea.

Q. Each of the items appearing all the way through there?

Mr. Long: Of Schedule 6?

[fol. 170] Mr. Jinkinson: Of Schedule 6, yes.

The Witness: That is the idea.

By Mr. Jinkinson:

Q. Therefore, you are assuming that the bottle expense is as it appears in its relation to percentage, to the total figure $84,657.55 is being distributed in the formula on the basis of drivers' time, is that right?

A. That is right.

Q. And that is true of each and every item that appears on Schedule 6?

A. Yes. I think the costing principle, the costing formula that is applied to the problem, I mean—I am beginning to be understood now, and that is why I keep going back to this business of units.

Q. Now, Mr. Bergfeld, what relationship does the—in reality, does the item "Bottle Expense" as it appears in Schedule 6 have to driver's time, time which he spends at the store in making deliveries?

A. Bottle expense, like all these expenses, must be recovered during these delivery service times, and it is again comparable to a very standard practice in the industry.

We take these expenses as representing the facilities, [fol. 171] the requirements for providing the delivery services of the route. This is our cost of being in that kind of business at Elston in the month. These are the problems that are faced at the Elston Division during a month.

In other cost environments it is sometimes called the overhead.

Q. But the expense——

A. I paused because I was afraid you were not listening.

Q. Oh, yes, I am listening.

A. (Continuing) The costing technique demonstrated here is that which has been used in product and costing services pretty generally, and that is, you take the cost of supporting the function and divide those expenses of supporting a function by the unit work measurements involved in the function, and thereby determine the costs of the services performed in the function. And this is a fairly standard practice of getting a costing rate in terms of a unit product service rendered. The unit of product of service rendered in this case, because it is primarily a service being rendered, we have not said anything about differences in the product [fol. 172] cost—is time; and to provide the time for those services, the expenses listed, as an example, for Elston for that month are the expenses required to provide the environment for those work elements to be done.

And bottle losses are among the things that the company incurs as the cost of providing that environment.

Q. Now, as I understand it, the differential between discount granted chains and granted independents is based solely, or mainly, upon the elapsed time the drivers spend in making delivery, is that right?

A. In principal, I think your statement is practically correct.

Q. But let me ask you this question: Are bottle expenses created by the drivers' activities?

A. Well, these bottle losses occur in the environment activities, yes, and we have to expect some bottle losses from his delivery and serving functions.

You see, it would be unrealistic to not face the realities of the things that are going to cost money as he goes on in the course of his assignment.

And these things do cost money, as shown in examples for that month. I want to make a full explanation.

[fol. 173] Q. Now, what possible relationship could there be between drivers' time at a store and advertising?

A. In order to have his time at a store be effective. It is not relationship between his time at the store, it is in relationship between what he does in the store, what he is expected to accomplish at the store.

As a matter of business practice, they feel that his time and efforts there have to be supported by bottles and depre-

ciation and advertising and other things that are scheduled there.

Without those it is assumed that he would be less effective. You asked for a relationship. It is creating environment for him to make his time most fruitful.

Q. As I understand it then, you are saying that all of these necessary items which appear on Schedule 6 of the cost of doing business at the B wman Dairy Company which provide him the opportunity, the driver, to be in one of these stores and spend time, is that about what it amounts to?

A. Well, I think if you will look at them as the supporting factors to make his time effective in the store, I think that—[fol. 174] Just as a man in the plant—now, wait.

See, these work functions, whether they be in milk distribution or the operating of a drill press in a factory, the assembling of component parts on an assembly line, those activities of the work units being performed cannot exist in a vacuum; you've got to give them an environment to exist in.

These are the things that are necessary or at least have to be used. I am not prepared to say the exact essentiality of each one of these, but from the standpoint of good business judgment they consider or at least they faced and paid for these factors in the environment of the drivers' route day to support his route activity and the things on which he spends his time.

Q. Are you saying they have a remote relationship but not a direct relationship?

A. I am saying they have a very direct and essential relationship, not remote by any means, because I do not know—let's go down the items. I do not know how a driver could perform his time unless these facilities were made available to him, trucks and bottles and all the things.

[fol. 175] Q. That is very true, but when you get down to the allocation of the differences between given discounts between chain stores and independents, the only item you are taking into effect is the driver's time?

A. No, sir. Excuse me. That is not quite true. We are using the time measurement as the basis for taking into effect everything that was paid for to render those services, as you pointed out with me just a moment ago, the items

listed, proportional and so forth, on the schedules that we discussed it from.

I think, as I said before, these are the supporting activities paid for to provide the facilities and the environment necessary for his time to be effective. We cannot have him just walking around unimplemented, going through the spending of minutes.

Q. Well, take the item of auto expenses in Schedule 6. Now, you want to relate that item, percentagewise, whatever the item is, to the total expenses to Schedule 2, Page 2.

A. You said I wanted to what, please?

Q. You do relate that expense, as it appears, to the total expense, as it appears as to the total expense of doing business at the Elston Division in November, 1954?

[fol. 176] A. We included it.

Q. Percentagewise, whatever percentage that is.

A. We included it on the basis of the calculation we reviewed a minute ago.

Q. Now, did you ever make any study—or would it not be a better study, to relate that expense to tonnage miles carried by the trucks for customers?

A. Well, now, I am going to venture an opinion as to whether I think it would be better for tonnage miles carried, which is what you have asked me to do.

Q. That is right.

A. My opinion is no, it would be a less accurate and less useful basis on tonnage miles carried for this reason, that our costs are not determined and should not be on the basis of how many tons we can put on a truck.

Our costs have to be determined on how much the man can take off the truck in the time he has got available for taking it off after and including all the other things he had to do with that time.

Our problem in the milk business——

Q. Part of that function of the driver, of course, is to get the merchandise to the store, not just unloading it?

[fol. 177] A. That is right, that is why I say all the other demands on his time—Our problem in this milk industry as I see it through my client is not to load up the trucks. We could load up the trucks and get a ton mile cost on a loaded truck at the point where the actual load would be considered

within the range of the safety regulations that applied to trucks.

That is not what determines what we get on a truck. What we get on a truck is what we can have the man take off and get to the customers, and what he can take off and get to the customer is based on how much time he has got for that function, considering all the other things too that are required.

Furthermore,—Let me make this observation. Here is another reason why I do not think it would be right. That costs for carrying do not always stay in a proportional linear relationship such as you have indicated on proportions on that schedule for ton miles.

For example, we can take a given truck at any time of the day and half load it, and we will not find a substantial decrease in the gasoline it consumes. And you won't find on a half-loaded truck a substantial difference in the depreciation required to provide for the retirement of the vehicle.

[fol. 178] Even if you took ton miles between two different vehicles that were completely loaded, a lighter vehicle and a heavier vehicle, you would not find that there was a proportional—I do not believe you will find—I have not done this, this is an opinion, but it is a fairly strong opinion found in grappling with this sort of problem for quite awhile;

You would not find that the operating costs per ton mile of a five-ton truck is half what the operating cost per ton mile is for a ten-ton truck. This has been the thing we worked on for fifteen years. How do you get to a unit that does mean something?

I might say that ton miles is among several units that have in the past been considered and, at least in my opinion, rejected. This again is not a procedure that is unique and experimental in this demonstration. This is a fundamental procedure that we have used with other clients on basic business problems, and these other studies I mentioned to you the other day where we have worked on problems for State Governments who were trying to decide what the right costs and price determinations would be.

I did not mean to go off for so long, but I would like to [fol. 179] have you share some of my real doubts that ton miles would do it. Again, it is not the tons you put on, it is the amount we can take off.

(Discussion off the record)

By the Witness:

A. (Continuing) The point here is, what we are trying to determine here is the cost of distributing milk, not the hauling cost per ton mile.

By Mr. Jinkinson:

Q. All right now, referring to your study, in the price study of certain bulk wholesale customer transactions of the Bowman Dairy Company, dated March, 1956, which I will mark Bergfeld Exhibit No. 3——

A. Let's see. We are going into a whole separate thing here, the bulk. Bob, would you help me find copies of that report?

(Discussion off the record)

The Witness: There are some other points on this philosphy of costing that I would like sometime to have an opportunity to make.

Mr. Jinkinson: Well, you can put this on the record, that if it is necessary, you can count on your very able counsel. [fol. 180] Mr. Hart: Count on me for helping you.

Mr. Jinkinson: We will see that you have an opportunity.

By Mr. Jinkinson:

Q. Now, directing your attention to Schedule 3, Bergfeld Exhibit No. 3, you have an item there——

A. Schedule 3 on Page 3?

Q. Of Bergfeld Exhibit No. 3. There is an item of wages of solicitors.

A. Yes.

Q. Now, you also have an item in Schedule 6 of Bergfeld Exhibit 1 in which an item appears "Solicitors' Wages."

A. Yes.

Q. Now, do these solicitors, as listed in Bergfeld Exhibit No. 3, and the solicitors listed in Schedule 6 of Bergfeld Exhibit 1, are their duties different?

M. Wooley: Significantly different.

By Mr. Jinkinson:

Q. Significantly different?

A. Let me discuss some differences and have you decide on their significance. The solicitors indicated on Schedule 2 of Exhibit 3—Are we calling this 3?

Mr. Hart: Bergfeld Exhibit 3.

[fol. 181] By the Witness:

A. (Continuing) Bergfeld Exhibit 3, Schedule 3; these solicitors work in really quite a different market environment than the solicitors in Schedule 1—Schedule 6; Bergfeld Exhibit 1.

They are really selling products to a buyer who does two things. This bulk buyer referred to in Exhibit 3 resells the products, some of them, as packaged and processed direct to consumers, which could be considered analogous to the customers solicited by the solicitors mentioned on Schedule 6.

But in addition to that, and this incidentally introduces quite a complexity in my opinion of those solicitors' jobs. They sell products that in turn are further processed at the restaurant level by, as you know, chefs and cooks and so forth, who in my experience take pride in whatever they are trying to accomplish by their processing and, therefore, frequently bring to bear on the supplier a whole series of problems considerably more complex than the solicitor has to resolve with the store customers.

I mean, they want their product, for example, sometimes at slightly different hours of the day to conform to their baking cycle.

[fol. 182] And sometimes they are particularly—as I understand it, again, though I have not talked to any of these chefs or cooks. This is just experience in the milk industry. They sometimes want them just a little different, or they have a particular temperature idea as to when they want it and the way they want it to arrive.

And very often when our products are mixed with many other products and then the result is not just what they hoped for, why, then it is a matter, I believe, of these solicitors having to help them find the reason. There is a whole

new series of significantly more complex problems involved in bulk sales, in my opinion, than in just a straight sale, where a processed product is involved.

So I think therein might lie some significant differences.

By Mr. Jinkinson:

Q. All right now, in your Bergfeld Exhibit 1, the solicitors' wages were merely an item on Schedule 6

A. Right.

Q. (Continuing) and ultimately was applied to the

A. Cost per minute.

Q. Cost per minute by the formula set forth in Schedule [fol. 183] or Page 1 and Page 2 of Schedule 2; is that right?

A. I think the schedule numbers are right on that. They were ultimately applied.

Q. And that resulted in being applied to the drivers' time at the store?

A. That is right.

Q. Now, on Page 12, Bergfeld Exhibit 3

A. Page 12?

Q. Yes.

A. Yes, sir.

Q. You applied the solicitors' time to your cost study and delivery of bulk wholesale in an entirely different manner, you applied it directly, didn't you?

A. I believe that is right.

Mr. Jinkinson: I believe that is all.

Mr. Bergfeld: Thank you very much.

(And Further Deponent Saith Not.)

[fols. 184-185] Notary public's certificate (omitted in printing)

[fol. 186] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 439

UNITED STATES, Appellant,

vs.

THE BORDEN COMPANY, ET AL.

Appeal from the United States District Court for the Northern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—December 4, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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609334—61——1

Statutes: Page

Clayton Act (Act of October 15, 1914), 38 Stat. 730, as amended, 49 Stat. 1526; 38 Stat. 736, as amended, 62 Stat. 909 (15 U.S.C. 13(a), 13(b), and 25):

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (Appendix, *infra*, pp. 20–38) has not yet been reported. The prior opinion of the district court, and the opinion of this Court when this case was previously before it, are reported, respectively, in 111 F. Supp. 562 and 347 U.S. 514.

JURISDICTION

This suit was originally brought under § 4 of the Sherman Act, 15 U.S.C. 4 and § 15 of the Clayton Act, 15 U.S.C. 25. The final judgment of the district court was entered on February 27, 1961 (App., *infra*, p. 38), and the notice of appeal was filed on April 28, 1961. The jurisdiction of this court is conferred

by § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended. *United States* v. *Yellow Cab Company*, 332 U.S. 218; *United States* v. *du Pont & Co.*, 353 U.S. 586; *International Boxing Club* v. *United States*, 358 U.S. 242.

QUESTION PRESENTED

Whether sellers of fluid milk who have engaged in prima facie unlawful price discrimination in favor of all chain stores and against all independents, regardless of the volume of their individual purchases, can justify the discriminations as making "only due allowance for differences in the cost of * * * sale, or delivery resulting from the differing methods or quantities" in which the milk is sold or delivered to the chains and the independents, merely by proving that sales to all chains are less costly *on the average* than sales to all independents, without showing any justification for treating the chains and independents as separate classes of purchasers.[1]

STATUTE INVOLVED

The pertinent provisions of Sections 2(a), 2(b), and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended, 49 Stat. 1526; 38 Stat. 736, as amended, 62 Stat. 909 (15 U.S.C. 13(a), 13(b), and 25), commonly known as the Clayton Act, are as follows:

> SEC. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like

[1] The government does not continue to raise the issue, included in its notice of appeal, of the legality of appellees' price discriminations to restaurants.

grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

SEC. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *.

SEC. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing a government civil antitrust suit which charged the two largest dairies in the Chi-

cago, Illinois, area with illegal price discrimination, in violation of Section 2(a) of the Clayton Act. The district court found that the appellees' prices were discriminatory and constituted "prima facie violations of Section 2(a)" (App., *infra*, p. 27). It ruled, however, that the companies had established that such discriminations were justified by differences in cost under the proviso to Section 2(a) which permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [different] purchasers sold or delivered."

1. THE PRIOR PROCEEDINGS

The complaint in this case, filed in 1951, charged the defendants with violating Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act. In 1953, the district court dismissed the complaint after the government had presented its case. It held that the Sherman Act violations charged had not been proved; and that, although there was proof of price discriminations constituting prima facie violations of the Clayton Act, no injunctive relief was necessary because there was an outstanding injunction in a private antitrust suit which enjoined the defendants from engaging in such discriminatory practices. *United States* v. *Borden Co.*, 111 F. Supp. 562 (N.D. Ill.).

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed the dismissal of the Clayton Act charges. *United States* v. *Borden*

Co., 347 U.S. 514. It held (p. 520) that "the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree," and remanded the case for further proceedings.

On remand, the government's proof was limited to evidence that, subsequent to the entry of the decree in the private case, the appellees Bowman Dairy Company ("Bowman") and The Borden Company ("Borden") had discriminated in price in selling fluid milk in the Chicago area. The case was presented on the basis of stipulated facts, the depositions of expert witnesses, and written briefs. No testimony was taken.

The undisputed evidence established the following facts:

Bowman and Borden are two large dairy companies operating in the Chicago area. The wholesale customers of Bowman and Borden include large grocery chains, and "independent" stores which, for the most part, are singly owned. Fresh fluid milk is sold and delivered daily by Bowman and Borden to both chain and independent stores. The milk is delivered by trucks on mixed routes, *i.e.*, milk is delivered daily to both chain and independent stores from the same trucks, on the same routes, and by the same drivers. (Supplemental Pretrial Order, dated November 4, 1955 [Bowman]; Supplemental Pretrial Order, dated November 8, 1955 [Borden]).

Bowman and Borden have each adopted pricing systems for fluid milk products based upon the classi-

fication of all grocery stores as either "chains" or "independents." Under both systems chain stores receive a fixed discount, regardless of quantities purchased; independent stores receive discounts dependent upon the volume of their purchases, but in no event as high as that granted the chains. Thus, during the period from June 1954 to August 1955, Bowman granted the chains (A & P and Kroger) a flat 11 percent discount from fluid milk list prices, regardless of quantities purchased; it granted the independents a sliding scale of discounts based on the quantities ("points") purchased,[2] with a maximum discount of 8 percent (Supplemental Pretrial Order, dated November 4, 1955 [Bowman]). During the same period, Borden gave the chains (A & P and Jewel) a flat 8½ percent discount off list, while grouping the independents into four categories which, depending on volume, received no discount or discounts of 2, 3, or 4 percent, respectively (Supplemental Pretrial Order, dated November 8, 1955 [Borden]).

Under these price systems, all the independent customers of both Bowman and Borden necessarily paid substantially higher net prices than the chains, regardless of the volume of the independents' purchases or the methods by which Bowman or Borden sold or delivered the products to them.

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[2] In the dairy industry, it is customary for quantities to be expressed in "points." Thus, one quart of milk equals one "point"; one gallon of milk equals four "points"; one quart of cream equals four "points", etc. Both the Bowman and the Borden discount systems based the independents' discounts on the average daily points purchased each month.

2. THE COST STUDIES

The principal defense offered by Bowman and Borden was that the price discriminations in favor of the chains were justified by lower costs of selling and delivering to them.[3] In support of this claim, each company presented an elaborate cost study, which admittedly had been prepared for the trial. No evidence was offered to show what part, if any, of the cost data reflected in these studies had been considered by the appellees' officials when the price systems were adopted.

The Bowman cost study.—Bowman based its study upon an alleged distinction in the methods of sale and delivery as between the chains and the independents. In its cost allocation, it charged the independent stores as a group (but not the chains) approximately 24¢ per delivery for the collection of C.O.D. payments by its route drivers (Bowman Ex. 4, pp. 2–3, 13; Bowman Ex. 14, pp. 1–2, App. A, p. 1, schedules 2 and 3). It further charged the independents approximately six-tenths of a cent per point of milk delivered for various "customer services" allegedly performed by the drivers for the independent stores (but not the chains), such as delivering milk to the rear of the store, placing the milk in the refrigerator, assisting in arranging displays, etc. (Bowman Ex. 4, pp. 2–3, 7–8, 10, 13; Bowman Ex. 14, pp. 1–2, App. A, p. 1,

[3] Bowman and Borden also contended that the discriminations in price were not in interstate commerce, that their customers were not in competition with each other, and that the discriminations did not injure competition. The district court rejected these arguments (App., *infra*, pp. 26–27).

schedules 2 and 3). Bowman prepared charts setting forth, on the basis of these extra charges assessed against the independents, the alleged cost per point of delivering the same quantities of milk to chain and independent stores, at volume levels for a single delivery ranging from 10 to 1200 points of milk (Bowman Ex. 14, schedules 4 and 5). While the cost per point in both the independent and chain categories decreased with an increase in volume, it inevitably followed, in view of the extra charges to the independent stores, that the cost per point for delivering a given quantity of milk to an independent store was greater than delivering the same quantity of milk to a chain store (*ibid.*). Based upon these comparisons, the Bowman cost study concluded that the discount differentials at each volume level were "cost justified" (Bowman Ex. 14, pp. 1–3, 7, schedule 6).[4]

The Borden cost study.—Borden's study attempted to justify the discriminatory discounts by comparing the alleged total cost of delivering milk to all chain stores, whether owned by A & P or Jewel, with the alleged total cost of delivering milk to each of four

[4] New discount schedules which resulted in even greater discriminations in price between chain and independent store customers were made effective by Bowman in September 1955 and in January 1956. The supplemental cost studies offered in support of these new discounts (Bowman Exs. 15, 16) relied upon allegedly increased differences in delivery costs between chain and independent stores. These supplemental studies purported to calculate costs upon the basis of the same formulae used in the original study, and used the same number of delivery minutes at varying volumes to calculate costs of each delivery function. Bowman offered no explanation of why the cost of delivery to the independents (but not to the chains) had increased.

groups of independent stores, classified according to the volume requirements necessary to qualify the independents for each of the three discount brackets (Borden's Additional Pretrial order, dated September 19, 1957, pp. 60–170). (Independents in the lowest volume bracket received no discount.) Total weekly delivery costs were then allocated between the five classes of stores. From these allocations, Borden computed the alleged weekly cost, per $100 of sales, of delivering milk to each group of stores. Based on a comparison of the alleged cost per $100 of sales of delivering milk to the chain stores with the alleged cost per $100 of sales of delivering milk to each of the four groups of independent stores, the Borden study concluded that the discount differentials were cost-justified (Borden brief in opposition to post trial brief of the United States).

3. THE DECISION OF THE DISTRICT COURT

The district court held that the Bowman and Borden studies sustained the companies' claims that their discriminations in price—which "constitute prima facie violations of Section 2(a) of the Clayton Act" (App., *infra,* p. 27)—were cost-justified. Adopting "a liberal approach to cost justification studies" (*id.,* p. 28), the court found (*id.,* p. 35):

> * * * [D]efendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification for

the differences in prices described above in defendants' published discount quotations.

Although the court recognized that "the studies are imperfect in some respects," it rejected the government's challenges to their validity, since "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect" (*id.*, p. 35). The court also overruled the government's attack on the studies because of their "seemingly arbitrary classification" of customers which "results in percentage discounts which do not bear a direct ratio to differences in volume of sales" (*id.*, p. 35). It stated (*ibid.*, emphasis in original) that "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores." Finally, the court stated (*id.*, p. 37) that the government "is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted."

THE QUESTION IS SUBSTANTIAL

1. This appeal presents an important question relating to the basis upon which discriminations in price, otherwise illegal under Section 2(a) of the Clayton Act, may be justified by evidence of alleged differences in cost under the proviso permitting "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in

which such commodities are to such purchasers sold or delivered * * *." The district court sustained, as cost-justified, a pricing system which, the court found, discriminated in favor of grocery chain stores at the expense of their independent competitors. The cost studies, upon the basis of which the price discriminations were upheld, treat the chains collectively and the independents collectively as separate purchasers. There is no showing, however, that there are common savings in cost applicable to all the chains that are not applicable to any of the independents; or that the allegedly common higher costs of serving the independents as a class are not applicable to any of the chains. The cost studies are thus inherently defective because there is no basis for treating the chains as one class of customers and the independents as another.

In the Robinson-Patman Amendments, "[t]he exception to price discriminations based on quantitative differences was limited to those making 'only due allowance for differences in * * * cost'" (*Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69). In order to justify a cost differential in favor of chain stores as against independents, therefore, a seller would have to show that there were in fact cost savings applicable to all the chains that were not applicable to any of the independents. As we show below, the appellees have made no such showing here.

The issue of the validity of cost studies based upon such an arbitrary categorization of customers is plainly substantial. The Robinson-Patman Amend-

ments stemmed from Congressional concern over the rapid growth of chain stores, particularly in the grocery field, and the ability of such chains to secure price and other concessions that were not available to the small independents. "The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43. The cost defense proviso was deemed "of great importance, for while it leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution; it also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression." H.R. No. 2287, 74th Cong., 2d Sess. 9 (1936); see also 80 Cong. Rec. 9417 (1936).

The legislative purpose of limiting "quantity price differentials to the sphere of actual cost differences" would be thwarted if substantial price discriminations in favor of chain stores as against independents could be cost-justified on the basis here permitted. Neither Bowman nor Borden established any basis for treating the chains and independents as separate categories of customers. The district court, in nevertheless up-

holding the studies, concluded (App., *infra*, p. 35, emphasis in original) that the "seemingly arbitrary classification" between chains and independents "is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores"; and that although "the studies are imperfect in some respects," "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect." While such studies need not allocate costs with mathematical precision, they cannot be accepted unless they clearly establish that the discriminations in price reflect only actual differences in the cost of sale or delivery to different customers. Their validity is not established merely because they are "*not* wholly arbitrary," or because, as the district court also found (App., *infra*, p. 35), they represent a "bona fide effort" to allocate costs between different types of customers.

2. While the Bowman cost study contains a number of substantial errors in the allocation of costs between the chains and the independents,[5] its basic flaw runs

[5] Thus, Bowman allocated all of the costs of its South Wholesale Division on the basis of the time spent by its deliverymen in delivering dairy products to its store customers (Bowman Ex. 14, p. 5, schedule 1). Since, according to the time studies conducted by Bowman, its deliverymen spent a substantial amount of time in performing "customer services" for and in collecting C.O.D. payments from independent stores (but not chain stores), this method of allocation charged a proportionately greater amount of the costs for the Division to the independents. But Bowman made no showing that these alleged differences in the direct costs of selling or delivering milk to independents and chains also provided a proper basis for allocating those other expenses of the Division which could properly be charged as an indirect cost of selling or delivering

far deeper. As indicated *supra*, pp. 7–8, the Bowman study is based upon a comparison of the alleged costs of delivery of varying volumes of its milk products to the chains and to the independents, respectively. The alleged difference between the costs of serving the two categories of customers rests upon the fact that the independents, but not the chains, have been charged for the costs of C.O.D. collections and for an assortment of so-called "customer services" inside the store. But Bowman made no effort to demonstrate that all of the independents operated on a C.O.D. basis or that each took all or even a portion of the customer services—services which Bowman itself had denominated as "optional" (Bowman Ex. 4, pp. 2–3; Ex. 14, p. 1). On the contrary, the record demonstrates that all independents did not operate on a C.O.D. basis (Bowman Ex. 4, p. 2; Ex. 14, p. 1), and that a large percentage of independents took none or substantially less than all of the optional "customer services" (Plaintiff's Rebuttal Pretrial Order as to Bowman, entered Dec. 16, 1958, Table 11). Thus, even assuming that no chain store availed itself of any of these services, and without considering the obvious de-

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milk. Moreover, the total cost of operation of the South Wholesale Division included many substantial expense items such as "plant depreciation," "utilities" and "milkroom wages" (*ibid.*), which had no relation to the different methods or quantities by which store customers purchased dairy products. Such expenses therefore should have been completely excluded from the study's cost base. Bowman conceded that, if the government were correct in its objection to this phase of its cost study, the district court could have found that its price differentials had not been fully cost justified. (Bowman Supplemental Pretrial Order dated December 23, 1957, p. 21.)

fect resulting from Bowman's failure to charge the chains with the costs incurred in handling their payments on a deferred basis, the basic fallacy of the Bowman study lies in its arbitrary classification of all of the independents into one group which assertedly had common costs greater than the common costs of serving the chains.

The inherently discriminatory nature of such a pricing system is apparent. Under a discount policy properly reflecting actual costs of sales and deliveries to individual purchasers, those independently owned supermarkets which Bowman serves in a manner similar to that by which it serves the chain stores and which purchase in volumes exceeding or approaching the average volume of a chain's stores,[6] should receive the same 11 percent discount that the chains enjoy, rather than the 8 percent figure which Bowman arbitrarily established as a maximum for the independents.[7] But, by the simple device of lumping all "independents" together and allocating to this artificial group the aggregate delivery and sales costs allegedly assignable to the independents as a whole, Bowman precludes any independent from ever competing on equal terms with the chain no matter how

[6] We assume *arguendo*, but do not concede, that the cost of serving a particular chain may properly be determined on the basis of the average cost of serving all stores in the chain, rather than the varying costs of serving particular stores.

[7] Bowman could, of course, set a limit on the discounts it would offer any purchasers, even though some might qualify for a higher discount. What it cannot do, but has done, is fix an 8% cut-off for discounts to independents as a class while granting a higher discount to the chains as a class.

great its volume of purchases or how closely it approximates the chain's methods of operation.[8]

3. The Borden study, while superficially different from the Bowman study,[9] is subject to the same infirmities because it rests upon an arbitrary classification of customers according to ownership. The proper basis for classification, however, is, not ownership but differences in methods or quantities of sales

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[8] The record indicated that two independently owned supermarkets in Bowman's South Division during the period of the Bowman survey took an average of 650 points of milk per day, as contrasted with an average of 500 points for the Bowman chain stores (Rebuttal Pretrial Order as to Bowman, filed December 16, 1958, Tables 12–A, 12–B). As to at least one of these purchasers the Bowman cost justification was invalid on its face, even assuming that the special charges to independents were applicable to it and the other cost allocations appropriate (see Bowman Ex. 14, Schedules 4–6).

[9] Borden's cost study, like Bowman's was seriously deficient on its own terms. Thus, it substantially prejudiced the independent stores by its method of allocating indirect costs. These costs, including labor costs of many functions in the company's delivery route operations, the cost of owning and operating its delivery trucks, and nearly all of its branch office clerical salaries, accounted for over one-half of the total costs charged to Borden's independent store customers (Borden Additional Pretrial Order dated September 19, 1957). The Borden study allocated most of these indirect costs on the basis of the number of store locations and the remainder on the basis of the number of delivery stops made for customers in each discount category (*id.*, pp. 129, 142, 151). In other words, Borden allocated an equal share of these costs for each store location or delivery stop without regard to the volume of dairy products delivered or the amount of time required to make the delivery. This method of allocation was clearly erroneous. Indirect delivery costs and related clerical expenses are not incurred in equal amount for each store location or delivery stop but rather in proportion to those factors which limit the rate of use of the company's personnel and equipment, *e.g.*, volume of goods delivered or time required to make delivery.

or delivery that result in differences in costs. Thus, Borden treats the A & P and Jewel stores as if they were the same "purchaser", without any showing that their methods of operation are identical and that the stores of one of the two chains purchased the same average volume of milk as the other. But unless the two chain customers are in fact alike in these two respects, there is no basis for determining whether both chains are entitled to the largest discount (even assuming that one of them is), or whether the smaller chain is entitled to a larger discount than the largest independent.[10] More important, Borden lumped the independents into four groups which have no relation to the particular mode of operation of any one retailer[11] and which contain wide variations in the volume of purchases between the largest and smallest store in any category.[12] Thus, as with Bowman, the

[10] The Bowman study has the same defect.

[11] Borden, unlike Bowman, did not allocate all the costs for C.O.D. payments and customer services to the independents. It did, however, allocate most of such costs to them, and then aggregated the total costs of serving all members of the group of independents. Members of the group that did not take such services were thus necessarily given a higher cost basis than the actual cost of serving them.

[12] Thus, the class of independent customers entitled to a 4% discount included all stores receiving 150 points or more per day (Supplemental Pretrial Order as to Borden, dated November 8, 1955.) There were 80 such stores (Borden Additional Pretrial Order (Cost Study), Par. 202, p. 126) and they actually averaged about 231 points per day. (*id.*, Schedule XXXIV, p. 163). Moreover, many of these stores had a much higher volume. Thus the Schubert store had monthly deliveries of $4,083 (Supplemental Pretrial Order entered November 8, 1955, Schedule II) which, assuming a 24 day delivery month and a price of 20¢ per point, amounts to approximately 850 points per day. The average Borden chain store, however, took only

large independent supermarkets have been prejudiced in their competition with the chains by being forced to assume a share of the costs of sales or deliveries to other independent stores operating in a different manner but nonetheless placed in their "class."

4. There may be real cost savings in making volume deliveries to purchasers. Similarly, a milk distributor is not precluded from charging retailers, either by way of flat fees or lower discounts, for special services in connection with milk deliveries which utilize the driver's time, provided that the retailer is aware that these services enter into the rate structure and is afforded an opportunity to accept or reject them. The cost studies submitted by Bowman and Borden might very well indicate that differential pricing systems other than those actually adopted by the appellees could be cost-justified. But the studies do not justify the discriminations based upon a wholly arbitrary distinction between "chains" and "independents", which precludes any independent from ever achieving or approximating the discount automatically accorded all chains, regardless of the volume of its individual purchases or the methods by which sales or deliveries are made.

CONCLUSION

This appeal presents a substantial question as to the basis upon which cost justification of price discriminations may be established under Section 2(a) of the Clayton Act. This Court has not directly

about 600 points per day (see Borden Additional Pretrial Order (Cost Study), Par. 202, p. 126, schedule XXXIV, p. 163).

passed upon the cost justification provision,[13] and the question is recurring and of public importance.[14] Probable jurisdiction should be noted.[15]

Respectfully submitted.

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SEPTEMBER 1961.

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[13] Although the cost justification defense was not directly involved in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, the Court discussed the provision (pp. 67–71).

[14] Most of the litigation involving the cost justification defense has been before the Federal Trade Commission. It has also been involved in three private antitrust actions—none of which involved the present problem. See *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985 (S.D. Fla.), affirmed, 187 F. 2d 919 (C.A. 5); *Russellville Canning Co.* v. *American Can Co.*, 87 F. Supp. 484 (W.D. Ark.), reversed, 191 F. 2d 38 (C.A. 8); *Reid* v. *Harper & Bros.*, 235 F. 2d 420 (C.A. 2).

[15] To whatever extent the district court's decision rests on its view that the Federal Trade Commission is "a more appropriate tribunal to grant effective relief, if it be warranted" (App., *infra*, p. 37), that ground is clearly erroneous. For the Clayton Act provides a "dual system of enforcement" (*Standard Oil Co.* v. *United States*, 337 U.S. 293, 310, n. 13), under which Congress has "explicitly provided" for "concurrent jurisdiction" in the courts and the Commission (*United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 208).

APPENDIX

In the United States District Court, Northern District of Illinois, Eastern Division

No. 51C947

[Entered February 27, 1961]

UNITED STATES OF AMERICA, PLAINTIFF

v.

BORDEN COMPANY, ET AL., DEFENDANTS

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

CAMPBELL, *Chief Judge:* This suit began in June, 1951 by the filing of a complaint charging eight Chicago dairies with various violations of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act (Title 15 U.S.C., Sections 1, 2, 13(a)). Before the taking of any evidence, four of the eight defendants entered into a consent decree prohibiting the various practices which the Government sought to enjoin. The remaining defendants are the Borden Company and a wholly-owned subsidiary (hereinafter collectively referred to as Borden); and Bowman Dairy Company and a wholly-owned subsidiary (hereinafter collectively referred to as Bowman).

Since my conclusions rest in some measure upon differences between those practices alleged in the complaint and those practices alleged by plaintiff to exist in the milk industry in Chicago today, it is important to review those portions of the complaint which deal with alleged violations of the Clayton Act. The com-

plaint is twenty-three pages long, and, apart from its prayer for relief, consists of forty-eight paragraphs, only two of which are devoted to the Clayton Act charges, and read as follows:

> B. *Violations of Section 2(a) of the Clayton Act as Amended*
>
> 46. Beginning on or about January, 1941, and continuing up to the date of the filing of this complaint, each of the defendants has sold and is continuing to sell for resale fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality, and the effect of such discrimination may have been and may continue to be to substantially lessen competition or tend to create a monopoly in the sale of fluid milk to wholesale purchasers in the Chicago area or to injure, destroy or prevent competition between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended (38 Stat. 730, 49 Stat. 1526, 15 U.S.C. Sec. 13(a). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.
>
> 47. The aforesaid discriminations in price have been granted, often secretly, in the form of preferential prices, discounts, rebates, lump sum cash payments, installment cash sums, and interest-free loans.

The length of the allegations respecting Clayton Act violations fairly indicates the importance which the plaintiff attached to those violations at the 1953 trial, and the amount of time devoted to proof of those alle-

gations, as compared to the magnitude and complexity of the plaintiff's alleged Sherman Act case.

At the close of plaintiff's case in 1953, I dismissed the entire complaint *U.S.* v. *Borden Co.*, 111 F. Supp. 562, holding, first with respect to the Sherman Act, that plaintiff had failed to show either monopoly or a conspiracy to monopolize and, second, with respect to the Clayton Act that (even though plaintiff had established a prima facie case) the defendants were effectively prohibited from committing further violations by the terms of a decree entered by another judge of this Court. *Dean Milk Company* v. *American Processing and Sales Company*, No. 49 C 1159. I then stated, at 111 F. Supp. pages 581, 582:

> A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.

On appeal, the Supreme Court affirmed the Sherman Act phase of the case, but reversed and remanded as to the Clayton Act phase on the sole ground that the existence of a private decree does not *itself* deprive the Government of its right to a decree when

the need for injunctive relief is shown. U.S. v. *Borden Company,* 347 U.S. 514. However, the Court further indicated that the *Dean* Decree is properly one of the many considerations involved in this determination:

> The Government contends that it has "an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit." But we cannot say that the existence of the private decree warrants no consideration by the chancellor in assessing the likelihood of recurring illegal activity. We hold only that, in view of the difference in the respective interests sought to be vindicated by the Government and the private litigant, the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree.
>
> The judgment of dismissal as to the Sherman Act allegations is affirmed; as to the Clayton Act allegations the case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with this opinion (347 U.S. 514, 520).

After remand, on the motion of plaintiff, on April 18, 1955, I opened the record for the introduction of further evidence by plaintiff for the purpose of showing the existence of current Clayton Act violations, and by the defendants for asserting affirmative defenses. All of the evidence was taken in the form of stipulations which were then embodied in pre-trial orders, and in the form of depositions of expert witnesses. Afterward, all parties argued their respective positions through able and comprehensive briefs.

I am grateful to counsel for all parties for their cooperation and assistance in preparing the lengthy pre-trial orders and the able briefs. Without such cooperation this case might have consumed many weeks of the Court's time.

The sole question now before me is the appropriateness of the requested injunctive relief—whether, in the light of *present* conditions in the milk industry in Chicago, as shown by the evidence presented to the Court after remand, the public interest would be served by the issuance of an injunction in the form prayed by plaintiff's complaint.

Those paragraphs of the complaint, quoted above, relating to the Clayton Act fairly describe the type of evidence which was introduced at the 1953 trial. Plaintiff then showed that defendants had engaged in "stop-buying," that is, the "purchasing" of wholesale outlets. Plaintiff also showed that defendants had made interest-free loans to wholesale customers and granted discriminatory discounts to various customers either outright, or through gifts of fixtures or merchandise.

These practices, described in the complaint and shown at the 1953 trial, were not referred to after remand of the case. Indeed, there is no evidence of any kind to support a finding that any such practices exist today in the milk industry in Chicago. The practice to which the evidence before me relates, as shown by the stipulations of fact prepared after remand, consist of price discriminations which may be summarized as follows:

> 1. Bowman published and followed, during the years following the remand, discount quotations which on their face discriminated between chain customers and independent stores. For example, from June, 1954 to August, 1955, the

published Bowman discount quotations were as follows:

To chain customers (A & P and Kroger): 11 per cent off of the fluid milk list prices regardless of quantities purchased.

To independent stores: A sliding scale quantity discount with a maximum of 8 per cent off of the fluid milk list prices computed on the basis of the average daily "points" purchased each month.

Plaintiff has demonstrated by its Schedule I, comparing five grocery stores, chain and independent, within a radius of one mile and served by the same milk route, and by its Schedule II, comparing four stores, chain and independent, within another radius of one mile and served by the same milk route, that a price discrimination exists as against the independent stores under applicable discount quotations.

2. With respect to Borden, plaintiff's evidence as embodied in the stipulations also shows price discrimination between chain and independents by means of published discount schedules. For example, from June, 1954 until August, 1955, the following discount quotations were in effect:

To chain stores (A & P and Jewel): 8½ per cent off of the fluid milk list prices regardless of quantities purchased.

To independents: A graduated quantity discount with a maximum of 4 per cent off of fluid milk list prices computed on the basis of average daily "points" purchased each month. Again, by schedules relating to chain and independent stores within a radius of one mile and served by the same milk route, plaintiff has demonstrated a price discrimination as against independents under applicable discount quotations.

Plaintiff has made similar charges of price discrimination respecting the "bulk wholesale customers" of

defendants. This class of customers includes, principally, restaurants and hotels. By tables comparing the flat, net prices on customer purchases in the downtown area of Chicago, Illinois, plaintiff has demonstrated with regard to both defendants price differences among their bulk wholesale customers.

With regard to both classes of customers, plaintiff, in order to show prima facie violations of Section 2 (a) of the Clayton Act, must prove that:

> 1. Defendants were engaged in commerce, and that discriminatory practices occurred "in the course of such commerce";
> 2. Defendants either directly or indirectly discriminated in price between purchasers of commodities of like grade and quality;
> 3. That the effect of such discrimination "may be" to substantially lessen competition or to create a monopoly in this line of commerce, or to injure, destroy, or prevent competition with any person who grants such discrimination, or with customers of such person.

It is not open to question that the price differences described above are not price discriminations under Section 2(a) in light of *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536. However, defendants argue that these discriminations are not prima facie violations of Section 2(a) on the basis of these reasons:

> 1. Defendants contend that plaintiff failed to prove that the alleged violations were committed in the course of interstate commerce. A similar contention was before me prior to the 1953 trial upon the motion of defendants. After extensive argument and due deliberation, I rejected the contention and denied defendants' motion. On appeal, this contention was neither pressed by defendants nor considered by the Supreme Court. I have, however, again fully considered the evidence before me

and find that defendants' alleged violations with regard to wholesale and bulk wholesale customers did occur in interstate commerce.

2. Defendants contend that the Government has failed to show that there has been any injury to competition. This argument is wholly without merit in view of the well-settled principle that the Clayton Act frowns upon any discrimination which "may" injure competition. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37; *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152, 154. I note here the interesting analysis of the requirement of injury to competition by the Seventh Circuit Court of Appeals in the recent decision of *Anheuser-Busch Inc.*, v. *F.T.C.*, —— F. 2d ——, decided upon remand from the Supreme Court. Since that case differs factually from the cause now before me, I do not here find it relevant.

In short, the evidence shows: That the sales made by defendants were in commerce; that the defendants discriminated in price; that the customers of defendants were in competition with each other, and that there may be an injury to competition. I find that the published discount quotations of defendants, which on their face show discriminations between the defendants' wholesale customers, constitute prima facie violations of Section 2(a) of the Clayton Act. I further find that the discriminations between defendants' bulk wholesale customers constitute prima facie violations of Section 2(a) of the Clayton Act.

As I indicated previously, there are many factors which affect a determination of this case. Most important is the defense of cost justification raised by the defendants in accordance with the cost proviso of Section 2(a) which reads as follows:

> *Provided*, That nothing * * * (herein) contained shall prevent differentials which make

> only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

Though there has been some disagreement as to whether this provision should be strictly construed so as to require full cost justification of every price differential with mathematical certainly, or whether the provision should be liberally construed so as to allow a reasonable latitude in cost studies, I find that a liberal approach to cost justification studies is today supported by expert, as well as judicial, opinion.

The Supreme Court in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 commented specifically at Page 68 upon the "intricacies inherent in the attempt to show costs in a Robinson-Patman proceeding" and the "elusiveness of cost data." The Federal Trade Commission in *In the Matter of Minneapolis-Honeywell Regulator,* 44 F.T.C. 351, stated at Page 394:

> Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error.
>
> * * * * *
>
> Where they (cost studies) are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. * * * Respondent's burden under the Act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

In *American Can Co.*, v. *Russellville Canning Co.*, 191 F. 2d 38, the Court, finding that the district court "applied too rigid a standard," stated at Page 59:

> If a manufacturer granting quantity discounts is required to establish and to continuously maintain a cost accounting system which will record the expenses incurred in selling every individual customer and all of the data which the plaintiff deems essential, the burden, expense and assumption of risk involved would seem to preclude the granting of quantity discounts, at least until the approval of the plan by the Federal Trade Commission had been secured.
>
> We cannot say that the District Court was compelled to accept the defendant's justification of the quantity discounts which were granted. If, however, the system was adopted in good faith and the cost study during the test period of more than four years was honestly maintained, and reflected with substantial accuracy the differences in selling costs as between the customers in Class C and those in Classes A and B, we think the court's conclusion that the justification was inadequate because it was not continued beyond the test period, did not reflect cost differences as between individual customers, and failed to take into consideration conjectural geographical differences in selling costs and other matters which might be thought to have some speculative bearing on such cost differences, was not justified.

In *Reid* v. *Harper and Brothers*, 235 F. 2d 420, the Court made the following statements at Page 422:

> Both the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data derived from litigation-inspired accounting methods.

> To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyers, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such a requirement might be to discourage all price differentials, even those actually justified by cost distinctions.

In addition, the Report to the Federal Trade Commission by the Advisory Committee on Cost Justification under the Robinson-Patman Price Discrimination Act, filed February, 1956, and the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws concur in supporting a liberal approach to cost justification studies. The Report of the Attorney General's Committee contains the following statements at Pages 174, 175:

> As a legal framework, we recommend recognition that a Robinson-Patman cost defense is not susceptible to testing by precise or mechanical rules. We advise a liberal interpretation of the statute's "due allowance" criterion as enacting a reasonable de minimis concept to exonerate a challenged price even if an attempted cost defense falls short of "justifying" it by a fractional amount. Similarly, realistic adaptation of this concept should validate only partially "justified" price concessions whenever the "unjustified" portion of the differential alone could not reasonably cause "injury" sufficient to bring the Act into play * * *.
>
> Because any accounting apportionment of costs essentially involves subjective business judgment, not objective fact, we recommend that a reasonable approximation of production or distribution cost variances to prior differentials—when demonstrated in good faith through any authoritative and sound accounting principles—suffice as a matter of law to meet the requirement for justification under the Section

> 2(a) cost proviso. Applied in this way, the Act should impede no price variation reasonably related to economies in any of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions.

The Cost Justification Report at Page 6 expressly recognizes the "necessity for a broad approach in the administration of the cost proviso" and in discussing the meaning of the words "due allowance" as contained in the cost proviso, comments at Page 9 as follows:

> Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.
>
> In view of the plus-or-minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), "due allowance" should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly, so as to require only "reasonable allowance" for costs essentially involves subjective business pricing principles.

At Page 11, the Report states:

> Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. "Great weight" should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound. A mere showing that a method other than that used by the respond-

> ent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent.

And at Page 22, the Report concludes:

> The Committee recognized that the cost proviso of the Robinson-Patman Act operates in a complex area and that many of the problems to which it gives rise are not given to ready solution. Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role.

Plaintiff contends that the case of *F.T.C.* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55, dictates that the cost proviso of Section 2(a) must be narrowly construed. However, I find that that opinion, resting solely upon the court's interpretation of Section 2(e) of the Act, is not pertinent here.

I might add here that it is my opinion that the Federal Trade Commission, in matters of accounting detail, is the tribunal possessing *expertise*. I am completely in accord with the suggestion made by the *Supreme Court in Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 at Page 745:

> It (The Robinson-Patman Act) indicates, too, that the Federal Trade Commission is the appropriate tribunal to hear in the first instance the complicated issues growing out of grievances against a quantity discount practice of a seller.

The above statements of the Courts, the Federal Trade Commission Report and the Report of the Attorney General's Committee, set forth the principles which guide my decision as to the cost justification phase of this case.

I now consider the cost studies submitted by defendants to sustain their cost justification defenses:

1. *Bowman Studies.*—Bowman first maintains, and has attempted to show by studies, that plaintiff has engaged in a careful process of culling and grading of some 2,300 stores available for consideration by plaintiff in the Chicago area in order to show a discrimination among wholesale customers. Bowman contends this "culling and grading" process results in isolated examples of discrimination which are not representative of the situation throughout the Chicago area. Bowman has also submitted several cost studies conducted and analyzed primarily by Albert J. Bergfeld, an expert in the field, which purport to justify the different discounts granted to chains and independents. These studies, which are lengthy and detailed, conclude that the discount quotations are justified because of the difference in the cost of delivery between chain and independent stores.

With regard to the alleged price discriminations against bulk wholesale customers, Bowman contends that the price variations complained of were bona fide attempts to meet competition and were also justified by differences in delivery costs and has submitted a detailed cost study to this effect.

2. *Borden Study.*—The Borden study conducted by J. F. Malone, an expert in the field, assisted by the accounting firm of Haskins and Sells, is a detailed analysis of route activities, branch office clerical activities and district central office activities and concludes in substance that the price discrimination against independent wholesale customers is justified by a consideration of direct and indirect costs. With regard to the alleged price discriminations against bulk wholesale customers, Borden contends that the price variations complained of were justified by differences in manufacturing

costs due to differences in quantities of various products purchased and has submitted summary schedules to this effect.

The defendants have as well submitted by their briefs, a mass of material, much of which is argumentative, explaining and elaborating upon specific parts of the studies. For purpose of this memorandum it is sufficient to find, as I do, that the studies of both Bowman and Borden are products of extensive investigations of many customers within given areas and reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers.

Plaintiff has made detailed criticisms of defendants' wholesale customer cost studies. Among other contentions, plaintiff argues: That defendants have given too broad an interpretation to the phrase "methods or quantities" as used in the cost proviso in preparing their cost studies; that defendants' own cost charts show that the discount differences between their store customers were not justified by cost differences; that Bowman cannot justify its discriminatory prices on the basis of any alleged cost differences resulting from the collection of C.O.D. payments or the rendering of "customer services" in connection with its milk deliveries; that Bowman and Borden "customer services" are prohibited by Sections 2(d) and 2(e) of the Clayton Act and outside the scope of Section 2(a); that the Bowman and Borden systems of cost allocations are unsound and improper on several grounds including the use of erroneous premises, statistically unsound standard time formulae and wrongful classification of various functions. Plaintiff has, as well, by Tables, submitted corrections of these alleged deficiencies in defendants' cost allocations.

Another principal criticism of the cost studies relates to their seemingly arbitrary nature. A customer who qualifies as a chain, for example, gets a flat discount regardless of volume purchased, while a customer who qualifies as an independent must reach a prescribed dollar volume in order to qualify for his discount.

Plaintiff has selected some isolated cases where this seemingly arbitrary classification results in percentage discounts which do not bear a direct ratio to differences in volume of sales. However, this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores. Some measure of business (or accounting) judgment must be used in determining the premises of a cost study, and I cannot now find that these defendants have determined premises for these studies which are improper. Certainly, the studies are imperfect in some respects, but any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect.

Plaintiff contends with regard to defendants' bulk wholesale customers that Bowman failed to prove a bona fide meeting of competition as to its customers and also failed to prove a cost justification defense. Plaintiff contends that Borden failed to prove its cost justification defense.

Having fully considered all the evidence before me, as well as the schedules, summaries and tables and arguments relating thereto of the parties, I find that defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification

for the difference in prices described above in defendants' published discount quotations.

I further find that defendants' bulk cost studies provide an adequate justification for the difference in price described above with regard to the flat, net prices charged defendants' bulk wholesale customers.

I now consider whether a decree should be granted in accordance with the Government's prayer for relief. In reaching a decision on this question I have been guided, among other considerations, by the following:

1. As stated at the outset of this memorandum, the practices described in the plaintiff's complaint apparently no longer are followed by the defendants. In any event, such practices would be relevant only to show the present state of the industry and to determine the likelihood of future violations occurring. As Mr. Justice Jackson stated in *U.S.* v. *Oregon Medical Society,* 343 U.S. 326, at Page 333: "All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form it is to undo existing conditions, because otherwise they are likely to continue. In a forward-looking action such as this, an examination of 'a great amount of archeology' is justified only when it illuminates or explains the present and predicts the shape of things to come." The types of violations now alleged to exist are completely different from those described in the original complaint. No evidence was presented and no argument made that there is a *present* need for injunctive relief to cure such old practices. Further, these old practices which were the subject of the 1953 trial have already been condemned

by the terms of the *Dean* Decree. As I have already indicated, and as the Supreme Court has commented in this case, I am justified in considering *all* factors, as well as the *Dean* Decree, in arriving at this determination.

2. The various practices of which plaintiff *now* complains, consisting of alleged outright discrimination between classes of customers, are shown to have been adequately justified by the defendants' cost studies.

3. The single question for determination in this phase of these proceedings is whether or not I should issue an injunction regulating *all* wholesale sales made by defendants. Such an injunction would, by its nature, be general and all inclusive. And, as the parties well know, in all probability, subsequent proceedings for enforcement, amendment and modification of the injunction would follow.

In short, I would regulate this particular phase of the industry and, in so doing, would continually be called upon to pass judgment on the pricing practices of these defendants. On the basis of the evidence presented, I feel that such a course is impractical and unwarranted.

I wish to make clear, however, that I have not given my stamp of approval to all pricing policies and practices revealed by the evidence. As I have indicated in other parts of this memorandum, these policies and practices have in many instances been imperfect.

Plaintiff is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted.

Accordingly, keeping in mind the admonition of the United States Supreme Court in this very case that:

> (T)he moving party must satisfy the Court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive;

I find that plaintiff has shown no need for the exercise of the Court's equitable powers and accordingly, the case must be, and is, hereby dismissed.

I adopt as my Findings of Fact the Stipulations of Fact embodied in the pre-trial orders heretofore entered by me.

Further, in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, the facts and conclusions stated in this memorandum shall stand as additional findings of fact and conclusions of law.

(S) CAMPBELL,
Chief Judge.

Dated Feb. 27, 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

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Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

---

MOTION OF THE BORDEN COMPANY TO AFFIRM

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MOTION OF THE BORDEN COMPANY TO AFFIRM

Appellee, The Borden Company, pursuant to Rule 16, of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court sought to be reviewed in this case be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

Appellant's Jurisdictional Statement (herein called "J.S.") sets forth a single "Question Presented" (J.S. 2). The "Question" as stated is not, however, presented by the record as to this appellee. The only issues actually presented by the appeal are questions of fact arising out of the complex and lengthy cost justification studies presented by the two appellees. Not one of these fact questions is substantial; not one is important; and not one is apt to be presented in the same form in any other case.

HISTORY OF THE CASE

This is a direct appeal from the judgment of the district court taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended. The judgment appealed from, entered February 27, 1961, denied the Government's request for an injunction against future violations of Section 2(a) of the Clayton Act.

The Government filed its complaint in this case more than ten years ago, on June 18, 1951, primarily charging several dairies in the Chicago area with violating Sections 1 and 2 of the Sherman Act, but incidentally including, in two of the forty-eight paragraphs of the complaint, a general charge of price discrimination in violation of Section 2(a) of the Clayton Act. At the close of the Government's case—which was devoted primarily to the Sherman Act charges—the district court granted defendants' motions to dismiss for failure of proof of the Sherman Act charges and for failure of the evidence on the Clayton Act charges to warrant the granting of the relief sought.

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed and remanded the case as to the Clayton Act charges "for further consideration" as to whether an injunction should in equity be granted. *United States* v. *Borden Co.*, 347 U.S. 514. On remand, the "sole question" was, as the district court phrased it, "whether, in light of *present* conditions in the milk industry in Chicago, as shown by the evidence presented to the Court after remand, the public interest would be served by the issuance of an injunction" (J.S. App. 24).

At the request of the Government, the record was reopened for evidence "of current Clayton Act violations" (J.S. App. 23). The Government introduced evidence of discount schedules used by Borden in the sale of its prod-

ucts to various classes of grocery customers; and evidence of a substantially different system of quotations by Bowman to grocery customers based on a different classification method from that used by Borden (J.S. App. 24-25).* Both Borden and Bowman submitted extensive and wholly independent studies to justify the resulting net price differentials to their customers on the basis of cost differences.

The ultimate conclusion reached by the district court upon this massive record was that "plaintiff has shown no need for the exercise of the Court's equitable powers and accordingly, the case must be, and is, hereby dismissed" (J.S. App. 38). As to the practices claimed to violate the Clayton Act which appeared in the evidence on the first trial, the district court found that such practices "apparently no longer are followed by the defendants" and that "The types of violations now alleged to exist are completely different from those described in the original complaint." The district court concluded that "No evidence was presented and no argument made that there is a *present* need for injunctive relief to cure such old practices," and that these old practices were in any event "condemned by the terms of the *Dean* decree" previously issued in private litigation by the same district court (J.S. App. 36-37). No attack is now made on these conclusions.

As to the new pricing practices shown by the evidence introduced on reopening, the district court found:

> "The various practices of which plaintiff *now* complains, consisting of alleged outright discrimination between classes of customers, are shown to have been

* Evidence of differences in prices charged restaurants, hotels, and similar "bulk wholesale customers" was also introduced, as to which cost justification defenses were offered and sustained (J.S. App. 25-26, 33-34). While the Notice of Appeal contained a "question" directed to this phase of the case, the Jurisdictional Statement abandons this issue (J.S. 2, fn. 1).

adequately justified by the defendants' cost studies" (J.S. App. 37).

The only attack now made by the Government on the decision below relates to this conclusion.

The Issues as to Borden and Bowman Are Separate and Distinct

While Borden and Bowman were joined in the original complaint as co-conspirators in violation of the Sherman Act, there was no allegation of any conspiracy to violate the Clayton Act, and thus nothing justified joinder with respect to the Clayton Act charges. When the Sherman Act charges were dismissed, and the dismissal was upheld by this Court, the only basis for joinder ceased to exist.

The pricing practices of the two dairies placed in evidence after remand were markedly different, and the cost justification evidence offered by each was wholly independent of the evidence offered by the other, both in form and in content. While for convenience the two cases were decided by a common opinion, the issues as to Borden and Bowman were treated throughout as separate and independent. Separate pre-trial orders were entered as to each defendant, and the evidence as to each was separately presented. The case as to neither appellee is dependent upon nor stands or falls with the case made for the other. As the Jurisdictional Statement makes clear, the Government's attack on the two cost justification defenses necessarily rests upon different bases.

For the reason that the appeal thus raises different issues as to the two appellees, and those issues must be presented separately to avoid confusion, separate motions to affirm are being filed.

Nature of the Evidence on Remand

On reopening, the Government's additional evidence as to Borden was set forth in stipulations which form a "Supplemental Pre-Trial Order" (herein called "SPTO-Borden"). Borden's extensive cost justification study was also reduced to stipulated form as an "Additional Pre-Trial Order" (herein called "APTO-Borden").

During the period of time covered by the Government's evidence, Borden published discount schedules applicable generally to grocery store customers based on quantities purchased. This schedule read in part:

> "The following discount schedule will be applied to all purchases of Borden's fresh milk products.
>
> | Average converted units per day | % Discounts |
> |---|---|
> | 0—24 | 0 |
> | 25—74 | 2 |
> | 75—149 | 3 |
> | 150 and over | 4" |
>
> (SPTO-Borden, Schedule A).

Of the 1,322 "independent" grocery stores covered by the cost study, 392 were entitled to no discount under this schedule, 573 to a 2% discount, 277 to a 3% discount, and only 80 to a 4% discount (APTO-Borden p. 126, and p. 163, Schedule XXXIV).

Borden also offered its two largest customers discounts of 8½% which was 4½% in excess of the maximum discounts set forth in the published schedule. Those two customers were the Great Atlantic and Pacific Tea Company and Jewel Food Stores, Inc. (hereinafter referred to as "A&P" and "Jewel"). Borden was not then selling milk to any other grocery store customer in the Chicago area who operated more than one store under common corporate ownership—or was, in other words, a corporate chain store (APTO-Borden p. 83, ¶ 145).

A&P and Jewel were many times over the largest grocer customers of Borden; together they purchased 66% of Borden's total sales of fluid milk to all grocery store customers in the Chicago area (APTO-Borden p. 163, Schedule XXXIV).

The extent of Borden's cost justification study is evidenced by the fact that the pre-trial order in which it is set forth (APTO-Borden) is 171 pages in length, contains 281 paragraphs of stipulated fact, identifies 63 individual exhibits and 13 "bulk" exhibits (constituting the basic data of the cost studies), and includes 34 schedules of computations.

The Government presented four expert witnesses in rebuttal of the cost study. The direct testimony of these witnesses as to the Borden study appears in statement form, with other material, in a "Rebuttal Pre-Trial Order" (herein "RPTO-Borden"). Cross-examination of these witnesses (Taggart, Sawyer, Otto F. Taylor, and Woolley) was by lengthy depositions filed as part of the record (herein called "T.D.," "S.D.," "O.F.T.," and "W.D."). Further stipulations were also contained in a "Final Pre-Trial Order" (herein "FPTO-Borden").

All of the stipulated facts set forth in these various pre-trial orders were embodied by reference in the district court's findings, as were the ultimate facts and conclusions stated in the memorandum opinion of the district court (J.S. App. 38). Specifically, the district court made this finding as to the cost studies:

> "I find that the cost studies provide an adequate justification for the difference in prices described above in defendants' published discount quotations" (J.S. App. 35-36).

Grounds for This Motion and Facts on Which It Is Based

This motion is based on two grounds: *first*, that the record as to Borden does not raise the "Question Presented" which the Jurisdictional Statement asks this Court to decide; *second*, that the only possible questions open for review involve issues of fact which are neither substantial nor important.

I. THE "QUESTION PRESENTED" SET FORTH IN THE JURISDICTIONAL STATEMENT IS NOT RAISED BY THE RECORD.

The single "Question Presented" set forth in the Jurisdictional Statement is phrased as follows:

> "Whether sellers of fluid milk who have engaged in prima facie unlawful price discrimination in favor of all chain stores and against all independents, regardless of the volume of their individual purchases, can justify the discriminations as making 'only due allowance for differences in the cost of . . . sale or delivery resulting from the differing methods or quantities' in which the milk is sold or delivered to the chains and the independents, merely by proving that sales to all chains are less costly *on the average* than sales to all independents, without showing any justification for treating the chains and independents as separate classes of purchasers" (J.S. 2).

Inherent in the "Question" as so stated are three basic assumptions, all contrary to the record:

> (1) that Borden engaged in "price discrimination in favor of *all* chain stores," large and small, "against *all* independents" solely because the favored customers were chain stores;
>
> (2) that Borden's cost justification was limited to proof "that sales to all chains are less costly *on the average* than sales to all independents"; and

(3) that Borden made *no* "showing" of "any justification for treating the chains and independents as separate classes of purchases."

A brief review of the record will show that all three assumptions are contrary to the record, and that the alleged "Question Presented" is thus not raised by the record.

A. The "Question Presented" does not arise because Borden did not grant maximum discounts to "all chain stores" as such and did not grant discounts simply because of an "arbitrary classification of customers according to ownership."

Amplifying the first assumption underlying the alleged "Question Presented," the Jurisdictional Statement asserts: (1) that "The Borden study . . . rests upon an arbitrary classification of customers according to ownership" (J.S. 16); and (2) that under the Borden pricing system "chain stores receive a fixed discount regardless of quantities purchased" (J.S. 6). Both assertions are clearly contrary to the record.

There is not a scrap of evidence that Borden granted its two largest customers larger discounts than other customers simply because they were "chain stores." To the contrary, the undisputed evidence shows that the basic reason was the volume of the purchases by each of these customers. The sales by Borden to A&P and Jewel were in total almost exactly double the total sales made by Borden to all its 1,322 so-called "independent" grocery store customers (APTO-Borden p. 163, Schedule XXXIV). The weekly purchases of these two customers combined were more than 8 times the total weekly purchases of the 80 largest "independent" grocery stores served by Borden (which were the stores entitled to the 4% discount under the published schedule) (*ibid.*). Thus, it is obvious that

not a single "independent" grocery store had total purchases that were more than a very small fraction of the purchases made by either Jewel or A&P.*

Furthermore, Borden did not publish or use any discount schedule listing "chain stores" as such. The Borden discounts to A&P and Jewel were granted in individual and independent letters written to these two customers (SPTO-Borden pp. 3-6, Ex. B, C, and E). There is not a scrap of evidence to show that, had other "chain stores" offered to purchase from Borden, they would have been granted the same discount.

The misunderstanding of the record as to Borden's pricing practices which is implicit in the wording of the alleged "Question" is further reflected by the assertion that Borden had made a "wholly arbitrary" classification "which precludes any independent from ever achieving or approximating the discount automatically accorded all chains, regardless of the volume of its individual purchases" (J.S. 18). This misunderstanding is further betrayed by the assertion that "the Schubert store" received no more than a 4% discount despite its volume of purchases (J.S. 17, fn. 12). To the contrary, the Government's own proof showed that at least three of the largest independent customers (Schubert, Popek, and Cartan), as well as A&P and Jewel, received discounts greater than those set forth in the published discount schedule. The effective discount to these three stores was 5½% as against the 4% maximum set forth in the published schedule (SPTO-Borden pp. 3-5, Schedules I and II). Hence, the assumption that Borden granted discounts reflecting volume and other

* That the purchases of Jewel and A&P were approximately of the same order of volume is apparent from RPTO Borden p. 26 and FPTO-Borden, Schedule XXXVI.

economies only to "chain stores" is thus rebutted by the Government's own proffered evidence.*

Even the term "chain stores" crept into the case as to Borden simply as a matter of descriptive convenience. The pre-trial order embodying the Borden cost study stated that, "for purposes of the cost study," customers served on the 134 wholesale routes covered by the survey were classified as follows: (1) stores of A&P and Jewel "will hereafter be called 'chain stores,'" (2) all other grocery stores "will hereafter be called 'independent stores'" (APTO-Borden p. 83, ¶ 145). In other words, the fact that the two customers making the bulk of the purchases and thus receiving the maximum discounts happened to be chain stores led to the use of the phrase in the cost study. Obviously, these customers were *not* granted the discounts simply because they could for convenience be described as "chain stores."

The irrelevance of the term "chain stores" as a classification of customers is emphasized by the fact that, on August 29, 1955, Borden lost the Jewel business to a competing dairy, Dean Milk Company (APTO-Borden pp. 3-4, ¶ 7). Thereafter, the single customer receiving the lowest net price was A&P.

The fact that Borden's two largest purchasers at the time of the cost study were corporations operating more than one grocery store may be the reason why the purchases of those corporations exceeded many times over the purchases of any other customer, and thus warranted special

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* No separate computation of the costs of serving these three customers was made by Borden (although the basic data from which such a computation could be made is in the record), since it was later stipulated that "plaintiff does not contend in this proceeding that the added discounts of 1½% allowed by Borden . . . to store customers Schubert, Popek, and Arthur Cartan . . . are evidences of a violation of Section 2(a) of the Clayton Act as amended" (APTO-Borden p. 171, ¶ 2).

discount consideration. But that fact does not in any way justify the Government's contention that Borden made "an arbitrary classification of customers according to ownership."

B. The "Question Presented" does not arise because Borden's cost justification was not limited "merely" to proof "that sales to all chains are less costly on the average than sales to all independents."

The "Question Presented" asks whether the appellees "can justify the discriminations . . . merely by proving that sales to all chains are less costly *on the average* than sales to all independents" (J.S. 2).

Borden's cost justification defense was *not* so limited. The Borden cost study compared costs of sale and delivery to two specific chain store customers, A&P and Jewel, with costs of sale and delivery to *each* of four classes of independents (APTO-Borden pp. 129 and 131, Schedules XXVI and XXVII). The study showed that the differentials between the net prices charged each category of independent store customers were fully cost justified as against the net prices charged each other category of independent store customers. The study further showed that the net prices charged A&P and Jewel were fully cost justified, category by category, with each class of independent store customers.

Furthermore, the statement of the alleged "Question Presented," by assuming that the Borden cost study deals only with average costs to the several classes of customers, overlooks the fact that the Borden cost study contains the basic data as to costs of sale and delivery to each location and to each single customer. (This fact is discussed more fully under Proposition II.) All that was left to be done was to make the arithmetical computations, customer by customer. If such computations had been significant, the

Government was free to make them from the data supplied by Borden. To imply that the Borden study was confined solely to a presentation of *average* costs is to mislead this Court.

C. The "Question Presented" does not arise because Borden's classification of customers was not made "without showing any justification for treating the chains and independents as separate classes of purchasers."

The "Question Presented" set forth in the Jurisdictional Statement assumes that Borden's cost study sought to justify the discounts to A&P and Jewel

> "without showing any justification for treating the chains and independents as separate classes of purchasers" (J.S. 2).

The charge that Borden did not make any "showing" of "any justification" for classifying its two largest customers separately from its other customers is repeated throughout the Jurisdictional Statement by such assertions as (1) that "The cost studies are . . . inherently defective because there is no basis for treating the chains as one class of customers and the independents as another" (J.S. 11); (2) that "Neither Bowman nor Borden established any basis for treating the chains and independents as separate categories of customers" (J.S. 12); and (3) that "the studies do not justify the discriminations based upon a wholly arbitrary distinction between 'chains' and 'independents'" (J.S. 18). These assertions are directly contrary to the record.

Before discussing the showing actually made of the reasons for the classification, it should be noted that classification of customers for purposes of cost justification has always been held proper, since the alternative of justifying costs as between each individual customer would prove so

impracticable as to defeat the Congressional purpose of permitting economies of manufacture, sale and delivery to be passed on to the consumers. Classification on a reasonable basis has been upheld in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 58-59 (8th Cir. 1951); *In the Matter of B. F. Goodrich Company*, 50 F.T.C. 622 (1954); *In the Matter of United States Rubber Co.*, 46 F.T.C. 998 (1950); *In the Matter of Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948); *In the Matter of Bird & Son*, 25 F.T.C. 548 (1937).

All three of the Government's independent expert witnesses (Taggart, Sawyer, and Taylor) were signatories to the "Report to the Federal Trade Commission by the Advisory Committee on Cost Justification under the Robinson-Patman Act" (herein called "Cost Justification Report" or "C.J.R."). This Report states:

> "Classification or grouping of customers, orders, commodities and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sales transaction or sales to each individual customer. This is important for cost justification purposes, since if no transaction or customer could be treated as a member of a class or group, the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers" (C.J.R. 11).

The Government's expert witnesses, Taggart and Sawyer, reaffirmed their agreement with this passage (T.D. 67-68; S.D. 43-44), and Professor Taggart added: "I think I probably wrote that" (T.D. 68).

The sole question therefore is whether, under the facts in the present case, Borden's classification of A&P and

Jewel as a class apart from other grocery customers was reasonable. That a substantial "showing" to support the finding of reasonableness was made is beyond question.

1. **The showing made as to the differences in quantities purchased by A&P and Jewel on the one hand and by the various classes of independent stores on the other was enough in itself to establish the reasonableness of the customer classification.**

Two-thirds of Borden's sales of fluid milk to grocery stores were made to A&P and Jewel. Differences in volume between these and other customers existed not only in total purchases, but also in total amounts delivered per location—The weekly deliveries to the 254 A&P and Jewel stores averaged $768.74 per store, while those to the 80 largest "independents" averaged only $289.59 per store (APTO-Borden p. 126 ¶ 202, and p. 163, Schedule XXXIV). The "differing amounts" in which the sales and deliveries were made thus were so extreme as to constitute without more a "showing" justifying the separate classification of these two customers in order to ascertain whether the discounts granted, in the language of the Clayton Act, made "only due allowance" for differences in the cost of sale or delivery resulting from differences in the quantities purchased.

2. **The showing made as to the differences in the methods of sale and delivery to A&P and Jewel as compared to the various classes of independent stores was also sufficient to establish the reasonableness of the customer classification.**

The record shows many differences between the *methods* of sale or delivery to A&P and Jewel on the one hand and to all other Borden grocery customers on the other:

First. The large majority of "independent" customers pay cash for each delivery, which payment is collected by the routeman (or driver) at the time of delivery and must

be accounted for by him. A&P and Jewel pay weekly on a centralized billing basis (APTO-Borden p. 117, ¶ 185, item 15).

Second. Some "independents," however, purchase on a periodic payment or credit basis. In such cases the routemen make periodic collections at the time of delivery (APTO-Borden pp. 117-118, ¶ 185, items 15-17). However, in the case of A&P and Jewel, all billings are handled centrally (APTO-Borden p. 152, ¶ 244), a single total invoice being given each of the two customers (APTO-Borden p. 154, ¶ 250MD).

Third. In the six years up to and including the cost study, all bad debt losses from store customers had been incurred by extensions of credit to "independents," and none by any "chain store" (APTO-Borden p. 159, ¶ 262). Considerable work is performed with respect to independent stores in obtaining credit ratings, none of which is necessary in the case of A&P and Jewel (APTO-Borden p. 155, ¶ 251).

Fourth. In the case of "independents," whether on a cash or credit basis, the routeman (driver) must compute the sales price of each product purchased, and the total sales price of each delivery, and must enter these computed figures in the sales ticket book. In the case of A&P and Jewel, no such computations or entries are made by the routemen; all extensions are made in the course of the centralized billing operation (APTO-Borden p. 117, ¶ 185, item 14).

Fifth. In the case of "independents," new business is solicited by "solicitors," who also call upon the "independents" to hear complaints, distribute point-of-sale advertising materials, and to follow up on slow collections (APTO-Borden pp. 70-71, ¶ 112MD). These solicitors do *not* call on A&P or Jewel stores to secure or maintain their business (APTO-Borden p. 71, ¶ 113MD).

Sixth. A greater proportion of the time spent by Borden executives and administrative employees on particular customer activities "is spent on problems of independent stores than the sales of such stores bear to the sales of chain stores" (APTO-Borden p. 85, ¶ 151MD). Reasons for this were shown by Borden (APTO-Borden pp. 85-87, ¶ 152MD and ¶ 153MD).

Seventh. The stores operated by A&P and Jewel tend more than independent stores to be concentrated in areas with denser population, reducing truck time between store locations (APTO-Borden pp. 77-78, ¶ 127MD).

Eighth. The A&P and Jewel stores required delivery of milk to places in the store far more accessible than those to which delivery was required by independents (See time allocations, APTO-Borden Schedules XXVI and XXVII).

These facts were clearly sufficient to warrant the separate classification of A&P and Jewel because of "differences in the cost of manufacture, sale, or delivery resulting from the differing *methods* . . . in which such commodities are to such purchasers sold or delivered."

Furthermore, the facts found prove that these differences in the methods and "quantities" by which such milk was purchased resulted in conspicuous differences in cost of sale and delivery.

First. Differences in method of doing business are reflected in the fact that, although the weekly purchases of A&P and Jewel combined totaled $195,262, as against $98,672 for all "independent" stores and $23,167 for the 80 largest independent stores (APTO-Borden p. 163, Schedule XXXIV), the time spent by drivers in assembling the products to be delivered to each store after its requirements had been ascertained totaled 17,856 minutes for A&P and Jewel stores, 23,600 minutes for all independent stores, and 3,635 minutes for the 80 largest independent

stores (APTO-Borden p. 115, ¶ 185, item 7; p. 126, ¶ 202; p. 129, Schedule XXVI; p. 135, Schedule XXVII; p. 163, Schedule XXXIV). This means (1) that substantially less time was spent in this activity in delivering $195,262 of sales to A&P and Jewel stores than was spent in delivering $98,672 of sales to the independents, and (2) that, although sales to A&P and Jewel were 8.4 times as much as total sales to the 80 largest independents, the time spent in this activity was only 4.9 times the time spent at those 80 largest independents. The differences in cost of delivery caused by this factor alone are obviously substantial.

Second. The easier accessibility to point of delivery in the A&P and Jewel stores is shown by a comparison of minutes spent by drivers in carrying milk from their trucks to the designated point of delivery on the store premises. This required a grand total of 11,538 minutes in the case of A&P and Jewel stores, 12,709 minutes in the case of all independents, and 2,041 minutes in the case of the 80 largest independents (same references as above, plus APTO-Borden p. 115-116, ¶ 185, item 8). This shows that this activity took *less* time with respect to the $195,262 of sales to A&P and Jewel than it did with respect to the $98,672 of sales to all independents. Furthermore, although sales to A&P and Jewel were 8.4 times as much as to the 80 largest independents, the time spent on this activity at the A&P and Jewel stores was only 5.6 times that spent at those 80 independent stores.

Third. Another difference in the method of accepting delivery is dramatically illustrated by the relative time spent on the driver activity of stocking and packing merchandise in the store refrigerator. While only 3,367 minutes were spent in the aggregate on this activity in the A&P and Jewel stores, a total of 20,959 minutes was spent performing this function, with respect to half the same vol-

ume, in the independent stores. This activity took 4,866 minutes in the 80 largest independent stores. In other words, although sales to A&P and Jewel were 8.4 times as much as to these 80 largest independents, substantially *less* time was spent on this activity in the A&P and Jewel stores (same references as above, plus APTO-Borden p. 116, ¶ 185, item 11).

Fourth. The necessity of individualizing bookkeeping and collections with respect to both cash and credit sales to independent stores resulted in heavy differentials in costs of delivery. Drivers' time in preparing sales tickets and entering deliveries in route books aggregated 8,878 minutes for A&P and Jewel stores, 22,192 minutes for all independent stores, and 2,831 minutes in the 80 largest independent stores (same references as above, plus APTO-Borden pp. 117 and 118-9, items 14 and 22). In other words, nearly three times as much drivers' time was spent in independent stores in these activities than in the A&P and Jewel stores, although sales to the latter were twice those to the former. Furthermore, although sales to A&P and Jewel were 8.4 times as much as to the 80 largest independent stores, only 3.2 times as much time was spent on these activities.

Fifth. The total minutes of routemen's time spent in direct service to the A&P and Jewel stores was only 83,170, while direct service to the independents consumed 119,427 minutes. Service to the 80 largest independent stores alone consumed 21,231 minutes (*ibid.*). In other words, although A&P and Jewel were buying in the aggregate two bottles of milk for every one sold to the independent stores, the drivers were spending 44% more time serving the independent stores than A&P and Jewel! Even with respect to the 80 largest independent stores, 26% as much time was spent in serving them as in serving the A&P and Jewel stores, while their total purchases were

less than 12% of those of A&P and Jewel. Direct labor charges for delivering milk to these 80 largest independents were thus more than twice as much per dollar of sales as the labor charges in delivering to A&P and Jewel.

The Government's assertion that Borden made no "showing" of "any justification for treating the chains and independents as separate classes of purchasers" thus betrays the fact that the Jurisdictional Statement was written by someone who was unacquainted with the record in the case. Borden *did* in fact make an extensive and thorough "showing."

Since the "Question" which this Court is asked to answer is based on three false assumptions and is not presented by the record, the decision of the district court should be affirmed.

II. THE QUESTIONS OF DETAILED FACT WHICH ARE THE ONLY ISSUES ACTUALLY PRESENTED BY THIS APPEAL ARE NEITHER SUBSTANTIAL NOR LIKELY TO RECUR.

The effort of the Government, by its framing of the alleged "Question Presented," to persuade this Court that an issue of possible importance is presented for decision may be placed in perspective by comparing that "Question" with the "Question Presented" in the Notice of Appeal. The two are markedly different. The Notice recognizes that the only issue raised by the record is a question of detailed fact, by stating the "Question" in the following words:

> "Whether defendants' pricing systems to chain and independent grocery stores can be cost justified under Section 2(a) of the Act, and, if so, whether defendants met their statutory burden of affirmatively showing

that their discriminatory pricing practices were based solely upon differences in cost resulting from the differing methods or quantities in which their products were sold or delivered" (Notice of Appeal p. 8).

The "question" so stated is obviously one solely of fact, involving no problems of statutory interpretation or any other principles of general application. Furthermore, the specific criticisms of the Borden study made in the Jurisdictional Statement involve minor details of the methods employed in this cost study. A decision by this Court upon these detailed fact questions will have no precedent value. A brief review of what the Bordon cost study actually showed will demonstrate that the Government's criticisms are wholly insubstantial.

A. The findings of ultimate fact made by the district court support the conclusion that Borden cost-justified its discount schedule.

The memorandum filed by the district court contains these findings of ultimate fact about the cost justification defenses both of Borden and Bowman:

1. That "the [cost justification] studies of both Borden and Bowman are products of extensive investigations of many customers within given areas, and reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers" (J.S. App. 34).

2. That the classification of customers for purposes of cost analysis which each appellee made "is not wholly arbitrary";—in other words, such classification is reasonable (J.S. App. 35).

3. That "I cannot now find that these defendants have determined premises for these studies which are improper";—in other words, the premises of the cost studies were proper (J.S. App. 35).

4. That "defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers" (J.S. App. 35).

5. That "such cost allocation is the sole reason for the alleged price discrimination" (J.S. App. 35).

6. That "the cost studies provide an adequate justification for the difference in prices" (J.A. App. 35-36).

7. That "plaintiff has shown no need for the exercise of the Court's equitable powers" (J.A. App. 38).

These findings of ultimate fact are clearly sufficient to support the judgment of the district court.

B. This Court should not be burdened with the onerous task of reviewing and reappraising the multitudinous stipulated facts to see if they substantially support the district court's findings of ultimate fact.

Under Rule 52(a), F.R.C.P., such findings of ultimate fact "shall not be set aside unless clearly erroneous." The findings of ultimate fact in this case rest, of course, upon the findings of specific fact which consist of the *stipulated* facts set forth in the various pre-trial orders. The Government obviously cannot attack findings of facts which are stipulated. The only possible question for review is whether the stipulated facts provide substantial support for the findings of ultimate fact.

The facts set forth under Proposition I have clearly shown that no substantial question exists as to whether the district court's conclusion that Borden's classification of A&P and Jewel as a separate class was reasonable was adequately supported by substantial evidence.

The question as to whether the stipulated facts support the other ultimate findings as to Borden can only be resolved by a thorough study of a lengthy record embodying

the results of a complex, extensive, and thorough cost justification study. The Jurisdictional Statement fails to point to any compelling reason why this Court should be burdened with the onerous task of reappraising the soundness of the inferences to be drawn from the many thousand items of factual data set forth or summarized in the findings.

C. The Government's criticisms of details of the Borden cost study are without substance since the record supports the ultimate finding that the "premises for these studies" were proper and that the studies represent "a bona fide effort to allocate" Borden's costs "between different types of wholesale customers."

Criticisms of a cost study based upon claims that charges or allocations should have been handled differently are without substance when, as here, there has been "a bona fide effort to allocate costs" as between classes of customers, and the methods employed are consistent with sound accounting principles. This Court has itself recognized the "elusiveness of cost data" (*Automatic Canteen Co.* v. *F.T.C.* 346, U.S. 61, 68). The Federal Trade Commission has pointed out that

> "Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight." *In the Matter of Minneapolis-Honeywell Regulator Co.*, 44 FTC 351, 394 (1948).

The Cost Justification Report, authored in large part by the three independent experts who were called as witnesses by the Government, and stating the views of competent authorities as to sound cost accounting practices, states:

> "Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. 'Great weight' should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound." (C.J.R. 11).

The courts are in accord. Thus in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 58-59 (8th Cir. 1951), the Court of Appeals stated that a system "adopted in good faith" and a cost study "honestly maintained" which "reflected with substantial accuracy the differences in selling costs between the customers in Class D and those in Classes A and B" was not lightly to be regarded as "inadequate."

In view of the district court's conclusion, well supported by the facts, that the allocations appearing in the Borden cost study were made in good faith, criticisms of the details of these cost studies cannot possibly raise a substantial issue justifying review by this Court.

D. Further, no substantial question could arise on this appeal since the Borden cost study showed that Borden's price differentials were more than cost-justified by any one of four methods of allocating or charging costs.

Borden submitted to the district court four different bases for cost justification based on the data which had been stipulated. Three of them used alternative methods of allocating indirect and overhead costs, and one was based on *direct* costs alone.* The computations as to these four

* All costs were directly charged on a time basis between A&P and Jewel on the one hand and each class of "independent" stores on the other. A few small items were allocated between the four classes of independent stores; no complaint has been or could be made of this feature.

methods appear as Summary Schedules I, II, III, and IV in Borden's Brief to the district court. These schedules cover:

I. "Cost Justification based solely on Direct Costs"

II. "Cost Justification based on allocation of Major Indirect and Overhead Costs on basis of Direct Cost"

III. "Cost Justification on the Basis of Direct Costs Plus Indirect Delivery Costs allocated on the basis of number of deliveries"

IV. "Cost Justification Based on Allocating Both Extra Compensation and Transportation Expenses on the Basis of Volume"

All four computations showed that in every respect the Borden price differentials were *more* than justified by differences in costs.

Actually, Schedule II almost exactly conforms with the allocation method suggested in the Jurisdictional Statement—that "indirect delivery costs and related clerical expenses" are incurred "in proportion to . . . time required to make delivery" (J.S. 16, fn. 9). On this basis, total costs of sale and delivery to the A&P and Jewel stores were 13.23 cents per dollar of sales, and costs to the 80 largest independent stores were 30.51 cents per dollar of sales. (Borden's Brief, Summary Schedule II, opposite p. 62.) A&P and Jewel received 8½% discount, and the 80 largest independents 4%, a differential of 4.50 cents per dollar of sales. A discount differential between these two classes as high as 17.28 cents per dollar of sales (30.51 less 13.23) would have been fully cost justified on this method of allocation.*

* As against the independent receiving no discount, a discount of 64.64% (77.87 less 13.23) rather than 8½% would have been cost justified! Similarly, as against stores receiving 2% discount,

Where a choice of several accounting methods is available in making a cost study (as it often is: C.J.R. 28), the fact that the choice made produces a wider margin of justification than some other method is no basis for setting aside the results:

> "A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by respondent" (C.J.R. 11).

If this be the case, the fact that price differences can be cost justified by use of any of several methods makes the result so clear as to leave no substantial basis for criticism. As the Government's own expert admitted on cross-examination:

> "If there are alternative methods of allocating a joint or indirect functional cost, exploration of alternative methods using different service units would strengthen the validity of the over-all judgment to be derived from any one of them" (S.D. 79).

Since the Borden cost study proved that the Borden discount schedule was fully cost justified on any one of *four* alternative methods, any contention that the evidence fails to support the district court's finding is clearly without substance.

E. The Government's criticisms of Borden's "method of allocating indirect costs" betrays a lack of awareness of the fact that Borden fully justified its price differentials on the basis of direct costs alone.

The lack of substance to the Government's attack upon the Borden cost study is further demonstrated by the fact

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a discount of 34.96% to A&P or Jewel (46.19 less 13.23 plus 2.00) would have been cost justified; and as against the stores receiving 3% discount, a discount of 24.81% (35.04 less 13.23 plus 3) would have been cost justified.

that the two major criticisms both are based upon a lack of awareness of what the Borden cost study actually showed.*

The first of these criticisms is an attack on Borden's "method of allocating indirect costs" and is the theme of the lengthy footnote No. 9, appearing at page 16 of the Jurisdictional Statement. It is directed to the part of the Borden study which shows what the results would be if certain *indirect* costs were allocated between classes of customers.

The Borden study did in fact attempt, for the sake of completeness, to analyze *all* the costs of sale and delivery, including both indirect costs and overhead. Such indirect costs and overhead costs cannot be charged directly, but must be allocated. The use of "locations" and "stops" as factors to measure the allocation of indirect costs was entirely proper under sound accounting principles—as the

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* Another criticism of the Borden cost study in the Jurisdictional Statement is that the study "admittedly had been prepared for the trial" rather than before the discounts to A&P and Jewel were granted (J.S. 7). Suffice it to say that the Government's own witnesses agreed that "such studies may be made either after the fact or before the setting up of a price schedule" (T.D. 15-16; *cf.* O.T.D. 31-32). The Cost Justification Report expressly points out that "Where a seller is challenged under the Robinson-Patman Act to justify a price differential, the costs to be considered are historical, *i.e.*, actual or retrospective costs" (C.J.R. 10-11), and expressly approves the making of "special studies" *after* complaint (C.J.R. 14). Similarly, "Both the courts and the Federal Trade Commission . . . have liberally accepted data derived from litigation-inspired accounting methods." *Reid* v. *Harper & Brothers*, 235 F.2d 420, 422 (2d Cir. 1956) *cert. den.* 352 U.S. 952. These comments simply reflect a realization that a cost justification defense necessarily must ultimately deal with what actually took place rather than rest upon a guess as to what may take place made before a discount is granted and sales made.

Furthermore, Borden had made prior cost studies which were used by management to fix policies and confirm management's understanding of the cost of selling and delivering milk (APTO-Borden p. 61 ¶ 85MD, 86MD and 88MD).

Government's own expert witnesses admitted (T.D. 78-79, 134-6; O.T.D. 58). But the issue need not be debated, since Borden's study proved that its price differentials were fully justified on the basis of *direct* costs alone.

Direct costs of sale and delivery to A&P and Jewel amounted to 4.43 cents per dollar of sales; direct costs of serving all independent stores amounted to 14.07 cents per dollar of sales; and costs of serving the 80 largest independent stores was 10.52 cents per dollar of sales (Borden's Brief, Summary Schedule I, opposite p. 52). While A&P and Jewel received a discount of only 4.50 cents per dollar more than the 80 largest independent stores, a discount of 6.09 cents per dollar (10.52 less 4.43) would have been fully cost justified.

Cost justification using *direct* costs alone is clearly a proper method of cost justification. In effect it means that indirect and overhead costs are allocated on the basis of dollar sales volume, thus having no tendency to justify cost differentials based on differences in volume or on differences in method of delivery (T.D. 72-73; S.D. 100). Such allocation of *indirect* costs on the basis of "volume of goods delivered" is the very method suggested by the Government itself in the Jurisdictional Statement. (See p. 16, fn. 9, last sentence.)

The Jurisdictional Statement, in criticizing Borden's "method of allocating indirect costs" thus betrays a total lack of knowledge of the facts presented by the record.

F. The Government's criticisms of the Borden cost justification study for its alleged failure to make "any showing" as to the costs of serving individual store customers, betrays a lack of knowledge that the basic data placed in evidence permitted an analysis of the direct costs of serving every individual customer.

The Government asserts that, as between A&P and

Jewel, Borden's defense is "without any showing" that the two companies used "identical" methods or "that the stores of one of the two chains purchased the same average volume of milk as the other;" and further asserts that "there is no basis for determining whether both chains are entitled to the largest discount" (J.S. 17). Similar criticisms are directed to the fact that one or a few individual independents may have purchased more than the average A&P or Jewel store, or required less "services," and were "prejudiced" by being treated as a member of a class (J.S. 17-18).

What the author of the Jurisdictional Statement apparently did not understand is that the Borden study included time study report forms showing time spent daily at each store location, identity of each such store location, and volume delivered to such location (APTO-Borden p. 91-94, Ex. II and III). These report forms were extended and placed in bound folders (APTO-Borden p. 97, ¶ 170 and 171). The bound folders constituted Borden Bulk Exhibit 4 (APTO-Borden p. 99, ¶ 173).

These report forms, as well as the other data of the cost justification study, was, of course, available to the Government. It was a simple matter of mathematical computation for the Government to find out whether the facts were different as between A&P and Jewel, or whether any one or more large independents produced lower costs of sale and delivery than A&P or Jewel. Borden sustained the costly burden of providing sufficient data to answer any of the questions as to which the Government now asserts Borden "made no showing."*

Actually, certain of the summaries made part of the record demonstrate that the sales to A&P and to Jewel

* It is significant that none of the Government's three independent experts made any computations from the basic data supplied by the cost study to support the criticisms which the Government now advances.

were of the same general order of magnitude (RPTO-Borden p. 26; FPTO-Borden, Schedule XXXVI). Again, the Jurisdictional Statement makes a criticism which is wholly unwarranted by the record.

CONCLUSION

The judgment below should be affirmed for two separate reasons.

In the first place, the record as to Borden does not raise the "Question Presented" which the Government's Jurisdictional Statement asks this Court to decide. To accept the appeal on the assumption that such a "Question" was in fact presented would impose an unnecessary burden on this Court and on the appellee.

In the second place, the only possible contentions as to Borden which are open to the Government on the record are contentions which raise purely fact issues. These fact issues are obviously insubstantial.

The questions of fact which are presented by the record arise out of the special facts of the particular cost justification defenses offered by Borden. Not a single issue is involved which is of a type likely to recur in an identical or even similar form in other cases.

We respectfully submit that the decision below should be affirmed on the ground that no substantial question is presented for the decision of this Court.

Respectfully submitted,

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October 20, 1961

Office Supreme Court, U.S.
FILED
OCT 25 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 439

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE, BOWMAN DAIRY COMPANY, TO AFFIRM OR DISMISS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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OCTOBER TERM, 1961.

No. 439.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE, BOWMAN DAIRY COMPANY, TO AFFIRM OR DISMISS.

Appellee, Bowman Dairy Company, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed or that the appeal be dismissed on the ground that the question is not fairly presented by the record, and is so insubstantial as not to warrant review by this Court.

OPINIONS BELOW.

The opinions below are adequately set forth in the Jurisdictional Statement.

JURISDICTION.

The Jurisdictional Statement is defective in that it does not state the court in which the notice of appeal was filed as required by Rule 15(1)(b)(ii) of this Court.

QUESTION PRESENTED.

Whether appellee Bowman Dairy Company has by its cost justification defense under the "Provided" clause of Section 2(a) of the Clayton Act, justified the difference in discounts allowed to two A & P stores (which Bowman no longer serves) and one Kroger store as compared with each of five independently owned grocery stores (of approximately 2,200 served by Bowman).

STATUTE INVOLVED.

The statute involved is adequately set forth in the Jurisdictional Statement.

STATEMENT.

In order to identify the Robinson-Patman Act issues which were raised against Bowman in the trial court, and preserved for review by this Court, it is necessary to restate the history of the case.

The Complaint, filed in 1951, contained two paragraphs involving the Robinson-Patman Act. It alleged that since 1941 defendants had discriminated among their store customers by practices such as lump sum cash payments, installment cash sums, and interest free loans. At the trial, in 1953, the Government offered evidence that some such practices had occurred in the past. Because that evidence related to old violations, and because a decree entered in a private suit against the defendants already assured that there would be no new violations, the trial court dismissed the Complaint at the close of the Government's case.

The private decree to which the Court referred was entered on December 3, 1952.[1] Prior to the entry of that decree, Bowman had employed an independent firm of management engineers to make time and motion studies and to develop an entirely new discount system for its store customers.[2] The new discount system was put into effect on February 1, 1953. It established a graduated discount schedule, providing for an increase in the discount rate for every increase in each store's average daily volume of purchases. A change of as little as one quart per day resulted in a change in the store's discount rate. Although the schedules have been modified from time to time, except for a period of a few weeks, Bowman has employed the graduated discount system continuously since 1953.[3]

In 1954, this Court held that the trial court had dismissed the Robinson-Patman portions of the Government case on an erroneous ground, and remanded the cause for further consideration of the need for equitable relief. Thereafter, in April 1955, the trial court granted the Government's motion to reopen the record to present such additional evidence bearing on the effectiveness of the private decree as might have been gathered by the Government.[4]

The case which was then developed and presented by the Government was entirely new. The Government did not contend that there had been any resumption of the old practices condemned by the private decree, or that Bowman had discriminated among its independent store customers. Instead, it made two new attacks on Bowman. One of these —the attack on the pricing to restaurants and hotels—has

1. *Dean Milk Company* v. *American Processing and Sales Company, et al.*, No. 49 C 1159, United States District Court for the Northern District of Illinois.

2. Supplemental Pre-Trial Order as to Bowman, entered December 23, 1957, pp. 11-17.

3. Bowman Exhibits 5 through 13, inclusive.

4. Order of April 18, 1955.

now been abandoned. The other was a limited attack on the different prices charged to a handful of carefully selected chain and independently owned stores.

In March 1955 Bowman served 2,180 independently owned stores and 163 A & P and Kroger stores. From this large group of customers, the Government selected two routes on each of which Bowman served a large independent store and a small chain store. Although over 98% of the independent stores purchased less than 200 points per day,[5] each of the independents selected by the Government purchased more than 200 points. On the other hand, all of the specific chain stores picked by the Government were far below the size of the average chain store unit. These stores are specifically identified in Schedules I and II to the Supplemental Pre-Trial Order as to Bowman entered on November 4, 1955.

As a part of its *prima facie* case of price discrimination among these specific stores, the Government also offered evidence of competitive injury. This evidence included a map pinpointing the locations of the selected stores, the fact that each of the two routes served both a chain and an independent, and the inference that in view of the proximity of the stores, competition among them must have been affected by the discount differentials.[6] On this issue of competitive injury both parties thereafter introduced a great volume of evidence including market analyses of the trading areas served by each of the stores, questionnaires and interviews of customers of the stores, and other relevant data.[7] On this issue the trial court ultimately found

5. Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, p. 10.

6. See Supplemental Pre-Trial Order as to Bowman entered on November 4, 1955, paragraphs 7, 8 and 16 and plaintiff's Exhibit 5 thereto.

7. See Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, pp. 2-11; Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, pp. 2-3.

that the stores were in competition with each other and that there may be an injury to competition. Thus, the Court found that the plaintiff had made out a *prima facie* case of price discrimination among the selected stores.

No other stores were identified in the plaintiff's *prima facie* case. Except for the evidence pertaining to those stores, no evidence of injury to competition was offered by the Government. Having proved its *prima facie* case of price discrimination between those selected independent and chain store units, the Government rested. Plaintiff then contended that the burden had shifted to Bowman to justify the specific price differentials on an individual store by store basis.

The cost defenses presented by Bowman did justify the price differentials on a store by store basis. Bowman Exhibit 14 includes a study of the cost of serving each of the stores identified in the Government's *prima facie* case. The study shows that in every case except one, the lower net price to the chain store was substantiated by cost differences. The one exception, amounting to an unjustified difference of one-tenth of one per cent, involved a comparison between a store in the Goldblatt chain and a store in the A & P chain. The record shows that Bowman has since lost both of these chains as customers.[8]

The cost defenses presented by Bowman also included a computation of the amount of discount that could have been justified for each store in the A & P and Kroger chains on an individual basis. The permissible discount for each of the separate chain store units was then listed, and all were totalled to produce the permissible discount for the entire chain. The total was larger than the amount which actually had been paid on the basis of 11% to the entire chain. A few of the chain store units earned less than 11%,

8. Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, p. 21.

but most earned more. Since the average exceeded 11%, the entire discount was justified on a store by store basis.[9]

These cost defenses were introduced into evidence by stipulation as part of the extensive pre-trial procedures followed in the District Court. To avoid an extended trial, the Government was permitted unlimited access to the underlying materials used by the engineers in making their cost studies.[10] The parties limited the issues by stipulation, thereby obviating the need for offering evidence on matters which were not in dispute. Thus, the Government's objections to the cost studies submitted by Bowman were identified and limited by pre-trial order. Those objections do not include the point sought to be raised on this appeal.[11]

9. See Bowman Exhibit 14, pp. 10-11.

10. See Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, p. 1.

11. They were as follows:

"28. Plaintiff makes three objections to the method of testing discounts described in the basic manual (Bowman Exhibit 4) and employed in the March 1955 tests (Bowman Exhibit 14). These three objections are: (1) Plaintiff does not agree that an adequate sample of routes was used for the purpose of making the time studies used to develop the standard time allowances for the work elements described in Appendix A to the basic manual (Bowman Exhibit 4). The basis of plaintiff's objection is that the 55 time studies which were used in obtaining time data were all taken on routes operating out of the Elston Division. (2) The method of testing discounts described in the basic manual (Bowman Exhibit 4) and employed in Bowman Exhibit 14, assumes that the total cost per route per day, calculated as shown on Schedule 6 of the basic manual (Bowman Exhibit 4) and Schedule 1 of Bowman Exhibit 14, reasonably may be apportioned among different Bowman store customers on the basis of the standard time required by Bowman drivers to perform the services received by those different customers. Plaintiff takes the position that the total cost per route per day may not be apportioned among customers on the basis of route drivers' time. Plaintiff would accept an apportionment of drivers' compensation among different customers on the basis of drivers' time, but plaintiff contends that it is not acceptable to apportion the total cost per route day among different customers on the basis of

After describing the plaintiff's objections to the Bowman cost studies, the stipulation provided:

> "31. Except for the foregoing three objections, and one further objection to the test of the store discount plan effective January 2, 1956 (Bowman Exhibit 16) based on its analysis of sales of glass and fiber containers, which objection will be set forth in the plaintiff's rebuttal material, plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case." Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, p. 22.

Each of the Government's three objections to the cost defenses offered by Bowman was the subject of extensive additional stipulated material, and each point was fully argued in the post-trial briefs in the District Court.[12]

Subsequent to the entry of the order limiting the plaintiff's objections to Bowman's cost defenses, the Government employed three well known cost accountants to testify as expert witnesses. These experts, Herbert F. Taggart, Otto F. Taylor and Albert E. Sawyer, were all members of the Federal Trade Commission Advisory Committee on Cost Justification under the Robinson-Patman Act. They

drivers' time because the total cost per route day includes items of cost in addition to drivers' compensation (see Schedule 6 of Bowman Exhibit 4 and Schedule 1 of Bowman Exhibit 14). (3) Plaintiff takes the position that the cost studies should have included an analysis of the Central Office overhead, including such items as executives' salaries and other costs incurred in the Central Office of the Bowman Dairy Company, and that such additional elements of cost should have been apportioned among the different customers of Bowman Dairy Company." Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, pp. 19-21.

12. Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, pp. 26-30; Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, pp. 3-14.

made certain additional criticisms of the Bowman studies, which thereafter became the subject of additional stipulated material.[13] These additional points, however, are not raised on the present appeal. Despite the eminence of these expert witnesses, the Jurisdictional Statement omits any mention of their testimony.

In further rebuttal, the plaintiff also submitted a number of complicated charts and tables prepared by the staff of the Antitrust Division. One of these exhibits was specifically directed at the Bowman contention that one reason independent stores are more costly to serve than chains is that they use relatively more glass containers (which require extra handling) and relatively fewer fiber containers.[14] The rebuttal exhibit directed at this glass-fiber issue indicates that Bowman served two independent stores purchasing a combined average of about 1300 points per day. By simple division these are the two stores referred to in footnote 8 on page 16 of the Jurisdictional Statement as taking an average of 650 points per day. No evidence was offered by the plaintiff for the purpose of proving a *prima facie* case of price discrimination with respect to these two stores. The record does not even disclose their identity or their location.[15] Nothing further was added to the record after the filing of these rebuttal exhibits.[16]

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13. See, for example, Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, pp. 18-21.

14. The plaintiff's objection to this contention had been expressly preserved in the pre-trial order. See Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, p. 22.

15. The exhibit does indicate that the stores are served from Bowman South Division. That Division serves an area encompassing several hundred square miles. Approximately one-third of which is within the area covered by the complaint (Complt. ¶ 11).

16. At the time these exhibits were filed, Bowman also filed comments and analyses of the exhibits insofar as they related to the issues which had already been framed. See Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, pp. 5-16. However, neither party treated the plaintiff's rebuttal exhibits as raising any new issues.

In the memorandum opinion, the District Court held that plaintiff had proved a *prima facie* case of price discrimination, stating:

> "Plaintiff has demonstrated by its Schedule I, comparing five grocery stores, chain and independent, within a radius of one mile and served by the same milk route, and by its Schedule II, comparing four stores, chain and independent, within another radius of one mile and served by the same milk route, that a price discrimination exists as against the independent stores under applicable discount quotations." (J. S. p. 25.)

It thereafter found that Bowman's cost defenses had been prepared in good faith and concluded that the price discriminations had been justified under the cost proviso of the Robinson-Patman Act.

ARGUMENT.

I. THE QUESTION PRESENTED IN THE JURISDICTIONAL STATEMENT IS NOT FAIRLY PRESENTED BY THE RECORD.

A. The Government states in its Jurisdictional Statement that the question presented by the record in this case is whether Bowman has cost justified "prima facie unlawful price discrimination in favor of all chain stores and against all independents" (J. S. p. 2). This appeal question assumes that a *prima facie* case was made of unlawful discrimination in favor of all chain stores and against all independents. This assumption is not supported by the record.

The Government's *prima facie* case against Bowman was limited to a showing with respect to nine stores identified on Schedules I and II of the Pre-Trial Order entered on November 4, 1955. With respect to those stores, the Government presented evidence that the price differentials might adversely affect competition among them. No evidence of injury to competition was offered with respect to any other store served by Bowman. Since the plaintiff's statutory burden was not met with respect to "all chain stores" as against "all independents," the question presented by the Jurisdictional Statement is purely hypothetical and should not be answered on this record.

B. The question presented, as amplified in the argument, assumes that the cost proviso required Bowman to show "that there are common savings in costs applicable to all the chains that are not applicable to any of the

independents" (J. S. p. 11). It is thus assumed that a *prima facie* case involving nine competitive stores shifts the burden to Bowman to justify all differentials among 2300 different stores without any evidence indicating which, if any, of these additional differentials may adversely affect competition. The question presented is thus beyond the scope of the Robinson-Patman Act. The Government should not be permitted to predicate an appeal on Bowman's alleged failure to cost justify a *prima facie* case never presented.

As a matter of procedure, since the plaintiff selected certain specific stores for the purpose of testing the legality of Bowman's prices, a defense which fully justified the prices to those stores should put an end to the litigation.

C. Because the record was developed primarily by stipulation in connection with a series of pre-trial conferences, a great mass of underlying data was omitted from the formal record. The original records and summaries developed during the time studies, the original accounting records setting forth Bowman's delivery expenses, the work papers detailing the calculations supporting the ultimate conclusions of the experts, and a great deal of other qualifying material was not placed in the formal record. No objection to this informal method of procedure was made by either party.

When objection was made, detailed evidence was assembled to meet the objection. When no objection was raised, it was assumed that it would be unnecessary to encumber the record with factual detail.

The Government's specific objections to the cost studies were carefully defined in the pre-trial order before the record was closed.[17] Bowman's position with respect to

17. See Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, pp. 19-23.

each of these objections is set forth in full in the record.[18] Those objections did not include the question presented by the Jurisdictional Statement. As pointed out below, the record does in fact provide a sufficient justification for treating chains and independents as separate classes of purchasers. However, since this point was not included in the plaintiff's objections to the studies, all of the evidence relevant to the issue has not been placed in the record. Instead, both parties find it necessary to cite portions of the rebuttal material (which was offered on an entirely different issue) in order to discuss the so-called "Question Presented".

Admittedly, the extent to which pre-trial procedures were employed in this case is not typical. Nevertheless, if such procedures are to serve the salutary purpose of shortening trials, limitations on the issues which are imposed by pre-trial order must be honored in appellate proceedings. The question presented by the Jurisdictional Statement was not preserved in the pre-trial order limiting the issues entered on December 23, 1957. Accordingly, plaintiff should not be permitted to raise that question in this Court.

II. THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

A. The Jurisdictional Statement reiterates in various forms plaintiff's position that in order to justify separation of chains and independents into separate classes, it is necessary "to show that there were in fact cost savings applicable to *all* the chains that were not applicable to *any*

18. See Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, pp. 23-30; Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, pp. 3-21; see also the references to professional literature which were incorporated in the post-trial brief for the Bowman Dairy Company at pp. 23-26, pursuant to the Court's directions.

of the independents."[19] This position has been directly refuted by the Government's experts in this case. In the trial court the Government employed as its expert witnesses three cost accountants who were members of the Federal Trade Commission Advisory Committee on Cost Justification under the Robinson-Patman Act. Each of these experts—Professor Herbert F. Taggart, Otto F. Taylor and Albert E. Sawyer—signed the Cost Justification Report to the Federal Trade Commission, which contained the following statement:

> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers." (Cost Justification Report at p. 11.)

Each of these experts reaffirmed this statement in this proceeding.[20] Thus the Government's own experts have plainly stated that the cost justification which the Government now demands is a "refinement [which] would be outside the realm of practicability and would tend to make price uniformity a necessity * * *."

These views of the Government's experts have never been expressly rejected, even in this appeal. A question upon which the parties, or their expert witnesses, have agreed does not merit the attention of this Court.

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19. J. S. p. 11, emphasis added.

20. See Taggart Deposition, pp. 67-68; Taylor Deposition, pp. 33-34; Sawyer Deposition, pp. 43-44.

B. The question presented by the Jurisdictional Statement incorrectly assumed that the Bowman cost defense was presented "without showing any justification for treating the chains and independents as separate classes of purchasers."[21] In fact, however, the justification for placing A & P and Kroger in a separate class of purchasers is adequately shown by the record.

The discounts granted to independents were based on a sliding scale discount schedule which established a myriad of different net prices to the hundreds of customers purchasing dairy products from Bowman pursuant to those schedules. No claim has ever been made that any of the price differences among the different independents is illegal. In short, as a matter of law, the case would be the same if Bowman followed a flat, one-price policy for all of its independent store customers.

A more favorable price was allowed to A & P and Kroger. The question which is raised is whether the record shows *any* justification for treating these chain stores as a separate class of purchasers.

The independents purchased an average of less than 58 points per day.[22] Over 98% of the independent stores purchased an average of less than 200 points per day.[23] On the other hand, the average A & P and Kroger unit purchases an average of over 500 points per day.[24] Thus, *some* justification for treating these two chains in a separate class of purchasers is provided by the dramatic difference in the quantities which they purchase as contrasted with the quantities purchased by independents.

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21. J. S. p. 2.

22. Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, p. 10.

23. *Ibid.*

24. See Column 1 of Table 12-B submitted with Plaintiff's Rebuttal Pre-Trial Order as to Bowman entered on December 16, 1958.

In addition, there are significant differences in the methods of service. Costly in-store services, including cash collection, are provided for independents, but are not available for chains. It is true that the hundreds of independent store owners served by Bowman are not a homogeneous class of automatons, each taking precisely the same services with precisely the same frequency. Nevertheless, the acceptance of these services is characteristic of the group as a whole and constitutes a significant element of Bowman's cost of serving independents but not chains.[25] It supplies a proper justification for treating the chains as a separate class of purchasers.

Plaintiff seems to contend that the classification cannot be justified if it is possible that one or two stores have been placed in the wrong category. There are two obvious answers to this contention. First, there is no evidence that any specific store has been improperly classified.[26] Second, even if two or three stores out of 2300 were improperly classified, it would not therefore follow that the prices to all of the others would be illegal. Certainly, it would not follow that the prices to the chain store customers would therefore be illegal.

The record amply demonstrates that Bowman was justified in placing A & P and Kroger within a separate category for pricing purposes.

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25. See Bowman Exhibit 4, pp. 1-3, 7-10; Bowman Exhibit 14, pp. 1-2.

26. The plaintiff refers to two large (650 point) independents, apparently implying that they may not have received in-store services. The record shows, however, that *all* large independents did in fact receive such services regularly. See Supplemental Pre-Trial Order as to Bowman entered December 16, 1958 at p. 8.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed without further argument, or that the appeal should be dismissed.

Respectfully submitted,

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No. 480

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, APPELLANT

v.

NEW JERSEY CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION FOR THE UNITED STATES TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM

The motions to affirm[1] rest on a misconception of the issues which have been litigated and of the question presented here for decision. For the prima facie violation of Section 2(a) found by the district court was "the published discount quotations of [appellees] which on their face show discriminations between the [appellees'] wholesale customers" (J.S. 27); the cost studies submitted by appellees were held to justify "the difference in prices described * * * in [appellees'] published discount quotations" (J.S. 36); and the question presented by this appeal is whether ap-

[1] While appellee Bowman has moved to affirm or dismiss, the jurisdiction of this Court to review the district court's final judgment dismissing the case is clear. See 15 U.S.C. 29; compare Rule 16(1)(a) of the Revised Rules of this Court with Rule 16(1)(b).

pellees' cost studies could exonerate the otherwise illegal discriminations found by the district court.[2] This question, however, involves not merely the factual issue whether the cost studies justify the price discriminations (as appellees attempt to frame it), but the broader legal issue whether the discriminations can be justified by cost studies which arbitrarily classify all chain stores as one class of purchasers, and all independent stores as a separate class.

1. The court below found that "Bowman published and followed * * * discount quotations which on their face discriminated between chain customers and independent stores. * * * With respect to Borden, plaintiff's evidence as embodied in the stipulations also shows price discrimination between chain and independents by means of published discount schedules" (J.S. 24–25). The cost studies offered to justify these discriminations were similarly based upon *a priori* distinctions between chains and independents. Borden's study placed all chains into one group and the independents into four broad groups based on volume of purchases. It then purported to show the cost of serving each group regardless of the varying volumes or methods of doing business of individual customers within any group. Bowman's study pur-

[2] That the government made out its prima facie case against Bowman on the basis of a sample group of nine stores does not alter the fact, despite appellee Bowman's suggestion to the contrary (pp. 9, 10), that the illegality shown was that of the entire pricing system. Moreover, the cost studies proffered by Bowman plainly show that it sought to justify its entire discount schedule and not merely the prices charged the nine sample stores.

ported to show the cost of doing business with any chain or any individual at any volume level, but the distinctions of cost between the two types of stores resulted from allocating to all the independents, but to none of the chains, fixed charges for optional customer services and collection costs regardless of whether these charges were incurred by a particular independent customer.

The Borden motion to affirm states (p. 8) that "the basic reason" for this classification was the fact that the "combined" volume of the Borden-served chains exceeded the "total sales made by Borden to all its 1,322 so-called 'independent'" customers. See also Bowman motion, p. 14. It is precisely this characteristic of appellees' cost studies that the government is challenging, since those studies show that *any chain* served by appellees received the maximum discounts while *no independent* could hope to reach so favored a position.[3] Unless appellees show that each of the chain customers was individually entitled, on the basis of lower costs of serving the chain, to receive the maximum discounts, and that none of the independents was entitled to a higher discount, the criteria which determined the discount to be given to particular customers plainly "rest[ed] upon an arbitrary classification of customers according to ownership" (J.S. 16).

[3] Borden's suggestion (p. 9) that other chains would not necessarily have received the same discounts ignores the fact that every chain served by Borden in fact received preferential treatment. No more need be shown to establish that Borden treated all chains as a separate classification of customers.

No such showing has been made by either appellee. Neither has shown that the two different chains which each of them served, and which received the same high fixed discount, purchased the same average volumes of milk for their stores, or that the same methods of sale and delivery were used in serving them.* Both admit that volumes and methods of sale and delivery vary greatly among the independents. The very table (Rebuttal Pretrial Order as to Bowman, Table 11) on which was based the schedule cited by appellee Bowman (p. 15, n. 26) to show "that all large independents did in fact receive [in-store customer] services regularly," clearly shows that a substantial percentage of the 30 largest independents served by the wholesale division concerned failed to receive the services for which they were assessed in Bowman's cost studies. Thus, large independents were barred by Bowman from obtaining the discounts needed to compete effectively with the chains, simply because of their independent ownership. The cost studies purporting to justify this classification are themselves based upon the same arbitrary categorization of customers. Clearly, both the discrimination and the proffered cost studies with which the record deals classified retail outlets solely on the basis of type of

* Borden suggests in the footnote on page 9 of its motion that the purchases of each of its chain customers "were approximately of the same order." The tables cited in support, however, merely compare aggregated chain volume to aggregated independent volume, with neither category broken down as to individual customers, be they chain or independent. Neither comparison gives the slightest clue to the relative position of one chain compared to another, or to any independent customer.

ownership. The validity of cost studies based upon such a classification is, contrary to Borden's contention (Motion, pp. 7–19), thus plainly presented by the record.

2. Thus, the issue now before this Court is not merely whether the particular price discriminations granted by appellees were justified by the proffered cost studies,[5] but whether any cost analysis constructed on the basis of a customer classification by ownership and providing average costs for the resulting groups can be used to justify discriminations among customers regardless of the actual costs of doing business with each. It is immaterial that cost studies constructed upon such an invalid theory might show the same justification even though costs were allocated on different bases (see Borden motion, pp. 23–25; but see Bowman Supplemental Pretrial Order dated December 23, 1957, p. 21); all such studies would be subject to the same basic defect that they rest upon an improper classification of customers. This appeal thus presents substantial issues relating to the scope of the cost justification proviso, which this Court has never directly considered. Moreover, the issues arise

[5] It is immaterial that Borden gave an additional 1½ percent discount to Schubert and several other large independents (Borden motion, p. 9). For the reason Borden gave this additional discount—a discount still far below that automatically given to all chains, regardless of their volume of purchases—was to meet the competition of other dairies (see Government Post-Trial Brief, p. 12; Borden Additional Pretrial Order dated September 19, 1957, p. 171). Thus, the granting of this extra discount in no way indicates that, apart from such a special competitive situation, Borden would not adhere to the limitations it imposes upon the discounts given to independents.

in the very factual context which led to the enactment of the Robinson Patman Act—discrimination in the grocery field in favor of the chain stores as against independents. The question is a substantial one involving an important area of business regulation, and it calls for plenary consideration by this Court.

Respectfully submitted.

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NOVEMBER 1961.

U.S. GOVERNMENT PRINTING OFFICE, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY[1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 557-572) has not yet been reported. The prior opinion of the district court, and the opinion of this Court when the case was previously before this Court, are reported, respectively, in 111 F. Supp. 562 and 347 U.S. 514.

JURISDICTION

The final judgment of the district court on remand was entered on February 27, 1961. The notice of

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[1] Pursuant to this Court's order of January 15, 1962, the United States is filing separate briefs in this case with respect to the two appellees, The Borden Company and the Bowman Dairy Company.

appeal was filed on April 28, 1961, and this Court noted probable jurisdiction on December 4, 1961. 368 U.S. 924. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended.

STATUTE INVOLVED

The pertinent provisions of Sections 2(a) and 2(b) of the Act of October 15, 1914, 38 Stat. 730, as amended, 49 Stat. 1526 (15 U.S.C. 13(a) and 13(b)), commonly known as the Clayton Act, are as follows:

> SEC. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.
>
> SEC. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of re-

> butting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *.

QUESTION PRESENTED

Whether a seller who discriminates in price in favor of chain stores, as such, can cost-justify the discrimination simply by showing that the average cost of sales and delivery to all chain stores is lower than the average cost of sales and delivery to broad groups of independent stores.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing a government civil antitrust suit which charged The Borden Company and the Bowman Dairy Company, the two largest dairies in the Chicago, Illinois, area, with illegal price discrimination in violation of Section 2(a) of the Clayton Act. The district court found that the appellees' prices were discriminatory and constituted "prima facie violations of section 2(a)" (R. 563). It ruled, however, that the companies had established that such discriminations were justified by differences in cost (R. 570) under the proviso to Section 2(a) which permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [different] purchasers sold or delivered."

On January 15, 1962, on motions filed by the appellees, this Court ordered separate hearings and the

filing of separate briefs on the merits for each of the appellees. This brief deals with appellee Borden, but the basic issues are common to both appellees.

THE BACKGROUND OF THE DECISION BELOW

The complaint in this case, filed in 1951, charged the defendants with violating Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act (R. 1–20). Insofar as the Clayton Act was concerned, the complaint charged a continuing practice by each of the defendants of selling "fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between such purchasers of fluid milk of like grade and quality," that the effect of the discrimination might be to substantially lessen competition or tend to create a monopoly in such sales, or to injure competition between purchasers knowingly receiving the benefits of such competition and those who did not, and that the discriminations in price "have been granted, often secretly, in the form of preferential * * * discounts * * *" (R. 16–17). The complaint further alleged that, unless enjoined from so doing, the defendants intended to pursue the discriminatory practices (R. 17, 18–19).

In 1953, the district court dismissed the complaint after the government had presented its case. *United States* v. *Borden Co.*, 111 F. Supp. 562 (N.D. Ill.). It held that the Sherman Act violations charged had not been proved; and that, although there was proof

of price discriminations constituting prima facie violations of the Clayton Act, no injunctive relief was necessary because there was an outstanding injunction in a private antitrust suit which enjoined the defendants from engaging in such discriminatory practices.

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed the dismissal of the Clayton Act charges. *United States* v. *Borden Co.*, 347 U.S. 514 (R. 26–31). It held (p. 520) that "the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree," and remanded the case for further proceedings.

On remand, the district judge stated, with respect to the Clayton Act issue remaining, that he conceived his primary duty, in the absence of a request for further proceedings, to be to consider whether injunctive relief was required in the light of the decision of this Court in *United States* v. *W. T. Grant*, 345 U.S. 629, giving due, but not conclusive, consideration to the effect of the consent decree in the private case (*Dean Milk Co.* v. *American Processing & Sales Co.*, No. 49 C 1159 (N.D. Ill.), entered December 3, 1952) (R. 40). The government on January 11, 1955, moved to reopen the record to permit the taking of additional evidence (R. 45–46), on the ground that the *Dean* decree had not been effective in preventing further price discrimination by the defendants who were alleged to "have engaged in discriminations in price

between different wholesale purchasers of fluid milk of like grade and quality subsequent to the entry of the *Dean* decree" and would continue to do so in the absence of an injunction (R. 46). The court granted this motion by order of April 18, 1955 (R. 47–50).

The case was presented on the basis of stipulations, embodied in pre-trial orders, the depositions of expert witnesses, and written briefs. No testimony was taken before the court. Each stipulation and pre-trial order reserved to the parties questions and issues of the weight, materiality, and relevancy of the data and statements in the stipulations (R. 57, 75, 119, 236, 379, 411, 514). The relevant facts of record as to Borden (which are not disputed except as noted) are set forth below.

THE NATURE OF BORDEN'S BUSINESS

Borden is a New Jersey corporation with its principal offices in New York City (R. 2). Borden and Bowman are the major distributors of fluid milk and fluid milk products in the Chicago metropolitan area. Borden supplies approximately 22 percent of the total sales of all such products in the area (R. 6).

Borden maintains a Chicago Central District Headquarters of which Borden's Chicago Milk Division is a part. The Chicago Milk Division operates four distribution branches, two of which, the Englewood Branch and the Irving Park Branch, served Borden's store customers in the Chicago metropolitan area. Borden's time studies of routemen activities were for routes and activities in these two branches (R. 127, 128).

Of the 1950 wholesale customers served in the Chicago metropolitan area by Borden's Englewood and Irving Park branches during the period of the cost study in July and August of 1955 (discussed *infra*), 1,322 were independent stores, 254 were chain stores and 374 were "non-store" customers (R. 181). During 1954 and most of 1955, Borden served both A & P and Jewel chain store units, but on August 29, 1955 (after the cost study) Bordon lost the Jewel account (R. 121). Thereafter A & P was the sole Borden store customer qualifying for the chain store discount.

In 1955, the Englewood Branch operated 57 store wholesale routes, and the Irving Park Branch operated 77 such routes (R. 128). In addition, 133 wholesale customers were also served by "retail routes"[2] operated out of these branches (R. 128). The assignment of customers to a route and the composition of a route were not dependent on store ownership but were related to a number of factors such as the distance from the Branch, distance between customers, and traffic conditions (R. 139). The number of customers served on a wholesale route showed a wide variance with some routes serving as few as seven customers and others as many as 25 (R. 138–139).

The routes are operated each week day to deliver milk and other products to Borden's various types of customers. There is no physical or functional

[2] The retail routes primarily served homes and residential customers.

difference in the trucks or instrumentalities used in delivery to the chain stores and the independent stores on any route. Daily deliveries are offered to substantially all customers. However, some stores are not served each day and on occasion more than one delivery is made to a store in one day (R. 138).

THE BORDEN PRICE AND DISCOUNT SYSTEM

Borden adopted a pricing system for fluid milk and fluid milk products based upon an initial classification of all its grocery store customers as either "chain" or "independent". The chain store discount was a fixed percentage discount from list price regardless of quantities or varieties purchased. Independently owned stores received discounts from list price dependent upon volume [3] of purchases by each store but

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[3] Volume was measured in terms of point values assigned to different quantities of each of the various milk products. The assigned "point values" for independent stores were (R. 82):

	Units
Gallons	4
½ Gals	2
½ Gal. Zest	2
½ Gal. Gail Borden	2
Qts. Milk	1
Skimmed Milk	1
Chocolate Drink	1
Buttermilk	1
Half & Half	1
Rich Cream	1
Whipping Cream	1
Sour Cream	1
Cottage Cheese	1
Triple & Reddi Wip	1
Yogurt	1

No points were given for butter, eggs, or bulk products.

in no event as high as that granted to chain stores. During the period from June 1954 through August 1955, Borden granted the chain stores (A & P and Jewel) a flat 8½ percent discount from list prices for fluid milk and fluid milk products regardless of quantities or points purchased (R. 83, 84). During this same period, Borden granted the independent stores a sliding scale of discounts from list prices based on the points purchased by each store, with a maximum discount of 4 percent. The independently owned stores were grouped into four categories which, depending on point volume, received a discount or discounts of 2, 3, or 4 percent, respectively (R. 82).[4]

The June 1954 discount schedule (which in practice was applied only to independent stores) was published by Borden in an announcement entitled "Borden's Milk Discount Schedule to Grocers" effective June 1, 1954. On its face this schedule was comprehensive of all quantity discounts being offered by Borden to all retail grocery stores irrespective of ownership for "all purchases of Borden's fresh milk products" (R. 82). This announcement and the discount schedule did not contain any statement or indication that higher discounts would or could be secured by independently owned stores on the basis of use or nonuse of "optional" or "additional" services related to

[4] The scaled discounts to the independent stores under the June 1954 schedules were as follows (R. 82):

Average points per day:	Percent discount
0–24	0
25–74	2
75–149	3
150 and over	4

Borden's methods of sale or delivery of its products.

Simultaneously with the publication of the June 1, 1954, discount schedule, Borden sent letters dated June 4, 1954, to the Great Atlantic & Pacific Tea Company and to the Jewel Food Stores, respectively, confirming a discount to the chains of 8½ percent effective June 1, 1954, on the purchase by these chains of "milk and certain dairy products in the Chicago area" (R. 83, 84). Both of these letters were signed by Harold Fagerson, Vice President of The Borden Company (*ibid*).[5]

In sum, from June 1954 through August 1955 the maximum discount was granted to all chain stores irrespective of volume purchased while independent store discounts were on a sliding scale computed on average daily point values. No independent store, whatever volume it purchased, could qualify or have an opportunity to qualify for as high a discount as that which Borden was granting to all the chains. Under the pricing system, all the independent customers paid substantially higher net prices than the chains, regardless of the volume of

[5] In September 1955, Borden revoked the June 1954 discount schedules and went on a net price basis with differentials in net prices to the chain stores and to all independents. The net prices to all independents (R. 84) were substantially higher than the net prices to the A & P stores (R. 86). The differences between the net prices to chain stores and to independent stores for the September 1955 announcement amounted to giving the chains (by this time, only A & P) a discount over the prices paid by *all* independents ranging from 7½–8 percent. Borden submitted no separate cost justification for this discrimination.

an independent's purchases, and regardless of the fact that deliveries were being made to both chain and independent stores from the same Branches under the same Central office, and on the same routes and in the same trucks by the same drivers.

BORDEN'S PROFFERED COST DEFENSE

The Borden cost defense consists of a two-step process: (A) an elaborate analysis and allocation of direct and indirect costs of sales and delivery of its milk products to (1) its two chain customers (A & P and Jewel) as one class and (2) its independent store customers as another, with the latter group being in turn subdivided into the four discount classifications based upon volume of purchases; (B) on the basis of this analysis, Borden purports to show by four alternative sets of calculations that its discount differentials were cost-justified.

A. *The Allocation of Costs*

By a series of time studies, allocations and calculations, Borden distributed among its chain customers, on the one hand, and each of the four discount classes of independent store customers, on the other,[6] costs relating to: (1) Routeman's delivery activities, (2) Branch, Main, and District office expenses, allegedly

[6] Borden's time and expense in serving the "non-store" customers on its wholesale routes was included in the initial calculations of total time and costs. By the same method used to allot elements of time or cost as between "chain" and "independents" as classes, Borden allocated costs between "store" and "non store" as classes. No separate time studies or calculations were made for wholesale stores served by retail routes.

attributable to the sales of its milk products to wholesale distributors, (3) the costs of solicitor and salesmen activities as related to the independent stores. In addition, Borden allocated a number of miscellaneous costs, such as bad debts and losses on returned products.

(1) *Routeman's Delivery Costs.*—The calculations with respect to the routeman's (milk driver) delivery costs commence with a determination by Borden of the total amount of costs to be allocated. It was determined that the average weekly labor costs of the wholesale route operations amounted to $29,242.50 (Schedule XXV, R. 170). Of this amount, $10,148.31, or approximately 35 percent, involved so-called "extra compensation" of the milk drivers, which was paid to the drivers on the basis of the total number of points of fluid milk products which they delivered to the customers on their route (R. 163–166).

This total cost of $29,242.50 was then distributed between the chains and the independents (and the "non-store" customers) according to a procedure by which the 376,864 minutes, which Borden calculated had been devoted by routemen to all of their activities during a week's test period, were broken down into some 40 work elements (R. 183).

As to each such work element, the calculated costs were in turn allocated between the chains and independents. With respect to 18 of these 40 work elements Borden simply clocked the total amount of time devoted to each in serving the chain stores and in serving the independents of each discount class. This allocation accounted for approximately 200,300 out

of the 376,864 minutes and approximately $15,540 out of the total of $29,242 of labor costs (approximately 53 percent). Of this $15,540, the time study assigned $6,285 or 40.4 percent to the chains and $9,254 or 59.6 percent to the independents (R. 183).

The total minutes and cost devoted to the other 22 work elements were similarly derived from a study of the routemen's time. However, with three minor exceptions,[7] these elements involved indirect expenses which could not be allocated among the chains and independents on a basis of the actual time spent on each. Therefore, the costs which had been assigned to 14 of these 19 elements were allocated among chains and independents on a so-called "location" basis, *i.e.*, on the basis of the number of stores (chain or independent) served by the drivers (*ibid.*). Since Borden's two chain customers during the time of the cost study had a total of 254 stores, whereas there were 1,322 independent stores (and 374 "non-store" customers) (R. 181), the result of allocating costs on this basis was to allocate approximately 67.8 percent of these costs to the independents and 13 percent to the chains. The net effect of allocating these costs on a "location" basis was to assign $4,412

[7] Two elements, drivers' time on processing chain store tickets at the branch office and in handling credit matters for chain stores (amounting to $168 in all), were actually allocated directly to the chains (R. 177) on the basis of time, but listed on Schedule XXVI (R. 183) as being allocated to the chains on a location basis. Similarly one element, drivers' time relating to credit matters for independent stores (amounting to $13), was actually allocated directly to the independents on the basis of time, but listed on Schedule XXVI (R. 183) on a location basis (R. 177).

in costs to the independents and only $1,013 to the chains.

Finally, the cost of the time spent on five other work elements, also involving indirect costs, was allocated among the chains on a so-called "stop" basis. This basis of allocation, intended to adjust for the fact that some stores received deliveries on fewer than six days a week whereas a number of others received more than one delivery per day (R. 138), was based on a computation of 2,412 chain store "stops" and 8,395 independent store "stops" (R. 181). The result of the allocation of costs on this basis was to allocate $3,728 or 65.5 percent of the total costs to the independents and $1,071 or 18.8 percent of the total costs to the chains (R. 183, 406).

(2) *Office Expenses.*—In addition to these delivery expenses, Borden also purported to allocate that proportion of its clerical salary costs at its Branch, Main, and District offices which it asserted were specifically relatable to the sales of fluid milk products. This process involved time studies to determine the actual breakdown of the time of the office help and that part of it devoted to sales activities (R. 199–215).[8]

In some few cases (such as the Branch office activities described as "checking and calculating chain

[8] In the case of the Main and District offices Borden made a further breakdown of these expenses to segregate the costs attributable to the wholesale customers (chain, independents and "non-store" customers) from the expenses attributable to other classes of customers handled by those offices (vendors, handlers and retail (home) deliveries) (R. 209, 210–211).

store tickets" and "checking customer tickets other than chain stores") Borden allocated the derived average weekly costs directly either to the chains or the independents (R. 202). In all other cases, the allocations between the chain stores and the independent stores were made on the location basis, described above (p. 13).

The effect was to allocate $1,387 to the independents and $918 to the chains (R. 203, 209, 210, 211, 215).

(3) *Salesmen's and Solicitors' Salaries and Other Miscellaneous Expenses.*—In its cost study Borden listed a number of its expense accounts totaling on a weekly average $24,974 (R. 137) which covered such items as the salaries of platform men, yardmen, watchmen, and shipping clerks, other miscellaneous salaries, travelling expenses, glass bottle service charges, general sales overhead, and advertising allowances to stores (R. 132–134, 137). Borden's expert stated that it would be proper to allocate all of these elements in proportion to the ascertainable direct costs to individual customers and classifications of customers (R. 135); but in fact no such allocation was made in the original Borden cost study with respect to any of these categories (R. 132). One of the categories, amounting to $2,066 per week (R. 137), was listed as "Salesmen's and Solicitors' Salaries" (R. 132) and Borden indicated that these salaries covered activities in soliciting the business and serving the

needs and complaints of independent stores only (R. 134). The Borden cost study contained no similar expense account with respect to the salaries for its officials engaged in servicing or soliciting chain accounts, but Borden subsequently estimated that the cost of the time devoted to such activities by these officials and their secretaries amounted to no more than $359 weekly (R. 620).

In addition, Borden allocated its calculated costs with respect to bad debt losses and the loss on unsold milk products returned by its store customers among its wholesale customers, assigning a total of $1,139 to the chains for these losses and $1,004 to the independents (R. 215–216).

B. *The Justification of the Discount Differentials*

On the basis of these allocations, Borden argued that its discount system was cost justified. It attempted to establish this on the basis of four alternate methods of combining and allocating costs, set forth in Summary Schedules I–IV (R. 585, 597, 605, and 617).

The first of these schedules (R. 585) purported to be a "Cost Justification Based Solely on Direct Costs". There were 11 categories of these "Direct Costs", the major items of which were (1) Routemen's Direct Labor Costs ($17,065), (2) Branch Office Clerical Salaries ($2,356), (3) Loss on Returned Products ($2,214) and (4) Salesmen's and Solicitors' Salaries ($2,066). The total cost allocated among the chain stores, independent stores, and non-store customers in this schedule amounted to $24,551, of which $8,657

were allocated to the chain stores, $13,881 to the independent stores and $2,013 to the nonstore customers. The independent store figures were then broken down into the four discount schedule classes with $1,785 being allocated to the 0% discount category, $5,306 to the 2% category, $4,352 to the 3% category, and $2,437 to the 4% category.

These costs were then compared in each discount class with the total sales volume for fluid milk products attributable to each such class, to derive a cost per $100 of sales. Since the chains, with allocated costs of $8,657, had a sales volume of $195,262 (see R. 217), the cost per $100 worth of sales in this category amounted under Borden's calculations to $4.43 per $100 of sales. Dividing the total sales volume for independent stores ($98,673, R. 217) into the total allocated costs of $13,881 for this category, Borden derived a cost per $100 of sales to independent stores of $14.07. Considered separately the four independent groups allegedly had calculated costs per $100 of sales of $27.24 for the 0% discount group, $16.05 for the 2% discount group, $12.12 for the 3% group and $10.52 for the 4% group.

Borden then subtracted its calculated chain store cost per $100 from its calculated figure for independent stores as a whole and for each of the independent store subgroups, with the resulting figure constituting, according to Borden, the maximum additional percentage discount which the chains could be granted over that granted to the independent stores in each group. The results of these computations, summarized in Borden's Table 1 (R. 592), purported to show that Borden's chain discount of 8½ percent

was more than justified as to each category of independent store: in the case of independents in the 3% bracket by a margin of $2.19 per $100 of sales, in the case of independents in the 4% bracket by $1.59 per $100 of sales.

Borden also adduced schedules purporting to cost-justify its differential discounts on three other bases. Schedule II (R. 597) added to the direct cost calculations of Schedule I a number of indirect costs (allocated on a stop or location basis) and major overhead expenses (allocated, in the main, according to the same chain-independent ratio calculated in Schedule I for direct costs) (see R. 600–601). Schedule III (R. 605) left out these overhead costs but added to Schedule I's allocation of direct costs the same indirect costs as in Schedule II (allocated entirely on a stop basis) (see R. 607). Schedule IV (R. 617) deleted routemen's extra-compensation costs ($10,148), which were paid on a volume basis, from the allocation of the routemen's "direct" labor costs and reallocated this item, together with the other indirect costs, on a volume basis (see R. 614–619).

The first two of these "alternative" methods of allocating costs produced calculated margins of differential costs substantially greater that those resulting from the allocation of direct costs only (R. 602, 608). The last method (wherein the indirect costs and extra-compensation costs of the route drivers, but *not* the direct costs, were reallocated on a volume basis) also resulted in alleged "over-justification". But in this instance, the calculated "over-justification" between chain stores and those independents in the 3 percent

category had been drastically reduced to a margin of only 67¢ per hundred dollars of sales, and the margin between the chains and the independents in the 4 percent volume bracket was reduced to only 46¢ per $100 of sales (R. 620).

Finally, using the figures from Summary Schedule IV, and adding to chain costs a figure of $359 per week, which Borden alleged was the total weekly cost of executive time chargeable to store wholesale operations, Borden offered a table (R. 621) which purported to show the cost justification of the 8½ percent chain discount by a margin of 48¢ per $100 of sales with respect to the independents in the 3 percent volume class, and only 27¢ per $100 of sales for the independents in the 4 percent discount class.

THE DECISION OF THE DISTRICT COURT

In an opinion which did not distinguish between the Borden and Bowman cost studies, the district court held that the Borden studies sustained its claim that its discriminations in price, which "constitute prima facie violations of Section 2(a) of the Clayton Act" (R. 563), were cost-justified. The court did not undertake any detailed analysis of the Borden cost study or of the government's objections thereto. Instead, adopting "a liberal approach to cost justification studies" (R. 563), the court found (R. 570):

> * * * [D]efendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost

> studies provide an adequate justification for the differences in prices described above in defendants' published discount quotations.

Although the court recognized that "the studies are imperfect in some respects" (*ibid.*), it rejected the government's challenges to their validity, since "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect" (*ibid.*). The court noted the "seemingly arbitrary nature" of the basic classification of appellees' customers into chains and independents (R. 569), receiving percentage discounts "which do not bear a direct ratio to differences in volume of sales" (R. 570). It concluded, however, that "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores" (*ibid.*, emphasis in original).

Finally, the court stated that it had not given its "stamp of approval to all pricing policies and practices revealed by the evidence * * *. These policies and practices have in many instances been imperfect" (R. 572). But it held that if it were to enjoin such practices it would lead to its complete regulation of this phase of the milk industry and it "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). Finding "such a course [to be] impractical and unwarranted," it stated that "on the basis of the evidence presented" (*ibid.*) the government "is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more ap-

propriate tribunal to grant effective relief, if it be warranted" (R. 572).

SUMMARY OF ARGUMENT

The Borden Company adopted pricing policies under which its independent customers received percentage discounts off list price, the amounts of which depended upon the volumes of their purchases, while its two chain store customers received higher fixed discounts, not dependent upon their volumes of purchases. In all cases the chain stores were afforded discounts more than twice as large as those which any independent could qualify to receive. Borden attempted to justify the *prima facie* violations of Section 2(a) of the Clayton Act which these discriminations were found to involve by cost studies which were based upon the same classification of its customers as the discounts themselves. This attempted cost justification does not meet the minimum requirements of the Robinson-Patman Act because the classification of Borden's customers as chains or independents failed to reflect the cost savings involved in serving the largest independent purchasers. These purchasers were restricted to the maximum 4 percent discount granted to all independents in this discount bracket, although Borden's own cost studies suggest that there was a wide difference in the cost of selling the smallest and largest customers in this class. Moreover, Borden's study did not show that there were any cost saving factors involved in selling the customers classed as chains which could not have been realized in selling the largest customers classified as independents. Accordingly, the proffered cost justification should have been rejected.

I

The Robinson-Patman Act amended Section 2(a) of the Clayton Act so as to prohibit any seller in interstate commerce from discriminating in price between purchasers where competition might be adversely affected unless the price differential makes only due allowance for certain described cost differences. Both the clear wording of the amendment and the legislative history of the provision indicate plainly that a price differential can only be justified by a showing of cost differences of approximately equal amount which flow directly from the method or quantities involved in dealing with the purchaser.

Where a seller deals with a very large number of customers practical considerations may make appropriate the establishment of defined classes of customers and the promulgation of prices for each class which reflect the cost savings necessarily involved in dealing with its members. Unless the classes of favored or disfavored customers are appropriately defined, however, the resulting price structure may lead to substantial and unjustifiable discrimination against individual members of the disfavored class of customers and may result in the destruction of price competition among the seller's customers.

The minimum requirement for an appropriately defined class of customers is that membership in a favored class be solely determined by the presence or absence of those differences in method or quantity of dealing which substantially account for the cost savings accruing to the seller. If membership in a favvored class of customers is determined either (1) in

terms unrelated to differences in method or quantity of dealing or (2) in terms of differences in method or quantity which fail to explain the alleged difference in cost of dealing with the individual members of the class, its use to determine or to justify prices will necessarily result in an unjustifiable discrimination against purchasers whose quantities or methods of dealing involve the same substantial cost saving factors which justify the low price granted the favored class.

II

The Borden cost study is based upon a comparison between the cost per $100 of sales of serving the stores of its two chain customers and the cost per $100 of sales of serving each of four broad categories of independent stores. It is not and cannot be based upon differences in quantity of purchases between individual independent store customers and the chain store customers, for even independent stores purchasing larger volumes of Borden's products than the average store of a particular chain are, under Borden's pricing system, only eligible for a discount which is less than one-half as great as that automatically afforded to both of Borden's chain customers. Nor can the classification properly be based on any uniform and inherent difference or differences between the methods in which Borden sells or delivers to chain stores and the methods by which it sells or delivers to independent stores. The alleged differences in method suggested by Borden either are not in fact differences in method of sales or delivery,

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or have not been shown to result in differences in cost of dealing, or are not distinctions between all chain customers and all independent customers. Even if it be assumed that one of these asserted differences involves a real distinction in Borden's methed of dealing with all of its chain store customers as contrasted with its methods of dealing with all of its independent customers (and a plausible case for such a distinction can only be made with regard to ' ae of Borden's asserted differences), this difference relates to a cost factor which demonstrably could not account for more than a fraction of the actual difference in discount prevailing under Borden's pricing policies.

There are substantial discriminatory effects of Borden's procedure of lumping a large number of widely varying independents into one group and then using the average cost of serving the group as the basis for determining the price discount to which each individual independent is entitled. The large independents in the highest discount group, with volumes ranging to over three times the group average, are denied the benefits of the cost savings resulting from the fact that they purchase quantities and, in all probability, are served by Borden with methods in all material respects similar to those used by the chain stores which receive twice as large a discount. The Borden discount system thus effectively precludes any large independent store purchaser from competing on equal terms with its chain competitors, even if the costs per unit of sales of dealing with such a store are not greater than the costs per unit of sales of dealing with the chains.

There is, moreover, no way in which an independent can change its quantity or method of dealing in order to obtain a price which is competitive with that charged a rival chain store. There can be no doubt that the Robinson-Patman Act was intended to and does forbid any such discrimination in price which does not merely make "due allowance" for differences in methods and quantities of sales and delivery between two individual purchasers.

III

Contrary to the belief of the district judge, adequate equitable relief would not involve a continuing and complex regulation of one segment of the economy, but would require only the simplest form of injunction—a prohibition of Borden continuing to charge different prices to different classes of customers on the basis of form of ownership or on any other basis not substantially related to the cost savings realized in dealing with the members of the class.

ARGUMENT

The proviso of Section 2(a) of the Robinson-Patman Act allows as a justification for a price differential a showing that the differential makes only due allowance for cost savings resulting from different methods or quantities of sale or delivery. Under the Borden price-discount system, Borden awards its chain-store customers a discount which is more than twice as large as that which is available to any independent store, although a particular independent may purchase greater quantities of milk products than the average chain store and although Borden's meth-

od of dealing with the two stores may be identical in terms of any factors which could justify the marked differences in discounts between the two customers. The question presented by this case is whether this discrimination in price between similarly situated customers can be justified by placing each of the customers into a different class and then attempting to show that it costs less to deal with the "average" member of one class than with the "average" member of the other class.

I

THE STATUTE BROADLY PROHIBITS ANY PRICE DIFFERENTIAL BETWEEN CUSTOMERS THAT IS NOT DIRECTLY AND IMMEDIATELY RELATED TO A SIMILAR COST SAVINGS

Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended in 1936 by the Robinson-Patman Act, 49 Stat. 1526, prohibits a seller engaged in commerce from discriminating, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them." It provides, however, that:

> * * * nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

The cost defense proviso of the amended Section 2(a) was a substitute for a proviso of the original Clayton Act which had made a mere difference in the quantity of the commodity sold a defense to a charge of price discrimination. 38 Stat. 730. The new language was deemed to be of "great importance," for while it permitted "the adoption and use of more economic processes of manufacture, methods of sale and modes of delivery," it "also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise such differentials would become instruments of favor and privilege and weapons of competitive oppression." H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9; see S. Rep. 1502, 74th Cong., 2d Sess., p. 5.

The reconciliation of policies accomplished by the statute's prohibition and its cost defense is clear. Competition was to be protected by the prohibition of price discrimination, yet customers were not to be denied by the statute the benefits of the economies and efficiencies that were uniquely involved in sale and delivery to them. The limits of a cost defense follow logically from this reconciliation of purposes. The Senate Report indicated that the bill "limits the differences in cost which may be honored in support of price differentials, to those marginal differences *demonstrable as between the particular customers* concerned in the discrimination" (emphasis added). It added that the bill was designed:

> * * * to leave the test of a permissible differential upon the question: [I]f the more favored customer were sold in the same quantities and by the same method of sale and

> delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same? * * * [S. Rep. 1502, 74th Cong., 2d Sess., p. 6.]

In sum, a price differential can only be justified by a showing of a cost difference of approximately equal amount which flows directly from the method or quantities involved in dealing with the particular purchaser.

II

THE USE OF CLASSES OF CUSTOMERS IN ESTABLISHING A COST JUSTIFICATION FOR DISPARATE PRICES IS CONSISTENT WITH SECTION 2(a) ONLY IF THE CLASSES ARE CREATED AND DEFINED IN TERMS OF FACTORS WHICH SUBSTANTIALLY ACCOUNT FOR THE DIFFERENCES IN THE COST OF SERVING THE INDIVIDUAL MEMBERS OF THE CLASSES

A. Read literally, the language of the statute and of the Senate Report seems to forbid any differential pricing between any two customers unless that difference is individually justified by a showing of a similar difference in cost of manufacture, sale, or delivery between the same two customers. As a matter of practical necessity, however, when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices for each customer. The seller must be permitted to establish appropriately defined classes of customers and to promulgate prices for each class which reflect the cost savings necessarily involved in dealing with that class.

It has therefore become accepted practice for sellers to establish prices and, as a correlative, to cost-justify

discriminatory prices by a two-step process. First, the seller establishes appropriately defined classes of customers. Second, the seller attempts to prove that its quantities or methods of dealing with each of these classes differ in ways that result in a cost difference similar in amount and direction to the difference in price charged the classes. However, the use of classes of customers need not be and, of course, should not be an excuse for treating differently any two or more customers who deal with the seller in the same quantities and with the same methods. The mandate of the Robinson-Patman Act remains that a difference in price is not cost-justified unless it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which" the goods are sold. And no difference in cost can result from identical methods or quantities of dealing.

B. Unless a seller carefully and appropriately defines the membership of favored and disfavored classes of customers, an apparently justifiable price structure may result in substantial and unjustifiable discriminations against individual members of the disfavored classes of customer and in the destruction of price competition among the seller's customers. Recognizing these dangers of discrimination inherent in improper categorization of customers, the Federal Trade Commission has, in a series of cases, established the requirement that the individual purchasers assigned to any one group for cost-justification purposes must be substantially related in terms of those factors

which determine the cost of manufacture, delivery, or sale. See *Curtis Candy Co.*, 44 F.T.C. 237, 267–268; *International Salt Co.*, 49 F.T.C. 138, 153–155; *Champion Spark Plug Co.*, 50 F.T.C. 30, 43; *Thompson Products, Inc.*, 3 Trade Reg. Rep. (FTC Complaints, Orders, Stipulations 1959–1960) ¶ 27,841. While the enforcement of the outer limits of this requirement of a price class which is homogeneous in terms of significant cost factors involves the exercise of the judgment and discretion of the trier of facts, recognition of the minimum content of the requirement involves a matter of law which can be derived from the wording and purpose of the statute.

This minimum requirement can be stated in either of two very similar ways: (1) The Robinson-Patman Act, which was designed to prevent price discriminations between similarly situated customers, does not authorize the use of classes of customers to justify price differentials unless membership in a favored class of customers is available to any customer whose method of dealing with the seller involves substantially the same cost-saving aspects which justify giving a special price to the favored class. Otherwise a defense against one price discrimination becomes an authorization for another discrimination. (2) The granting of lower prices to a favored class of customers necessarily involves price discrimination unless the membership of that class is determined solely by the presence of substantial cost-saving elements in dealing with the members of the class. For to define the membership of a favored class of customers in any other way is necessarily to authorize an unjustifiable

discrimination between the members of that class and other customers who deal in the same cost-saving way that is recognized in the class price. No requirement of convenience justifies a seller in using a classification system which, from the beginning, authorizes an unjustifiable discrimination between customers who deal alike with the seller in all material respects.

There are thus two considerations of major importance to the purposes of the Robinson-Patman Act which require a rule which permits classifying customers for purposes of cost justification only where the seller uses open-ended classes of customers defined *solely* in terms of significant cost factors:

(1) Only the definition of favored classes of customers in terms of cost-saving aspects of the method or quantities of dealing with each class provides a minimum guarantee that the selection of classes will not be used as a device to accomplish the very type of price discrimination that the Act was intended to forbid. A simplified example can best illustrate the harm of departure from this standard. Suppose a seller, X, incurs the following costs per unit sold in dealing with nine different customers:

Customer	Cost-saving factor	Cost of delivery per unit sold
A	Absent	14¢
B	Absent	13¢
C	Absent	12¢
D	Absent	10¢
E	Present	6¢
F	Present	4¢
G	Present	4¢
H	Present	5¢
I	Present	7¢

If X, for purposes of cost justification, divides his customers into two groups, A through G in one group and H and I in the other group, a price difference of 3¢ between the two groups will superficially appear justified, for the average cost per unit sold of delivery to customers A through G is 9¢, while the average cost of delivery to H and I is 6¢. If the process of classification is accepted, so is a price three cents lower for I than for E, F, or G, when in fact sales to F and G are 3¢ cheaper per unit and sales to E are 1¢ cheaper.

It is important to note that in this hypothetical example, as in the present case, the seller, X, might well be able to establish that there is a cost-savings factor (such as a particularly economical method of delivery) which is present in dealing with H and I and absent in dealing with the *majority* of customers A through G. If this is a sufficient showing of the reasonableness of the classification, then X will be permitted to charge E, F, and G 3¢ more per unit than H or I—even though the identical cost-savings factor is present in sales to all five customers. This would be discrimination *not* justified by the Act. Only if X is required to define its categories of customers in terms of the presence or absence of factors substantially relevant to the determination of X's cost, will X be effectively prevented from discriminating between similarly situated customers.

(2) Only a definition of classes of customers in terms of the substantial cost factors which are present or absent in the parties' dealing avoids permanently freezing a competitive inequality at the customer level, to the inevitable detriment of competition.

Even if it were shown that there had always been a certain cost saving factor in dealing with each member of a particular group of customers—for example, chain grocery stores—compared to the customary methods and costs of dealing with all members of another group such as independents, the creation of a continuing price differential based on whether or not a grocery store belongs to a chain rather than on the presence or absence of the cost-saving factor would be contrary to the requirements of the Robinson-Patman Act. An independent store which found itself unable to compete with a neighboring chain store would be effectively precluded from obtaining the lower price paid by the chain store even if it undertook to change its method of dealing so that its supplier could realize the same cost savings as in dealing with the chain store.

Only a definition of a price class in terms of the significant services its members require provides a framework within which a disfavored customer can, by changing his method of operation, obtain the lower prices available to his competitor. Without such an open-ended method of classifying customers a supplier's disparate prices will inevitably freeze out any future attempt at price competition between members of different classes of customers.

C. Proper definition of a class for one purpose in terms of a cost saving does not, in itself, mean that the classification can be utilized for allocating all costs between the purchasers so grouped. Specifically, it is not enough to show that in respect of some particular

quantity or method of dealing a number of purchasers properly fall into one of two groups and then to proceed to analyze all the costs of serving the two groups of customers on the basis of this classification. Before a single classification of customers may be utilized to determine all the costs of serving the individual members of each group, it must be demonstrated that the classification has been defined in terms of cost factors which substantially explain and justify the amount of the lower cost charged the favored class. Otherwise a classification based upon a factor of only marginal importance, which in no sense truly justifies the extent of the price differential between the seller's customers, could result in a statistical "justification" of substantial discriminations.

A minor variation on the hypothetical example just given (*supra*, pp. 31–32) illustrates the importance of requiring that the cost-saving factors used to define a favored class must be substantially related in terms of cause and amount to the difference in cost which is used to justify allowing a lower price to the favored class of customers.

Customer	Cost-saving factor #1 (involves a saving of 7¢ to 9¢)	Cost-saving factor #2 (involves a saving of 2¢ to 4¢)	Cost of delivery per unit sold
			Cents
A	Absent	Absent	14
B	Absent	Absent	13
C	Absent	Present	12
D	Absent	Present	10
E	Present	Absent	6
F	Present	Present	4
G	Present	Present	4
H	Present	Absent	5
I	Present	Absent	7

This example uses the same cost of delivery per unit sold as in the original example but is modified so as to show that the differences in cost per unit are attributable to the presence or absence of each of two cost-saving factors, one of which is of several times the importance of the other. If the seller, X, were allowed to create two classes of customers defined solely in terms of the less important cost-saving factor (#2), he could place A, B, E, H, and I in one class with an average cost of 9¢ and C, D, F, and G in the other class with an average cost of 7½¢. The result would be to justify charging E, H, and I 1½¢ *more* per unit than C is charged although the seller's cost of dealing is 6¢, 7¢, and 5¢ *less*, respectively.[9]

In sum, a difference in quantity or method of dealing which does not substantially account for and justify the over-all cost and price differentials between two classes of customers provides a scarcely less arbitrary method of classification than the random selection of favored customers and results in similar

[9] It is important to observe that the discriminatory effects are no less certain if the seller, X, establishes a single class defined by requiring the presence of *both* the insignificant cost-saving factor (#2) and a significant cost factor (#1) (as Borden may have done in the present case). F and G, the only two purchasers in the favored class, would then have an average cost of 4¢, while the average cost for all the other purchases would be more than 9½¢. X would therefore be authorized to charge F and G a price 5½¢ less than he charges E, H, or I although his cost savings are only 2¢, 1¢, and 3¢, respectively. This discriminatory result, which appears cost-justified "on the average", is wholly unjustified in terms of actual costs and results in a destruction of competition among five of the nine hypothetical purchasers.

unjustified discriminations between the seller's customers.

III

BORDEN'S CLASSIFICATION OF CUSTOMERS AS CHAINS OR INDEPENDENTS WAS BASED UPON NO DIFFERENCES IN THE METHOD OR QUANTITY OF SALES OR DELIVERY WHICH CAN JUSTIFY THE DIFFERENTIALS IN DISCOUNTS

A. The underlying assumption of Borden's detailed and elaborate cost studies is radically different from that of the government. Borden assumed that, if two or more groupings of customers were set up and there was some basis for believing that the general or "average" character of the groups differed, a cost justification of a price differential between every member of one group and every member of the other could be established by showing a differential cost per $100 volume of sales to each class. It therefore set up classes of independents and chain stores; pointed out in a general fashion that even the class of larger independents differs widely from the class of chain stores in average volumes and that different and more costly methods of sale or delivery are used for the "average" independent than are used in dealing with the chains; clocked and calculated the total time and cost spent in dealing with the two categories; and determined that the average cost per $100 of volume of dealing with the chain stores was a certain amount less than the cost of dealing with the larger independents (and, *a fortiori,* the other classes).

It is the government's contention, argued fully above, that an individual purchaser is entitled to the same treatment by a seller as his competitor unless

it can be shown that the volume of his purchases or his methods of purchasing and accepting delivery from the seller differ from his competitor's to a degree warranting a given price differential. The Robinson-Patman Act does not authorize customer-to-customer discrimination whether or not there is discrimination between the *average* members of the classes of customers in which each of the customers is put by the seller; for it explicitly forbids *any* discrimination between different purchasers which does not merely make due allowance for differences in cost "resulting from the *differing* methods or quantities in which such commodities are to *such* purchasers sold or delivered" (emphasis added). In short, it is the government's contention that only classifications of customers in terms of those differences in quantity or method of dealing which substantially account for the lower price to the individual members of a particular class can ever be the basis for a pricing policy or a cost justification.

B. Unquestionably a distinction between chain stores and independent stores, as such, is not a classification in terms of significant cost factors of quantity or method of dealing. Moreover, it is plain on the face of Borden's discount schedules that Borden has not created open-ended classifications of customers in terms of the quantities and services they require. For there is no way that an independent store can obtain as much as one-half the discount allowed every chain outlet regardless of the quantities the independent purchases and regardless of its willingness

to use the identical methods of sale and delivery that Borden furnishes the chain stores.

Although these facts alone, in the government's view, show that Borden's classification of customers cannot provide the basis for a valid cost justification, it is worth considering in detail Borden's contention that its classification is "really" not in terms of chain versus independent ownership but in terms of certain distinctions in quantities and methods of dealing with the members of each class. (Motion to Affirm, pp. 8–11.)

1. A number of the differences in quantity and method of dealing advanced by Borden (*id* at pp. 14–16) go only to "average" or "general" differences of the classes and do not purport to involve characteristics which are the same in all the independents and uniformly different in all the chain stores. In the government's view these "average" differences cannot justify treating a "non-average" independent differently from the chain stores.

(*a*). First, it is entirely clear that Borden's distinction between chain stores and independents cannot be justified as reflecting the greater quantity purchased by the average chain store [10] compared to the quan-

[10] Among the contentions made by the government below, but not resolved by the district court, was the argument that, where an independent store is in competition with a particular store of a chain taking a volume of purchases less than the average for that chain's stores, the independent is entitled to secure a discount proportional to the costs of serving it as contrasted with the costs of serving the individual chain store, rather than a discount proportional to a higher "average" cost of serving all stores in the chain. The government is willing

tity purchased by *each* independent. The record does not and could not show that every independent purchases in smaller quantities than the average chain store. One example of an independent which purchases substantially larger quantities than the average chain store is the Schubert store at 2610 W. 71st Street, Chicago, which had a dollar volume of purchases for December 1954 of $4,083 (R. 80). Since the average monthly volume of purchases for the 80 largest independent stores was approximately $1,255 (R. 217),[11] Schubert's volume was about 3¼ times the average. Expressed in points, this means Schubert took an average of approximately 750 points daily, as contrasted with the 231-point average for the 80 stores. This was well above the chain average of 599 points a day (R. 410) and meant that to the extent the discounts were based upon quantity savings Schubert should have received a substantially greater discount than either chain customer. Under the Borden discount scheme, of course, it did not,

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to assume, for purposes of this argument, that the proper volume figure to be used in comparing a chain with its independent competitors is the average volume purchased by the stores of that particular chain.

[11] This figure is calculated by multiplying by four the weekly purchase figure given in Schedule XXXIV (R. 217) for all independents, and adding an amount for two extra days of sales, to secure a total monthly volume for all independent stores in the 4 percent category, and then dividing by 80 to get the average.

for no independent store could obtain even comparable discounts.[12]

(*b*). Borden alleges that a large majority of "independent" customers pay cash for each delivery and that this is more expensive than the centralized billing of the chains. If Borden wishes to make an additional charge to those independents which either want to pay cash or, because of a poor credit rating, can reasonably be made to pay cash, such a charge is, of course, perfectly proper. What Borden may not do is what it has in fact done—charge independents which have excellent credit and which do not make cash payments a greater amount than a competing chain store simply because the majority of independents pay cash.

(*c*). Borden alleges that all bad debt losses from store customers have been incurred by extensions of credit to independents. But (i) it is clear that the cost of bad debts is not applicable to the vast majority of independents; (ii) the total amount of bad debts charged to the larger independents—$1.90 weekly,

[12] In its Motion to Affirm, Borden pointed out that the record indicates that Schubert and two other independents on its route (both of whom purchased an amount of Borden's products which was about average for stores in the 4 percent bracket (see R. 80)) actually received discounts of 5½ percent, 1½ percent above the normal maximum according to Borden's published discount schedule (R. 82). This extra discount was given the three stores by Borden to meet competition (Government's Post Trial Brief, p. 12 (not printed)), and thus does not demonstrate that Borden adjusted its published discount offers where cost savings to individual purchasers so dictated. In any event, at its volume level Schubert was entitled to at least the same 8½ percent discount given the chains, and its receipt of 5½ percent was not cost-justified.

R. 585—(or even to all independents—$31.42 weekly, R. 585) by Borden is so infinitesimal compared to their volume of purchases[13] that there can be no good faith reference to it as a significant factor in classification; and (iii) the cost of bad debts does not result from differing quantities and methods of dealing, as the statute requires.

(*d*). There are two other alleged differences in method of dealing which involve only "average" differences and not actual differences between each of the members of each class. The "tendency" of chain stores to be more concentrated in areas of denser population than independents (thus allegedly reducing truck traveling time) obviously cannot justify a classification by type of ownership; many independents will also be in areas of dense population. And the assertion that the independents generally required that deliveries be made to places in their stores less accessible than those areas to which chain store deliveries were made (an analogue of Bowman's "customer services" categorization) is meaningless as justification for a classification in view of the fact that Borden does not claim that all independent stores, because of the nature of their ownership, require deliveries to more inaccessible places than the chain stores, but only that this extra delivery expense is more characteristic of the independent stores as a group than of chain stores (R. 173, 404).

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[13] The total volume of purchases by the eighty largest independents during the same period was $23,167. For all independents it was $98,672 (R. 585).

2. Three other differences in method of dealing advanced by Borden (Motion to Affirm, pp. 15–16) are unsupported by any showing that the differences resulted in significantly different costs in dealing with the two classes.

(*a*). Borden notes that the billings of the chain stores which deal on a credit basis are serviced centrally, while those of the independents using credit are handled by the delivery men. However, no evidence was adduced to show: (i) that the latter method of collecting on credit accounts was inherently more costly; (ii) if so, why the cheaper method was not also used with the independents; and (iii) what the extent of the difference was.

(*b*). Borden contended that in the case of independents the routemen computed at the store the quantity *and* price of each product purchased and entered it on the sales ticket, whereas for chains only the quantity was entered, with the price being entered as part of a central billing operation (see R. 174). Again, however, there was no evidence introduced that: (i) for a given volume of goods the method for dealing with the chains was any less costly to Borden than the method of dealing with the independents; (ii) if so, why the cheaper method was not also used with the independents; and (iii) what the extent of the difference was.[14]

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[14] In any event, the difference could not have been material since the total weekly difference between the chains and independents for *all* sales ticket operations performed by the routemen was only $680 (Item 14, R. 183). Weekly costs of the central office billing department, on the other hand, involved charges of $356 to the chains and only $42 to the independents (R. 205, 209).

(*c*). Also falling within this class is the unsupported testimony of a witness for Borden that in his opinion the Borden executives spend proportionally more time on the problems of independent stores "than the sales to such stores bear to the sales to chain stores" (R. 144).

3. One difference in method of dealing remains which is not entirely disposed of by either of the above two objections. Borden notes that the soliciting and servicing of its independent store customers is done by its employees hired for this task, whereas the same function for the chains is performed by higher executives. For two reasons this distinction cannot justify the categorization of Borden's customers into a chain class and an independent class.

(*a*). There is no showing of any necessity for this internal division of labor. If, as there is every reason to assume, large independents could be serviced in precisely the same way as the chain stores, it is not a cost justification to show that, as a matter of the seller's choice, they are serviced in a more costly way.

(*b*). Borden allocated $2,066 per week to salesmen's salaries for all the independents and $487 for the larger independents alone (R. 617); it made a corresponding allocation of $359 for the cost of the time of higher officials performing similar services for the chains. Even if it is assumed, however, that the differences between these sums in fact represent the weekly differentials in the cost of dealing with Borden's classes of customers resulting from a difference in the method of solicitation, this difference in method would account for only about two-fifths of the calcu-

lated difference between serving Borden's chain customers, as a class, and the 80 largest independents, as a class. It therefore could not properly be used as a basis for a classification which purports to justify the much larger differential between the classes (see *supra*, pp. 33–36). This is particularly true where the classification at the same time conceals the real differences in volumes between the individual members of the disfavored class.[15]

C. Borden thus failed to comply with the implicit statutory requirement that classes of customers be defined solely in terms of those differences in method or quantity of dealing which account for the difference in cost between the two classes. This is not merely a technical failure; it results in substantial unjustified discriminations among Borden's customers.

With minor exceptions, Borden made no attempt to explain or assess the importance of the various differences in quantity or method of sale among its customers. It is reasonable to conclude, however, that the greatest part of any cost savings involved in dealing with the chains resulted from increased volumes of purchase and from such "method" differences—which are related to volume—as the necessity of stacking merchandise in a store icebox (R. 173,

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[15] Thus, as to Schubert, which had a volume of approximately 3¼ times the average of independents in the 4% discount bracket, this factor, by itself, would account for only about one-eighth of the discount differential between the chains and the largest independent discount bracket. This differential would be outweighed to the extent that Schubert's greater volume than the average chain store results in other cost savings.

183). By lumping the largest 80 independents into one class Borden guaranteed that those very large independents whose quantities and methods of purchase and delivery approximated that of the chains were being charged with a proportion of the extra costs attributable to the small independents whose different quantities and operational methods involved extra costs to Borden. In this regard it is particularly significant that Borden, which had three volume categories for independents below a 150 point daily average, had only one discount category above 150 points, although average daily volumes of customers in this last category differed by at least 600 points (see *supra*, p. 39).

This point can perhaps best be illustrated by examining one of the comparisons adduced by Borden to show that alleged "differences" in the methods and "'quantities' by which [its] milk was purchased [by the chains on the one hand and the independents on the other] resulted in conspicuous differences in cost of sale and delivery" (Motion to Affirm, p. 16). Borden referred to the fact that it took its drivers 11,538 minutes to carry the milk from the trucks to the designated delivery points in the chain stores, 12,709 minutes in the case of all independent stores, and 2,041 minutes in the case of the 80 independents in the 4 percent discount category (*id.* at 17). Borden pointed out that according to these figures it took less time to perform this task for the 254 chain stores than for the 1,322 independent stores, despite the fact that the chains purchased about twice as much milk products as the independents (*ibid.*). It also showed that, though aggregate sales to the two chain customers

were 8.4 times the sales to the 80 independents in the 4 percent discount category, the time spent on this activity in the chain stores was only 5.6 times that spent in the 80 independent stores (*ibid.*).

The Borden example shows that substantial cost savings resulted from quantity dealing, but it also shows that the larger independents were precluded from taking advantage of such savings as their volume purchases might have entitled them to if their volumes had been compared directly with that of an average chain store. By lumping the largest 80 independents together, Borden treated a store such as Schubert, which took a volume of approximately 750 points, as if it took the class average of 231 points. Moreover, a large independent such as Schubert was forced, regardless of its own operational techniques, to bear a substantial share of the extra costs Borden incurred in dealing with much smaller independents whose methods of dealing were more costly. Specifically, under the Borden analysis, the large Schubert store and other independent supermarkets could take their deliveries at an outside rear platform, as presumably most of the chain stores did, and yet be charged with an additional sum arising out of an "inaccessibility" factor, because other independent stores in their group required time-consuming inside delivery.

As a dramatic example of the unfairness of the broad groupings into which Borden classified the independents, Schubert is undoubtedly not typical. But there are almost certainly other large independents who also were entitled on a quantity and method basis to discounts which, if they did not equal that

granted the chains (or earned by the individual chain customers), at least amounted to percentage discounts closer to that granted the chains than the spread between 4 percent and 8½ percent which actually existed.

It is no answer to this argument to point out that, if some of Borden's large independent customers would have gained as a result of being given individual treatment, others would have been worse off. The Robinson-Patman Act amendments to Section 2 of the Clayton Act prohibit discrimination between "purchasers" of like goods, not between classes of purchasers, and the cost-defense proviso is similarly geared to the rights of individual purchasers to be protected from discriminatory pricing unless the discrimination can be cost-justified by distinctions between their individual sale and delivery characteristics and those applicable to their favored competitors.

Finally, Borden's lumping-averaging process also introduced an element of distortion at the chain level. On this record there was no basis for classifying the two chain customers together, for there was no showing that the average A & P and Jewel stores purchased substantially equivalent amounts of milk.[16] The only material evidence on the point indi-

[16] Borden attempts to surmount such deficiences in its proof of its cost justification defense, by pointing out that the raw material for its cost study, consisting of the report forms from its time studies of its various functions were assembled in a series of "bulk" exhibits made available to the government and the court below (Motion to Affirm, p. 28). The government, it suggests (*ibid.*), could have derived from this source the necessary information to calculate the differences in average

cates that, on the contrary, the average Jewel store purchased about 32% less milk than the average A & P store.[17] Thus, to the large extent that Borden's cost justification is based upon the claim that there are cost savings in sales and deliveries to customers whose stores take relatively large volumes of Borden's goods, it is clear that the large discount differential between Jewel and the bigger independents was further exaggerated.

In sum, Borden's cost savings largely resulted from the efficiencies of dealing in large quantities and the economies of allowing large grocery stores to do many

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volume between the A & P and Jewel stores, or between volumes and methods of sale and delivery of particular independent stores to determine whether in fact the classification discriminated against particular purchasers. We think it clear that a party may not seek to cost-justify its discriminatory pricing policies on one basis, and then, when this is found to be inadequate, argue that the government had the burden of showing that no facts in the record might conceivably cost-justify the discrimination on some other basis.

[17] Schedule XXXVI of the Final Pre-Trial Order as to Borden (R. 519) indicates that there were 256 chain stores served by Borden in 1954, the last full year in which it had both A & P and Jewel as customers, and that it served only 112 chain stores in 1956, the first full year it served only A & P among the chains. The schedule also shows that, figured as a percentage of the 1947 volume of chain store purchases, Borden's chain store volume in 1954 was 192.2 percent and in 1956 only 97.5%, slightly more than half as much. This would indicate that the *aggregate* volumes of sales by Borden to A & P and Jewel were "of the same general order of magnitude" (Borden Motion to Affirm, pp. 28–29). But since Borden was serving approximately 145 Jewel stores in 1954 and only 110 A & P stores, the *average* A & P store would be taking about 32 percent more of Borden's milk products than the average Jewel store.

of the sale and delivery tasks that Borden performed for smaller stores. Borden could, if it wished, charge a single price to all stores regardless of these cost savings in dealing with some. But if it wished to recognize these cost savings in a price discount system, it had to do this with a price schedule which applied equally to every customer, regardless of form of ownership, and which determined each individual customer's discount in terms of the efficiencies and economies which give rise to Borden's cost savings.

If Borden had done this, its price schedule would have shown, instead of a leap in discount from 4% to 8½% dependent upon form of ownership, a gradation in discounts properly reflecting the actual economies, efficiencies, and cost savings involved in dealing with individual customers who are grouped together only in the costly benefits they enjoy and who are free to exchange some benefit of service for a lower, more competitive price. Only this type of schedule for price differentials is permitted by the Robinson-Patman Act, for this type alone makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchases sold or delivered * * *."

IV

A SIMPLE DECREE FORBIDDING ANY DIFFERENCE IN PRICE BASED UPON WHETHER A STORE IS INDEPENDENTLY OWNED OR BELONGS TO A CHAIN WOULD EFFECTIVELY REMEDY THE VIOLATION OF SECTION 2(a)

The District Court was incorrect in assuming that an appropriate injunctive decree would require it to

"regulate this particular phase of the industry" and would mean that the court "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). As the substance of the government's argument makes clear, the illegal discrimination practiced by Borden resulted from its use of a broad classification of chains and independent stores to allocate all the costs of the two classes when only a small part, if any, of the resulting differential in cost resulted from inherent differences in the quantities or methods of dealing between the members of the two classes. An appropriate decree would forbid the determination of price in terms not substantially related to the cost of dealing with each particular customer. Tailored to the present case, the necessary decree would simply enjoin the appellee from adopting or giving effect to any price or discount policy based upon a classification of its customers into chain stores or independent stores.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed and the case should be remanded to the district court with instructions to enter a judgment holding the appellee Borden Company to have violated Section 2 of the Clayton Act in its price discount practices and policies which were the subject of the hearing on remand and enjoining Borden from adopting any price or discount policies based upon a classification of its customers into chains and independents.

Respectfully submitted.

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MARCH 1962.

Office-Supreme Court, U.S.
FILED
MAR 21 1952
JOHN T. DUNN, CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

BOWMAN DAIRY COMPANY [1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 557–572) has not yet been reported. The prior opinion of the district court, and the opinion of this Court when this case was previously before this Court, are reported, respectively, in 111 F. Supp. 562 and 347 U.S. 514.

JURISDICTION

The final judgment of the district court on remand was entered on February 27, 1961 (R. 572). The notice

[1] Pursuant to this Court's order of January 15, 1962, the United States is filing separate briefs in this case with respect to the two appellees, the Bowman Dairy Company and the Borden Company.

of appeal was filed on April 28, 1961, and this Court noted probable jurisdiction on December 4, 1961 (R. 1286; 368 U.S. 924). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended.

STATUTE INVOLVED

The pertinent provisions of Sections 2(a) and 2(b) of the Act of October 15, 1914, 38 Stat. 730, as amended, 49 Stat. 1526 (15 U.S.C. 13(a) and 13(b)), commonly known as the Clayton Act, are as follows:

> SEC. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.
>
> SEC. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of rebut-

ting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *.

QUESTION PRESENTED

Whether a seller who discriminates in price in favor of chain stores, as such, can cost-justify the discrimination simply by showing that the average cost of sales and delivery to all chain stores is lower than the average cost of sales and delivery to all independent stores.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing a government civil antitrust suit which charged The Borden Company and the Bowman Dairy Company, the two largest dairies in the Chicago, Illinois, area, with illegal price discrimination, in violation of Section 2(a) of the Clayton Act. The district court found that the appellee's prices were discriminatory and constituted "prima facie violations of section 2(a)" (R. 563). It ruled, however, that the companies had established that such discriminations were justified by differences in cost (R. 570) under the proviso to Section 2(a) which permits price differentials "which make only due allowance for difference in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [different] purchasers sold or delivered."

On January 15, 1962, on motions filed by the appellees, this Court ordered separate hearings and the filing of separate briefs on the merits for each of the appellees. This brief deals with appellee

Bowman. However, the basic issues are common to both appellees.

THE BACKGROUND OF THE DECISION BELOW

The complaint in this case, filed in 1951, charged the defendants with violating Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act (R. 1–20). Insofar as the Clayton Act was concerned, the complaint charged a continuing practice by each of the defendants to sell "fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between such purchasers of fluid milk of like grade and quality," that the effect of the discrimination might be to substantially lessen competition or tend to create a monopoly in such sales, or to injure competition between purchasers knowingly receiving the benefits of such competition and those who did not, and that the discriminations in price "have been granted, often secretly, in the form of preferential * * * discounts * * *" (R. 16–17). The complaint further alleged that, unless enjoined from so doing, the defendants intended to pursue the discriminatory practices (R. 17, 18–19).

In 1953, the district court dismissed the complaint after the government had presented its case. *United States* v. *Borden Co.*, 111 F. Supp. 562 (N.D. Ill.). It held that the Sherman Act violations charged had not been proved; and that, although there was proof of price discriminations constituting prima facie violations of the Clayton Act, no injunctive relief was necessary because there was an outstanding injunction

in a private antitrust suit which enjoined the defendants from engaging in such discriminatory practices.

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed the dismissal under the Clayton Act. *United States* v. *Borden Co.*, 347 U.S. 514 (R. 26–31). It held (p. 520) that "the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree," and remanded the case for further proceedings.

On remand, the district judge stated, with respect to the Clayton Act issue remaining, that he conceived his primary duty to be, in the absence of a request for further proceedings, to consider whether injunctive relief was required in the light of the decision of this Court in *United States* v. *W. T. Grant*, 345 U.S. 629, giving due, but not conclusive, consideration to the effect of the consent decree in the private case (*Dean Milk Co.* v. *American Processing & Sales Co.*, No. 49 C 1159 (N.D. Ill.), entered December 3, 1952) (R. 40). The government moved on January 11, 1955, to reopen the record to permit the taking of further evidence, (R. 45–46), on the ground that the *Dean* case had not been effective in preventing further price discrimination by the defendants who were alleged to "have engaged in discriminations in price between different wholesale purchasers of fluid milk of like grade and quality subsequent to the entry of the *Dean* decree" and would continue to do so in the absence of an injunction (R. 46). The court granted this motion by order of April 18, 1955 (R. 47–50).

The case was presented on the basis of stipulations, embodied in pre-trial orders, the depositions of expert witnesses, and written briefs. No testimony was taken before the court. Each stipulation and pre-trial order reserved questions and issues of the weight, materiality, and relevancy of the data and statements in the stipulations (R. 57, 75, 119, 236, 379, 411). The relevant facts of record as to Bowman (which are not disputed except as noted) are set forth below.

THE NATURE OF BOWMAN'S BUSINESS

Bowman is one of the largest dairy companies operating in the Chicago metropolitan area. It accounted for approximately 38 percent of fluid milk and related products sold at wholesale in that area (R. 6). The wholesale customers of Bowman include large grocery chains and "independent" stores. It also sells to "nonstore" customers such as restaurants and institutional bulk buyers (R. 343, 344). The number of stores served varies but in 1955 Bowman was serving an average of 3,270 customers, of which about 2,500 were independent grocery stores, 163 were stores of the Atlantic & Pacific Tea Company and the Kroger chains in the Chicago area, and the remainder were nonstore customers (R. 335, 336, 481). Daily weekday calls were made at each customer store on a driver's route, and product delivery was made from the truck as ordered from the driver by the customer. Butter, eggs, and bulk products[2] in addition to the

[2] "Bulk" products refer to fluid milk products sold, largely to restaurants and industrial users, in much larger containers, for use by the purchaser or resale after being placed in smaller containers by the purchaser.

fluid milk and fluid milk products were carried on the route trucks for daily sale and delivery (R. 330, 333). The milk and other products are delivered by trucks on mixed routes, *i.e.*, they are sold and delivered to both chain and independent stores and to nonstore users from the same trucks, on the same routes, and by the same drivers (R. 343–344). There is, in fact, no physical or functional difference in the instrumentalities used in delivery to the chains and the independent stores. All delivery personnel are employees of Bowman, and Bowman owns and operates the trucks and other delivery equipment. The assignment of stores to routes and the personnel and equipment on routes is wholly unrelated to store ownership.

THE BOWMAN PRICE AND DISCOUNT SYSTEM

Bowman adopted a pricing system for fluid milk and fluid milk products based upon a classification of all grocery stores as either "chain" or "independent." The chain store discount was a fixed percentage discount off of list prices, regardless of quantities or varieties purchased. Independently owned stores received discounts dependent upon volume of monthly purchases by each store, but in no event as high as that granted to chain stores. For purposes of calculating the discount to independent stores the volume was converted to "point" values assigned to each fluid milk product.

During the period from June 1, 1954 through August 1955, Bowman granted the chain stores it served (A & P and Kroger) a flat 11 percent discount from

list prices for fluid milk and fluid milk products, regardless of quantities or "points" purchased (R. 69–70). During this same period Bowman granted the independents a sliding scale of discounts from such list prices based on the quantities (converted to "points") purchased by each store, with a maximum discount of 8 percent.[3] The discounts to the independent stores were based on monthly purchases and were determined after each month. To receive any discount the independent stores were required to purchase at least "one or more converted points of Bowman milk products per normal delivery day" (R. 67).

The June 1954 discount schedule was published by Bowman in a "Resale Store Discount Schedule" (*ibid.*). This document on its face covered all quantity discounts being offered by Bowman to all retail stores irrespective of ownership (*ibid.*). Neither the published announcement nor the schedules contained any statement or indication that higher discounts

[3] The scale of discounts to the independent stores under the June 1954 schedules were as follows (R. 67):

Average converted points per day	*Percent of discount*	*Average converted points per day*	*Percent of discount*
0 to 10	3.0% to 3.4%	80 to 90	5.6% to 5.8%
10 to 20	3.4% to 3.8%	90 to 100	5.8% to 6.0%
20 to 30	3.8% to 4.2%	100 to 110	6.0% to 6.2%
30 to 40	4.2% to 4.6%	110 to 120	6.2% to 6.4%
40 to 50	4.6% to 5.0%	120 to 130	6.4% to 6.6%
50 to 60	5.0% to 5.2%	130 to 140	6.6% to 6.8%
60 to 70	5.2% to 5.4%	140 to 140	6.8% to 7.0%
70 to 80	5.4% to 5.6%		

On August 25, 1954, this schedule was amended by adding thereto (but not publishing) the following additional discounts (R. 68):

Points	*Discount*
150 to 200	7.0% to 8.0%
Over 200	8.0%

would or could be secured by independently owned stores on the basis of their use or non-use of "optional" services related to product delivery or by adoption of methods of payment not involving daily collections by the route drivers.

On May 28, 1954, three days prior to the effective date of the ostensibly general discount schedule of June 1954, Bowman sent letters to The Great Atlantic and Pacific Tea Company and to the Kroger Company, respectively, confirming a discount to the chains of 11 percent of dollar volume effective June 1, 1954 (R. 69–70). Unlike each independent, each chain store was not required to make daily purchases to qualify for any discount. The letter to The Great Atlantic and Pacific Tea Company referred to the "general average" of sales, delivery, customer service, and collection costs for stores "falling outside of the so-called chain store category" as the justification for the greater chain store discount (R. 69). The letter to the Kroger Company simply confirmed its 11 percent discount for the purchase of dairy products in all areas except Racine, Wisconsin (R. 70). Both letters were sent from Bowman's head office in Chicago. The A & P letter was signed by the president of the Bowman Dairy Company and the Kroger letter was signed by its general sales manager.

New discount schedules which resulted in even greater discriminations in price between chain and independent store customers were made effective by Bowman on September 26, 1955 and on January 2,

1956, respectively.[4] Under the September 1955 "Bracket Discount Plan" the independently owned stores were required to take an average of 25 points a day to get any discount, and those with volumes greater than this amount were granted a discount of 2, 3, 4 or 5 percent, depending upon their volume "bracket," with stores taking 250 points or more entitled to the 5 percent maximum. The chains were given a flat 9.8 percent (R. 350–351). Under the January 1956 schedule, the maximum independent discount was 5½ percent (for those taking an average of 355 converted points or more per day) (R. 359), while the chains were given a flat 10 percent (R. 357).

THE PROFFERED COST DEFENSE

A major defense relied upon by Bowman in the court below was that the discriminatory prices in favor of chain stores were justified, under the proviso to Section 2(a), by the lower costs of selling and delivering to them.[5] Under Section 2(b) the burden of showing such cost justification fell upon Bowman.

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[4] In September 1955 there was a period of eleven days between the discontinuance of the June 1954 schedule and the effective date of the September 1955 schedule in which net prices were charged to A & P and a higher net price to the independents, but Kroger bought at a still higher list price (19.32¢ per quart as contrasted with 18¢ for independents and 17¢ for A & P) minus an 11% discount. This was followed by a period of 18 days in which Kroger bought at the same net price as A & P (with no discount) (R. 60–61). During this first period Kroger was in effect paying .2¢ more per quart than A & P.

[5] Bowman also contended that the discriminations in price were not in interstate commerce, that their customers were not in competition with each other, and that the discriminations did

In support of this claim Bowman presented a series of cost studies which are fully set out in the record.[6]

In general the method employed by the cost studies to justify the discrimination was as follows: (1) Bowman first computed the total expenses of each of its distribution divisions and then, assuming that these expenses could be fairly allocated to different customers in terms of delivery time, it used this figure to determine a cost rate per minute for milk truck drivers (R. 274, 309). (2) Bowman then determined the amount of a driver's time required per customer or per quantity of a certain type of milk product to accomplish each of eighteen separate work steps that a driver might be called upon to do (R. 286).[7] (3) It used these figures to determine the total delivery cost to serve independent grocery stores and chain stores at any given volume level (R. 277,

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not injure competition. The district court rejected these arguments and found that the government had established a prima facie case under Section 2(a) (R. 562–563).

[6] The basic Bowman cost study and cost allocations procedures are stated in its "Manual for Establishing and Testing a Store Discount Schedule" (R. 271–310), in its "Discount Schedule Tests" purporting to justify the June 1954 and January 1956 discount schedules (R. 328–348, 357–369) and in its "Test of Bracket Discount Plan", allegedly supporting the September 1955 discounts (R. 349–356).

[7] Of these work elements the calculated time devoted to five were allocated on a per customer basis, five others on a per case basis, three on a basis of a given amount of time for the first case, plus an additional amount of time for each additional unit, one (driving time en route) on the basis of a complicated special formula providing a constant for all stores on the route, and one other on the basis of a given amount of time per glass bottle (R. 286). The other three, which were the decisive elements, are discussed in the text.

278, 283, 284). (4) Simple division by the number of units purchased then gave the cost of delivery per unit at any given volume level (R. 277). (5) the cost per unit of serving the independents at any given volume level was then compared with the cost per unit of serving the chains at the same volume level to determine how great a discount could be granted the chains in excess of that granted the independents under the published Bowman discount schedule (R. 345–347, see R. 278–279, 284).[8]

Only the third of these five steps is of crucial importance to the present case. In allocating the time required for each work step to independents and chains at various volume levels Bowman determined that three of the eighteen work elements would never be chargeable to chain stores and would always be chargeable to independent grocery stores. These three "work elements" require special notice for they constitute the sole explanation of why Bowman gave

[8] This comparison process (set out in Schedules 4–6 of Bowman Ex. 14, R. 345–347), involved for both chains and independents adding the "platform" cost of the milk to the calculated delivery cost per quart at any volume level and subtracting this figure from the list price to secure a "maximum margin" available for discount purposes. From this margin figure for the independents, expressed as a percentage of list price, was then subtracted the percentage rebate for that volume of purchases to secure a so-called "gross margin". Subtracting this gross margin from the maximum available percentage margin for chains at the particular volume level gave the maximum discount which Bowman claimed it could give the chains (see R. 278–279, 284).

different discounts to independent stores and chain stores taking the same volume of Bowman products.[9]

First, Bowman charged *all* independent stores but *no* chain stores .033 minutes per unit or point of milk for so-called "optional customer services" (R. 272, 286). These were defined by Bowman as "some optional delivery services that the driver may be requested to do, such as deliver the order inside, place the containers in a refrigerator, rearrange containers so that any product remaining unsold from yesterday will be sold first today, leave cases of products at different spots in the store, etc." (R. 272, 275 and 292).[10] Bowman admitted that not all independents availed themselves of these services (R. 272, 275), but introduced no figures into the record to show what percentage of the independents utilized the so-called customer services. The government, in rebuttal, introduced evidence, based upon Bowman's 1949 studies of driver time on the 55 routes of its Elston Division, which showed that of the 687 independent stores on

[9] Despite the differing methods of calculating the time to be assigned to each of the other fifteen work elements, they were not allocated to the chains in any manner different from that in which they were allocated to the independents. While they account for the major portion of the calculated total cost per point of serving any Bowman customer at any particular volume level, no distinction between independent and chain stores at any volume level results from this part of the allocation.

[10] While Bowman admitted that "requests vary widely and there is no standard set of options" (R. 276) it stated that "any movement of merchandise beyond a point just inside the store door is considered additional service" (*ibid.*).

these routes, 224 or 32.6 percent took customer services on neither of the days of the study and 46 more, or 6.7 percent took such services only on one of the two dates (R. 480).

The other two work items charged only to independents involve the time and expense of daily cash collections and the related item of delays in collection. These were charged on the basis of a fixed amount of time (1.19 minutes and .13 minutes respectively) per each "cash customer" per day (R. 286). The charge was made to all independent stores and to no chain stores (R. 277–278, 303–330). The basis for this distinction was that "most store customers pay the driver in cash daily, rather than paying by check monthly or semi-monthly" (R. 272, 275). On the other hand, "central billing" on a credit basis was part of the "arrangement" made with the chains (R. 276). However there are no figures in the record detailing what percentage of the independent stores actually paid for their purchases by daily cash collections or whether those who did not were large or small purchasers.

The crucial significance of these three items was recognized by Bowman itself. It explained in its "Manual for Establishing and Testing a Store Discount Schedule" (R. 271, 278) that:

> * * * [T]he same method of calculation [was] used to establish the maximum available margin for chain stores [as for independent stores] but the following elements are not included in the regular services [for chain stores] and are omitted from the total delivery times (see Schedule 2A) [R. 303].

Customer service
Collect
Delay to collect

Due to the omission of these elements, the maximum margin available to chain stores is greater than that available to independents * * *. [Emphasis added.]

As worked out in Exhibit 14 (R. 328–348), the asserted justification of its June 1954 discount schedule, Bowman purported to find that the chain discount of 11 percent was justified for all volume levels over a 180-point per day average.[11] Calculations based upon the same principles also indicated justification for the discount differentials between chains and independents under the September 1955 (R. 349–356) and January 1956 (R. 357–369) discount schedules. In fact, the greater discriminations between the chains and independents under these latter two discount systems were only justified through raising the cost per route minute from 18.2¢ to 18.5¢ (compare R. 345–346 with R. 364–365)[12] and by a change in the price justification formula, not acknowledged in either Bowman Exhibits 15 or 16, providing for an additional differential between the chains and the independent stores allegedly "to reflect the differential proportion of fiber and glass containers between chain and independent stores" (R. 437–438, see R. 438). As a

[11] At all volume levels between 40 points a day and 160 points a day chain discounts of between 9 percent and 11 percent were allegedly justified.

[12] In its Trial Brief below (p. 18–19) Bowman stated this increase was due to the fact that "it was more expensive to operate in the winter months."

result of these two changes the schedules introduced to justify the January 1956 discounts showed a decrease by about 25¢ in the calculated chain delivery cost per point at volume levels above 100 points per day (Compare R. 346 with R. 365) while the delivery costs per point to the independents at these levels showed an *increase* of approximately .03¢ (Compare R. 345 with R. 364).

The government, in a rebuttal pretrial order, introduced expert testimony (R. 411–513) as well as additional evidence challenging a number of the premises upon which the Bowman cost studies were based. In its post-trial brief and reply brief, the government argued these points as well as attacking the basic invalidity of any classification based upon an allocation to all independents but to no chains of the costs of optional customer services and cash collections (Government's Reply Brief (not printed), pp. 18–26, see R. 569).

THE DECISION OF THE DISTRICT COURT

In an opinion which did not distinguish between the Bowman and Borden cost studies, the district court held that the Bowman studies sustained its claim that its discriminations in price, which "constitute prima facie violations of Section 2(a) of the Clayton Act" (R. 563) were cost-justified. The court did not undertake any detailed analysis of the Bowman cost study or the government's objections thereto. Instead, adopting "a liberal approach to cost justification studies" (R. 563), the court found (R. 570):

> * * * [D]efendants have each made a bona fide effort to allocate their costs between different

> types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification for the difference in prices described above in defendants' published discount quotations.

Although the court recognized that "the studies are imperfect in some respects," (*ibid.*) it rejected the government's challenges to their validity, since "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect" (*ibid.*). The court noted the "seemingly arbitrary nature" of the basic classification of Bowman's customers into chains and independents (R. 569), but concluded that "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores" (R. 570, emphasis in original).

Finally, the court stated that it had not given its "stamp of approval to all pricing policies and practices revealed by the evidence * * *. These policies and practices have in many instances been imperfect" (R. 572). But it held that if it were to enjoin such practices it would lead to its complete regulation of this phase of the milk industry and it "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). Finding "such a course is impractical and unwarranted," it stated that "on the basis of the evidence presented" (*ibid.*), the government "is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as

the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted" (R. 572).

SUMMARY OF ARGUMENT

The Bowman Company adopted pricing policies under which its independent customers received percentage discounts off list price, the amounts of which depended upon the volumes of their purchases, while its two chain store customers received higher fixed discounts, not dependent upon their volumes of purchases. In all cases the chain stores were afforded discounts almost half again as large as those which any independent could qualify to receive. Bowman attempted to justify the *prima facie* violations of Section 2(a) of the Patman Act, which these discriminations were found to involve, by cost studies which were also based upon the classification of its customers as either chains or independents. This attempted cost justification does not meet the minimum requirements of the Robinson-Patman Act because the distinctions in Bowman's methods of sale and delivery to its wholesale customers upon which its studies were based, as well as any cost distinctions flowing from the different quantities of Bowman's products which these customers purchased, were demonstrably unrelated to whether a particular customer was a chain store or an independent.

I

The Robinson-Patman Act amended Section 2(a) of the Clayton Act so as to prohibit any seller in interstate commerce from discriminating in price

between purchasers where competition might be adversely affected unless the price differential makes only due allowance for certain described cost differences. Both the clear wording of the amendment and the legislative history of the provision indicate plainly that a price differential can only be justified by a showing of a cost difference of approximately equal amount which flows directly from differences in the method or quantity of sales involved in dealing with the purchasers.

Where a seller deals with a very large number of customers practical considerations may make appropriate the establishment of defined classes of customers and the promulgation of prices for each class which reflect the cost savings necessarily involved in dealing with its members. Unless the classes of favored or disfavored customers are appropriately defined, however, the resulting price structure may lead to substantial and unjustifiable discrimination against individual members of the disfavored class of customers and may result in the destruction of price competition among the seller's customers.

The minimum requirements for an appropriately defined class of customers is that membership in a favored class be solely determined by the presence or absence of those differences in method or quantity of dealing which caused the principal cost savings accruing to the seller. If membership in a favored class of customers is determined either (1) in terms unrelated to differences in method or quantity of dealing or (2) in terms of differences in method or quantity which fail to explain the alleged difference in cost of dealing with the individual members of the class, its use

to determine or to justify prices will necessarily result in an unjustifiable discrimination against purchasers whose quantities or methods of dealing involve the same substantial cost saving factors which are involved in the low price granted the favored class.

II

The Bowman Company, both in establishing its pricing policies and in attempting to cost-justify them, created two classes of customers, chain stores and independents. But the two cost-saving methods of sale and delivery upon which it based its classification in the court below admittedly did not involve factors confined to the chains; some independent stores also utilized the less costly methods. Similarly, any cost savings accruing to Bowman as a result of quantity purchases were not related to whether a particular purchaser was a chain store or an independent. For the record, although silent on the volume of purchases by either of Bowman's chain store customers considered individually, discloses that some independents had greater weekly purchase volumes than the combined average for the chain stores. Since Bowman's classification does not depend upon any uniform or necessary differences in the quantities or methods of dealing of chain stores and independents, it results in an unjustifiable discrimination against the larger independent stores which, for all that appears in the record, use the same method of delivery and payment adopted by the chain stores. Moreover, Bowman's classification prevents any independent from chang-

ing its quantity or method of dealing in order to obtain a price which is comparable to that charged a competing chain store. There can be no doubt that the Robinson-Patman Act was intended to and does forbid any such discrimination in price between individual purchasers who are served by identical methods and quantities of sales and delivery.

III

The question of the appropriateness of Bowman's classification of customers is properly presented on this appeal. Moreover, contrary to the belief of the district judge, adequate equitable relief would not involve a continuing and complex regulation of one segment of the economy, but would require only the simplest form of injunction—a prohibition of Bowman continuing to charge different prices to different classes of customers on the basis of form of ownership or on any other basis not substantially related to the cost savings realized in dealing with the members of the class.

ARGUMENT

Beneath a mass of data, tabulations, charts, and analyses designed to prove the cost savings which are said to justify Bowman's policy of applying a different discount schedule to chain grocery stores from that applied to independents, lies one undisputed fact and one clear question of law. The undisputed fact is that the discount schedule applicable to chain grocery stores arbitrarily assumes and gives effect to three items of cost savings in methods of delivery and payment which are not given effect in determining the

discount for an independent grocery store even though the methods of sale to and payments by the independents actually involve the same methods of delivery and payment and therefore result in identical cost savings for identical reasons. The question of law is whether the resulting greater discount to a chain store operating identically to an independent can be "cost justified" by treating the chain store and the independent as members of different classes of customers although they are individually alike in every way relevant to costs.

I

THE STATUTE BROADLY PROHIBITS ANY PRICE DIFFERENTIAL BETWEEN CUSTOMERS THAT IS NOT DIRECTLY AND IMMEDIATELY RELATED TO A SIMILAR COST SAVING

Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended in 1936 by the Robinson-Patman Act, 49 Stat. 1526, prohibits a seller engaged in commerce from discriminating, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It provides, however, that:

> * * * nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods

> or quantities in which such commodities are to such purchasers sold or delivered: * * *

The cost defense proviso of the amended Section 2(a) was a substitute for a proviso of the original Clayton Act which had made a mere difference in the quantity of the commodity sold a defense to a charge of price discrimination. 38 Stat. 730. The new language was deemed to be of "great importance," for while it permitted "the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery," it "also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise such differentials would become instruments of favor and privilege and weapons of competitive oppression." H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9; see S. Rep. 1502, 74th Cong., 2d Sess., p. 5.

The reconciliation of policies accomplished by the statute's prohibition and its cost defense is clear. Competition was to be protected by the prohibition of price discrimination, yet customers were not to be denied by the statute the benefits of the economies and efficiencies that were uniquely involved in sale and delivery to them. The limits of a cost defense follow logically from this reconciliation of purposes. The Senate Report indicated that the bill "limits the differences in cost which may be honored in support of price differentials, to those marginal differences *demonstrable as between the particular*

customers concerned in the discrimination" (emphasis added). It added that the bill was designed:

> * * * to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same? * * * [S. Rep. 1502, 74th Cong., 2d Sess., p. 6.]

In sum, a price differential can only be justified by a showing of a cost difference of approximately equal amount which flows directly from the method or quantities involved in dealing with the particular purchaser.

II

THE USE OF CLASSES OF CUSTOMERS IN ESTABLISHING A COST JUSTIFICATION FOR DISPARATE PRICES IS CONSISTENT WITH SECTION 2(a) ONLY IF THE CLASSES ARE CREATED AND DEFINED IN TERMS OF THE SUBSTANTIAL COST FACTORS INVOLVED IN DEALING WITH THE MEMBERS OF EACH CLASS

Read literally, the language of the statute and of the Senate Report seems to forbid any differential pricing between any two customers unless that difference is individually justified by a showing of a similar difference in cost of manufacture, methods of sale, or delivery between the same two customers. As a matter of practical necessity, however, when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices

for each customer. The seller must be permitted to establish appropriately defined classes of customers and to promulgate prices for each class which reflect the cost savings necessarily involved in dealing with that class.

It has therefore become accepted practice for sellers to establish prices and, as a correlative, to cost-justify discriminatory prices by a two-step process. First, the seller establishes appropriately defined classes of customers. Second, the seller attempts to prove that its quantities or methods of dealing with each of these classes differ in ways that result in a cost difference similar in amount and direction to the difference in price charged the classes. However, the use of classes of customers need not be and, of course, should not be an excuse for treating differently any two or more customers who deal with the seller in the same quantities and with the same methods. The mandate of the Robinson-Patman Act remains that a difference in price is not cost-justified unless it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which" the goods are sold. And no difference in cost can result from identical methods or quantities of dealing.

Unless a seller carefully and appropriately defines the membership of favored and disfavored classes of customers, an apparently justifiable price structure may result in substantial and unjustifiable discriminations against individual members of the disfavored classes of customer and in the destruction of price

competition among the seller's customers. Recognizing these dangers of discrimination inherent in improper categorization of customers, the Federal Trade Commission has, in a series of cases, established the requirement that the individual purchasers assigned to any one group for cost-justification purposes must be substantially related in terms of those factors which determine the cost of manufacture, delivery, or sale. See *Curtis Candy Co.*, 44 F.T.C. 237, 267–268; *International Salt Co.*, 49 F.T.C. 138, 153–155; *Champion Spark Plug Co.*, 50 F.T.C. 30, 43; *Thompson Products, Inc.*, 3 Trade Reg. Rep. (FTC Complaints, Orders, Stipulations 1959–1960) ¶ 27,841. While the enforcement of the outer limits of this requirement of a price class which is homogenous in terms of significant cost factors involves the exercise of the judgment and discretion of the trier of facts, recognition of the minimum content of the requirement involves a matter of law which can be derived from the wording and purpose of the statute.

This minimum requirement can be stated in either of two very similar ways: (1) The Robinson-Patman Act, which was designed to prevent price discriminations between similarly situated customers, does not authorize the use of classes of customers to justify price differentials unless membership in a favored class of customers is available to any customer whose method of dealing with the seller involves the identical cost-saving aspects which justify giving a special price to the favored class. Otherwise a defense

against one price discrimination becomes an authorization for another discrimination. (2) The granting of lower prices to a favored class of customers necessarily involves price discrimination unless the membership of that class is determined solely by the presence of significant cost-saving elements in dealing with the members of the class. For to define the membership of a favored class of customers in any other way is necessarily to authorize an unjustifiable discrimination between the members of that class and other customers who deal in the same cost-saving way that is recognized in the class price. No requirement of convenience justifies a seller in using a classification system which, from the beginning, authorizes an unjustifiable discrimination between customers who deal alike with the seller in all material respects.

There are thus two considerations of major importance to the purposes of the Robinson-Patman Act which require a rule which permits classifying customers for purposes of cost justification only where the seller uses open-ended classes of customers defined *solely* in terms of significant cost factors:

(1) Only the definition of favored classes of customers in terms of cost-saving aspects of the method or quantities of dealing with each class provides a minimum guarantee that the selection of classes will not be used as a device to accomplish the very type of price discrimination that the Act was intended to forbid. A simplified example can best illustrate the harm of departure from this standard. Suppose a seller, X,

incurs the following costs per unit sold in dealing with nine different customers:

Customer	Cost-saving factor	Cost of delivery per unit sold
A	Absent	14¢
B	Absent	13¢
C	Absent	12¢
D	Absent	10¢
E	Present	6¢
F	Present	4¢
G	Present	4¢
H	Present	5¢
I	Present	7¢

If X, for purposes of cost justification, divides his customers into two groups, A through G in one group and H and I in the other group, a price difference of 3¢ between the two groups will superficially appear justified, for the average cost per unit sold of delivery to customers A through G is 9¢, while the average cost of delivery to H and I is 6¢. If the process of classification is accepted, so is a price three cents lower for I than for E, F, or G, when in fact sales to F and G are 3¢ cheaper per unit and sales to E are 1¢ cheaper.

It is important to note that in this hypothetical example, as in the present case, the seller, X, might well be able to establish that there is a cost-savings factor (such as a particularly economical method of delivery) which is present in dealing with H and I and absent in dealing with the *majority* of customers A through G. If this should be accepted as a sufficient

showing of the reasonableness of the classification, then X will be permitted to charge E, F, and G 3¢ more per unit than H or I—even though the identical cost-savings factor is present in sales to all five customers. This would be discrimination *not* justified by the Act. Only if X is required to define its categories of customers in terms of the presence or absence of factors substantially relevant to the determination of X's cost, will X be effectively prevented from discriminating between similarly situated customers.

(2) Only a definition of classes of customers in terms of the cost factors which are present or absent in the parties' dealing avoids permanently freezing a competitive inequality at the customer level, to the inevitable detriment of competition. Even if it were shown that there had always been a certain cost saving factor in dealing with each member of a particular group of customers—for example, chain grocery stores—compared to the customary methods and costs of dealing with all members of another group such as independents, the creation of a continuing price differential based on whether or not a grocery store belongs to a chain rather than on the presence or absence of the cost-saving factor would be contrary to the requirements of the Robinson-Patman Act. An independent store which found itself unable to compete with a neighboring chain store would be effectively precluded from obtaining the lower price paid by the chain store even if it undertook to change its method of dealing so that its supplier could realize

the same cost savings as in dealing with the chain store.

Only a definition of a price class in terms of the services its members require provides a framework within which a disfavored customer can, by changing his method of operation, obtain the lower prices available to his competitor. Without such an open-ended method of classifying customers a supplier's disparate prices will inevitably freeze out any future attempt at price competition between members of different classes of customers.

One final point should be noted because of its relevance to the companion case of *United States* v. *Borden Co.*, although it is unnecessary to the present argument. In contending that any classification of customers for purposes of the determination or justification of a price differential must be in terms of differences in methods or quantities of dealing, we have not meant to suggest that customers can properly be classified in terms of a difference in method or quantity of dealing which is of only marginal importance to, and in no sense truly justifies, the different costs involved in dealing with a particular class. To the contrary, a class of favored customers must be defined in terms of cost factors which substantially explain and justify the amount of the lower cost charged the favored class. Since Bowman did not define its classes of customers in terms of cost factors at all, this point requires no further attention in the present brief.

III

BOWMAN'S CLASSIFICATION OF CUSTOMERS AS CHAINS OR INDEPENDENTS WAS NOT BASED UPON NECESSARY DIFFERENCES IN THE METHOD OR QUANTITY OF SALES OR DELIVERY BETWEEN THE CUSTOMERS SO CLASSIFIED AND IS THEREFORE INVALID

If the general principles we have outlined above are sound, there can be no doubt as to the invalidity of Bowman's cost justification. For its basic classification of all purchasers as chains or independents bears no necessary relationship to cost differences in dealing with the members of the two groups arising out of any difference in method of delivery or sale or quantity of purchases. There was thus no basis for using the classification for an allocation of costs.

A. As indicated in the Statement, *supra*, in the court below Bowman justified its disparate prices solely on the ground of a distinction in methods of sale and delivery stemming from the nonuse by the chains of optional customer services and their operation, unlike the majority of the independents, on a credit rather than on a cash payment basis. But, as Bowman admitted with regard to both of these factors, there were independent stores which operated on exactly the same basis as the chains (see Statement, pp. 13–14). Accordingly, Bowman was not justified in charging the costs of these activities (which fully accounted for the difference in discounts) to every independent store. If these two factors in fact formed the sole basis of the differences in Bowman's

costs of doing business with its various customers at any given volume level, the costs of these two activities should have been allocated among four classes of stores (all of which might have included some independents), namely:

(1) Purchasers using both the costly method of payment (daily cash payments to the truck driver) and the costly method of delivery (in-store services).

(2) Purchasers using only the costly method of payment.

(3) Purchasers using only the costly method of delivery.

(4) Purchasers using neither service.

B. In its Motion to Affirm or Dismiss (p. 14) Bowman attempted to shore up its classification of purchasers as either chains or independents for purposes of cost justification, by arguing that the distinction can be justified and the discounts explained on the basis of quantity savings in dealing with the chain stores. This belated effort cannot assist Bowman. For if quantity is to be the basis of a differential in the discounts offered different purchasers, then any classification of customers designed to reflect quantity savings for cost-justification purposes must be in terms of quantity of purchase and not ownership so as to make allowance for the large independents which purchase as much or more than the average chain store.

Bowman suggests (Motion to Affirm or Dismiss, p. 14) that, although its higher discounts to the chains were not in terms based on quantity (since the chains were not required to take any volume of milk to

qualify for the 11% discount), and although its cost-justification study was also not constructed on this basis (since its schedules show that the chains were entitled to a higher discount at any given quantity level), its discount differentials between the chains and the independents were nevertheless justified on a quantity basis. It points to the fact that the average independent store took only approximately 58 points of milk per day, with 98% of the independents taking less than 200 points per day (see R. 481, 526–529). On the other hand, the average chain store (considering A & P and Kroger together) purchased 500 points per day (R. 482).

The error in this argument is two-fold: (1) There is no basis for considering A & P and Kroger as one purchaser. (2) There is no basis for averaging the volumes of the independents, thus requiring the larger independents to be compared with their chain rivals on the basis of the average volumes for all independents rather than on the basis of their own volumes of purchases.

Aside from three chain stores utilized by the government to prove its prima facie case (R. 62–63), there are not figures in the record by which the volumes of purchases of independent stores may be compared with the volumes of particular stores of either the A & P or Kroger chain or even the average store volume for either of those chains.[13]

[13] Among the contentions made by the government below, but not resolved by the district court, was the argument that where an independent store is in competition with a particular store of a chain taking a volume of purchases less than the average for that chain's stores, the independent is entitled to secure a discount proportional to the costs of serving it

There is thus no justification for considering A & P and Kroger as if they were the same purchasers. If, for example, it turned out that the Kroger stores averages 600 points and the A & P stores only 400 points, it would clearly be improper to give the A & P chain a quantity-based discount differential over the independent stores based upon a 500 point daily average of the A & P and Kroger stores.

More important, there can be no justification for treating the independent stores for purposes of quantity discounts on the basis of average volume of the entire group. A sampling of one-third of the independent stores served by Bowman shows (R. 481) that in this group alone there were 12 independent stores with daily purchases from 200 to 400 points (averaging 275 points) and 4 stores with daily purchases of over 400 points. This latter group averaged 536.38 points, as contrasted with a "chain" average for A & P and Kroger of 506.48 points (R. 481, 482). Two of these independents averaged 648 points between them, almost 150 points more than the chain average. Despite the substantial volumes purchased by these stores and although Bowman made no showing that its method of dealing with these stores differed from that used with the chain stores in any respect relevant to cost, these inde-

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as contrasted with the costs of serving the individual chain store, rather than a discount proportional to a higher "average" cost of serving all stores in the chain. The government is willing to assume, for purposes of this argument, that the proper volume figure to be used in comparing a chain with its independent competitors is the average volume purchased by the stores of that particular chain.

pendents were at all times restricted to a maximum discount on purchase price which was 3% less than the chain stores were allowed.

Even if Bowman could show on remand what it did not undertake to show below—that all the large independent stores used one or both of the costly customer services—a pricing system like Bowman's, which would in no event allow an independent to obtain the same discount as a chain store, would still violate Section 2(a) of the Robinson-Patman Act. Bowman's system makes it impossible for an independent grocery store to enter into price competition with a neighboring chain store, for regardless of the volume of milk products it takes and regardless of its attempts to change its methods of dealing with Bowman so as to assure Bowman all possible cost savings, it could not obtain Bowman's commodities at a price comparable to that available to any chain store. Under the Bowman price-discount system there is no way that an independent store can enter into price competition with a chain store on equal terms.

There is thus an unexplained actual discrimination of substantial importance between Bowman's large independent customers and its chain store customers, and there is a pricing system which requires continuing anti-competitive pricing even if an independent customer deals with Bowman in a way identical to that used by a chain store with which it hopes to compete in price. Bowman justifies the creation of separate categories for chain stores and independent stores on the ground that, although they are not defined in these terms, the categories in fact differ in average

volume and in normal method of payment and delivery. The short answer to this is that if any one of the three cost variables or any combination of them justifies a certain discount to chain stores, it must also justify a similar discount to independent stores operating in a similar fashion. There is no great business difficulty in establishing open-ended categories of customers, the benefits of which are available to whoever deals in certain cost-saving ways. Even if there were substantial inconvenience in establishing such categories, it is an obligation the Robinson-Patman Act imposes, for it is a necessary condition of keeping open the avenues of price competition between the customers of a wholesale distributor.[14]

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[14] A further, unrelated, objection to the Bowman study made by the government below (R. 251) was directed to Bowman's basic assumption that the total expenses of its distribution division, including such important items as auto depreciation, office salaries and wages, personnel benefits, advertising, and bottle expenses (see R. 309, 341) could be allocated between the chain and independent stores on the basis of calculations of the time spent by the milk drivers in delivering milk to the two types of customer.

There is a serious question as to whether many of these "overhead" items are properly part of the cost study at all. For, as the House Report on the Robinson-Patman Act makes clear, permissible cost differentials may include "differences in overhead where they can actually be shown as between customers or classes of customers concerned, but it [the language of the proviso] precludes differentials based upon the imputation of overhead to particular customers, * * * where such overhead represents facilities or activities inseparable from the seller's business as a whole and not attributal to the business of particular customers * * *." (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 10; see S. Rep. No. 1502, 74th Cong., 2d Sess., p. 6.) But assuming that some or all of these charges were directly connected with cost differences in the method of sales or deliv-

IV

THE QUESTION OF IMPROPER CLASSIFICATION OF CUSTOMERS IS PROPERLY PRESENTED IN THIS APPEAL

In its Motion to Dismiss or Affirm Bowman contended that the question presented by the government on this appeal is not properly before the Court. Specifically Bowman alleged that since the government had made out its *prima facie* case of price discrimination on the basis of an analysis of some nine competitive stores on two routes (including two A & P stores and one Kroger store), it was required to cost justify only the differentials in discounts to these particular stores. Thus, the issue on appeal assertedly could not be whether Bowman had cost justified "*prima facie* * * * unlawful price discrimination in favor of all chain stores and against all independents" (Bowman Motion to Affirm or Dismiss, pp. 10–11). Bowman also contended (*id.* at 6–7, 11–12) that the government had expressly limited its

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eries to the chains on the one hand and the independents on the other, there was no demonstrable basis for allocating such expenses on the basis of driver's time on route. On the contrary, as the government contended (and as the Borden study recognizes) at most only the driver's wages (which made up less than one-third of the expenses allocated (R. 341)) should have been allocated on this basis.

Bowman, it should be noted, stipulated that if the government was correct in this argument, its cost justification would fail (R. 251). The district court, however, did not resolve the issue and it is impossible to determine whether the court agreed with Bowman, or merely felt, contrary to Bowman's stipulation, that this was one of the ways in which the cost studies were "imperfect", but that this imperfection was not decisive since Bowman had made a bona fide effort to allocate its costs between different types of customers (R. 569).

objections to Bowman's cost studies to four technical objections, upon which subsequent evidence was developed, and that none of these four objections related to the issue of improper classification of chains and independents now raised on appeal.

A. The first contention can be quickly disposed of. The government, as Bowman stated, did make out its prima facie case by an analysis of the effects of the discriminations between the chain and independent stores in the nine-store, two-route example for which the facts were set out in the November 4, 1955 Supplemental Pre-Trial Order, and its attached schedules and exhibits (R. 57–74, see also 236–244, 412–414, 447–461, 520–521). It was not, however, making out a prima facie case only as to these nine stores but rather adducing proof with respect to these nine stores to support its prima facie case as to discrimination with respect to the discount schedules applicable to all of the stores served by Bowman. The district court made this clear in its opinion, stating that the government had "demonstrated" by its analysis of the nine stores "that a price discrimination exists as against the independent stores under applicable discount quotations" of Bowman (R. 561), and subsequently found that "the published discount quotations of defendants, which on their face show discriminations between the defendants' wholesale customers, constituted prima facie violations of Section 2(a) of the Clayton Act" (R. 563). Nothing in the opinion indicates that the prima facie case which the court found had been established was limited to the nine stores used for purposes of analysis.

Moreover, any contention that the Bowman cost studies were limited to, or intended to be limited to, a justification of the discriminations found to exist with respect to these nine stores is negated by examination of the studies (R. 271–310, 328–369) and the Pre-Trial Order (R. 236–258) to which these studies are exhibits. Thus, Bowman's witness Bergfeld testified that the basic manual for establishing and testing a variable discount system (Ex. 4, R. 271–310) was developed in December 1952 for application by Bowman generally (R. 247–248) and that the three test reports (Exs. 14, 15 and 16, R. 328–369) were "designed to determine the equity of the discount schedule when compared to the discounts or prices granted to the various corporate chains and also to determine the equity of the classification of the sales to independent stores based upon their volume of purchase" (R. 248–249). Of the four exhibits which make up the Bowman cost study only one, Exhibit 14, the record of tests purporting to prove the justification of the June 1954 discount schedules (R. 328–348), specifically refers to the nine stores utilized by the government in proving its prima facie case. This exhibit contains two schedules purporting to justify the discrimination in discounts provided these nine stores according to the Bowman formula plus the other stores on the two routes (R. 343–344, see also 329–333). But in recognition of the general nature of the problem the exhibit also contains a purported test justification of the discounts with respect to all of the A & P and Kroger stores (R. 333–336). Detailed schedules (R. 345–347) filed in support of this latter analysis pur-

port to determine discount schedules for all independent and chain stores at various volume levels, as well as to establish the maximum discount at various volume levels for the chain stores in the light of the schedule of rebates applicable to all independents as of June 1954.

B. The argument that the United States waived its right to argue the basic invalidity of the Bowman cost studies and instead limited itself to four technical objections is equally without substance. It rests upon statements in paragraphs 28, 29 and 31 of the Supplemental Pre-Trial Order as to Bowman of December 23, 1957 (R. 236–258) that the government "makes three objections to the *method of testing* discounts described in the basic manual (Bowman Exhibit 4) and employed in the March 1955 tests (Bowman Exhibit 14)" (R. 250, emphasis added),[15] that the second of these objections was "plaintiff's principal objection to the cost defense offered by the defendant Bowman Dairy Company" (R. 251) and that:

> Except for the foregoing three objections, and one further objection to the test of the store discount plan effective January 2, 1956 (Bowman Exhibit 16) based on its analysis of

[15] These three objections were (1) to the adequacy of the sample used in developing standard time allowances, (2) to the allocation of the entire cost of Bowman's distribution division on the basis of driver's time (see p. 36, *supra*, n. 14) and (3) to the failure to consider that part of the expense of the Bowman central office related to sales problems (much if not all of which would have to be allowed to the chains (R. 250–251)).

sales of glass and fiber containers, which objection will be set forth in the plaintiff's rebuttal material, plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case. If the Court finds and concludes: (1) That the 55 time studies of Elston Division Routes provided an adequate sample of Bowman [fol. 911] store routes for the purpose of developing time standards; (2) that the total cost per route day may be apportioned among store customers on the basis of driver's time; and (3) that the omission of Central Office overhead from the cost studies is not a material defect in those studies, then the Court should find and conclude that the price differences identified on Schedule 1 of the pre-trial order were fully justified by cost differences. (R. 252).

These statements, however, do not stand alone. The second paragraph of the Supplemental Pre-Trial Order (R. 236) expressly made applicable to the order a provision of an earlier order of November 4, 1955 [16] which specified (R. 57–58) that "[t]he introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff * * * that the evidence sought to be introduced is immaterial or irrelevant". Nor can it be argued that this general reservation is inadequate

[16] The later order erroneously refers to the earlier order as having been entered on November 8, 1955.

to protect the government's right to argue the basic invalidity of the cost defense. For the trial judge, at the pre-trial conference held on December 23, 1957, immediately prior to the entry of the pre-trial order, expressly negated any such interpretation of its terms.

At this pre-trial conference the government expressly called attention to the possibility that language in the proposed order might be construed as limiting the government's objections to the underlying theory of the Bowman cost study. Counsel for the government made clear that "the Government wants to reserve the right to raise the legal question as to whether or not Bowman's cost studies are within the scope of the meaning of the section of the Clayton Act" (R. 229), and emphasized that the government had other objections to the cost study besides those specifically referred to in the order (*ibid.*). The court responded "I don't see how you waive it [the right to challenge the legal sufficiency of the cost study under the Clayton Act] by stipulating the cost studies" (*ibid.*). He went on to add "[t]he weight of his testimony is still subject to argument before * * * the Court. All you are saying here is that along with his testimony you want to put into the record the fact that you want to argue the weight of it" (*ibid.*). The government subsequently suggested that a phrase be included indicating that "plaintiff does not concede that the defendant Bowman's cost studies are within the meaning of Section 2A (sic) of the Clayton Act" (R. 230). The court, however, rejected it as "argumentative" since "[a]ll of the facts now being in

the record [you may] argue the weight and the conclusions to be drawn from those facts in your brief" (*ibid.*).

The government subsequently followed this suggested procedure. And the court's decision shows (R. 569–570) that it fully recognized that the government could argue, and was in fact arguing, defects in the Bowman cost study going well beyond the technical objections specified in paragraphs 28 and 31 of the December 23, 1957 Pre-Trial Stipulation.

V.

A SIMPLE DECREE FORBIDDING ANY DIFFERENCE IN PRICE BASED UPON WHETHER A STORE IS INDEPENDENTLY OWNED OR BELONGS TO A CHAIN WOULD EFFECTIVELY REMEDY THE VIOLATION OF SECTION 2(a)

The District Court was incorrect in assuming that an appropriate injunctive decree would require it to "regulate this particular phase of the industry" and would mean that the court "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). As the substance of the government's argument makes clear, the illegal discrimination practiced by Bowman resulted from its use of different price-per-volume schedules for independent and chain grocery stores when in fact this classification of customers necessarily results in unjustifiable discriminatory treatment of a number of customers who deal in an identical way with Bowman. An appropriate decree would forbid the determination of price in terms unrelated to the cost of dealing with the particular customer. Tailored to the

present case, the necessary decree would simply enjoin the respondent from adopting or giving effect to any price or discount policy based upon a classification of its customers into chain stores or independent stores.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed and the case remanded to the district court with instructions to enter a judgment holding the appellee Bowman Dairy Company to have violated Section 2 of the Clayton Act in its price discount practices and policies which were the subject of the hearing on remand, and enjoining Bowman from adopting any price or discount policies based upon a classification of its customers into chains and independents.

Respectfully submitted.

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MARCH 1962.

U. S. GOVERNMENT PRINTING OFFICE 1962

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FILED
APR 20 1962
JOHN F. DAVIS, CLERK

No. 439

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

---

BRIEF OF APPELLEE THE BORDEN COMPANY

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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BRIEF OF APPELLEE THE BORDEN COMPANY

QUESTION PRESENTED

Do the facts in the record substantially support the district court's conclusion that the Borden cost study provided an adequate justification for the differences in prices charged the grocer customers named in the Government's prima facie case?

Comment

The Government's Brief* (p. 3) sets forth a third version of the "Question Presented," differing both from the version set forth in the Notice of Appeal (R. 577-8) and that set forth in the Jurisdictional Statement (p. 2). This third

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* Hereinafter cited as "Br."

version of the "Question Presented" is not raised by the record, since it makes three assumptions, all of which are, as will be shown, contrary to fact:

(1) That Borden "discriminated in price in favor of chain stores, as such," when in fact there is not a scrap of evidence that Borden ever favored "chain stores" simply because they were chain stores.

(2) That Borden, having arbitrarily classified its customers, attempted to justify its discounts merely by showing differences in costs of sales and delivery between these arbitrary classes of customers, when in fact one of the purposes and results of the cost study was to test and establish the reasonableness of the "classifications"; and

(3) That Borden's cost study was solely concerned with the ascertainment of the "average cost" of selling and delivering milk to the classifications of "chain stores" and "independent stores," when in fact the collected data forming Borden's cost study shows the costs on a store-by-store basis.

STATEMENT OF THE CASE

The Statement in the Government's Brief is inadequate because (1) it fails to explain the prima facie case introduced by the Government below, which is necessary to an understanding of the issues actually presented; (2) it fails to describe how Borden's cost study was made, and limits itself to a discussion of some of the alternative calculations which can be made from the data collected by the study; and (3) it fails to give an adequate description of the calculations and analysis on which Borden relied in submitting its cost-justification defense.

1. The Government's prima facie case

After remand, and after the Government's motion to reopen the record for further evidence was granted (R. 45-50), the Government submitted two lists of Borden customers (R. 79-80). The first list named six grocery stores served by Borden's Route 25-W in March, 1955, and the second identified seven grocery stores served by Borden's Routes 181, 155, and 145 in December, 1954. Of these thirteen grocery stores, four were A&P stores, and one was a Jewel store. The remaining eight were individually owned.

The two lists showed total dollar purchases of milk products from Borden by each store for the month in question, together with the discount received. Three of the individually-owned stores received a discount of 5½%; one received 4%, and four received 3%. The lists show, as to A&P and Jewel, that these two customers each received an 8½% discount on its total purchases for its stores in the Chicago area and in other parts of Illinois, which total purchases included those made for its stores listed by the Government.

It was stipulated that Borden had in effect a "Milk Discount Schedule to Grocers" (R. 82), which offered all grocer customers the following discounts:

"Average converted units per day	% Discounts
0-24	0
25-74	2
75-149	3
150 and over	4"

The discount schedule provided that "total monthly purchases" would be "converted" into units to ascertain the applicable discount percentage, that the applicable discount

percentage would then be applied to the "total dollar purchases," and that a "discount check" would be mailed in the course of the subsequent month (*ibid.*).

This was the only "discount schedule" issued by Borden in which customers were classified. However, the Government's two lists showed that some customers were given additional discounts by individual arrangements (R. 79-80).

On June 4, 1954, Borden notified A&P by letter that it would be given a discount of 8½% effective June 1, 1954 (R. 83). A similar letter, providing for the same discount, was sent to Jewel (R. 83-4).

The lists also showed that some of Borden's largest "independent" grocer customers also received special discounts. Thus, of the eight independents listed by the Government, the three largest received a discount of 1½% in addition to the maximum of 4% provided by the discount schedule (R. 80).

The question was thus raised by the Government's prima facie case whether the special discounts of 1½% to the three largest independent customers had to be justified as against the lesser discounts given the five other independent grocers. In addition to a cost justification, Borden was prepared to offer evidence that the discount granted these particular three grocers was justified as the meeting of a competitive offer. The Government eliminated the entire issue from the case by later stipulating as follows:

> "Plaintiff does not contend in this proceeding that the added discounts of 1½% allowed by Borden . . . to store customers Schubert, Popik, and Arthur Cartan . . . are evidences of a violation of Section 2(a) of the Clayton Act as amended. Borden does not intend to offer evidence of any prices offered by Lake Valley

Dairy to Schubert, Popik, and Arthur Cartan" (R. 222-3).

The Government never inquired, nor does the record show, what other "independents" had special discount arrangements, nor the amount of such discounts. The only facts pertinent to the Government's prima facie case were that, of the eight "independents" selected by the Government as the basis of its claim of price discrimination, four had a volume sufficient to entitle them to discounts of 3% under the discount schedule, and four had a volume entitling them to discounts of 4%. However, of the latter four, the three with the largest volumes also received an additional 1½%, for a total discount of 5½% (R. 79-80).

The Government's prima facie case thus was limited to the charge that the discounts shown by the two lists of customers resulted in apparent price discriminations; and the Government's Post-Trial Brief to the District Court made this abundantly clear:

> "The Government will consider, first, the Bowman discount quotations of June, 1954, and then, the Borden discount quotations of June, 1954, and will show that a prima facie price discrimination between wholesale customers has been established" (Post-Trial Brief 4-5).*

* The Government's Brief to this Court implies (10, fn. 5) that another price discrimination was shown to have begun in September, 1955 by the grant to A&P of "a discount over the price paid by *all* independents ranging from 7½-8 percent" and that "Borden submitted no separate cost justification for this discrimination." While these assertions are incorrect, since special discounts to independents continued to be granted (R. 77-8), the important fact is that the Government below did not base any claim on the changed fact situation presented after September, 1955, which involved many new considerations, including the loss of Jewel as a Borden customer. Borden's cost study keyed to the Government's prima facie case had been completed (R. 145) at a cost in excess of $50,000 (R. 220-1, 91), and neither party desired to complicate the issue further by requiring a study of the new situation.

2. Borden's cost study

After the two lists had been submitted to Borden, a comprehensive cost study was undertaken under the direction of J. F. Malone, District Controller of Borden's Chicago Central District, a man well qualified professionally and widely experienced in this field (R. 125-7). Malone was assisted by the certified public accounting firm of Haskins & Sells, who have been Borden's independent auditors for many years (R. 126-7), and who vouched for the accuracy of the results (R. 221-2).

Time-study men rode each of the 134 wholesale routes operated in the Chicago area for a full week (R. 145-54).* By means of a stop-watch, every activity of the drivers (called "routemen") was timed and contemporaneously recorded (R. 154). The report forms identified each customer served, the time taken by each activity performed for each customer at each location, and the number of deliveries to each location (R. 148-9, 154-63, 180). The sales to each customer location on each delivery were also recorded (R. 150-1). The appendix to this brief consists of a copy of the report forms actually completed for the customer Schubert.

The work of the drivers was broken down into forty items, which were assigned numbers and are fully described in the stipulations (R. 171-7). Items 6 through 23, including such activities as carrying milk into the store, gathering empty bottles and returned goods, and preparing sales

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* The Government remarked that, as to 133 store customers who were located in scattered residential districts and were served by retail routes, "No separate time studies or calculations were made" (Br. 11, fn. 6). No one has ever contended that a cost study has to deal with every transaction and every customer; the Government's own expert considered Borden's samplings more than adequate (R. 656-8). Moreover, the cost survey covered every store named in the Government's prima facie case.

tickets, took place at the store location and hence were directly chargeable to specific stores. Two items (38 and 39), covering reports relating to chain stores, were chargeable to all chain stores on the route as a whole;* and one item (40), relating to time spent at the branch office on independent store credit matters, was directly chargeable to all independents to whom credit was extended. Items 1 through 5 and 24 through 37 were activities before and after the route trip, and time spent driving to and from the route area and between store stops. Not being wholly identifiable with or chargeable to a specific store, they constituted "indirect" or "joint" costs.

The total elapsed time spent by all drivers on these activities during the week of the study was then computed and found to be 376,864 minutes (R. 163). The total compensation paid to drivers, including fringe benefits, was also computed and found to be $29,242 (R. 163-70). Dividing this sum by the total minutes showed that the direct wage cost of drivers per minute was $.0775943—roughly, 7¾ cents (R. 170).

In this way, the direct cost of activities performed at a particular store could be computed. Eliminating time spent at non-store locations, $15,552, or more than half the total route labor costs, could be charged against specific store locations (R. 183), such as Schubert, Cartan or Popik, or the other stores on the Government's lists.

The wage costs of special deliveries, totaling $833 for the week, were also recorded in a similar fashion (R. 192-5).

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* For some reason, the Government criticizes the fact that the cost of these items was allocated to the chains on a location basis, rather than a time basis (Br. 13, fn. 7). This, of course, was because the time spent could not be identified on a store-by-store basis, but would have to be allocated to each on the basis of the total number of stores or "locations" if the cost of delivery to a specific chain store location were ever of significance.

A study was also made of clerical costs incurred at the branches and at the division main office. Clerks were required to keep daily records of time spent by activities. Some of these costs (checking A&P and Jewel tickets, checking tickets of independent and non-store customers, preparation and sending of weekly centralized billings to A&P and Jewel, preparation and sending of monthly discount checks to independents, preparation and sending of discount checks to A&P and Jewel, and activities of the main office credit department relating to independents or to A&P and Jewel) could be charged directly to identifiable groups of customers (R. 197-216).

The weekly average wage costs for "solicitors" or salesmen employed by Borden with respect to the routes surveyed ($2,065) was also ascertained from the accounting records (R. 132, 134, 137).

The weekly costs of operating and maintaining the trucks used for regular and special deliveries were computed from Borden's accounting records (R. 195-7). Similarly, the loss on returned goods was also computed from such records (R. 216-7). These costs could not be identified with particular customers, and thus constituted "indirect" or "joint" costs.

Bad debt losses for six years were studied, and all were found to be due to defaults of independent store customers. Charge-offs for bad debts were reduced to a weekly average (R. 215).

A description of what had been done was then prepared in the form of a proposed stipulation. Pertinent information as to Borden's methods of operation and books of account was added, and relevant data from those accounts was included (R. 88-93, 119-226).

The stipulation describing the cost study computed and assigned "direct" costs to the specific stores or groups of

stores which incurred the costs. For example, driver's time spent at each store was charged directly to that store (R. 148-9, 171, 183), while items such as clerical expense were assigned to the appropriate group of stores (R. 203).

With respect to other items, constituting what the accountants describe as "indirect" or "joint" costs (R. 782-3), the stipulation set forth data as to the use of "locations" or "stops" as a basis of allocation. For example, since a route was made up of a given number of stores, activities of drivers at the branches before leaving in the morning and after returning at the end of the day, and time spent driving to and from the route area, were susceptible to *allocation* on the basis of the number of stores making up the route. On the other hand, time spent in driving between stores could more properly be allocated on the basis of the number of "stops" or deliveries made, since deliveries were not made every day to all stores, and more than one daily delivery was sometimes made to other stores (R. 171-2, 175-7).

The cost study itself, however, was not based on any assumption that allocations of indirect costs *had* to be made on any particular basis. The cost study merely supplied the basic data from which the indirect costs which it disclosed might be allocated in proportion to various yardsticks, such as volume, stops, locations, direct costs, or the like.

The cost study itself contained no final computation of differential costs, nor did it contain any comparison between the cost differentials and the discounts sought to be justified.

The data thus assembled, including the report forms, the sales tickets, the punched cards to which the data was transferred, and the records of clerical time, was assembled and made available to the Government as Bulk Exhibits 4 through 13 (R. 159, 163-4, 180, 192, 197, 205, 209-11).

After the cost study data was submitted to the Government, Malone, under whose supervision the cost study had been made, was cross-examined by deposition. All of the matters elicited from Malone in which the Government expressed an interest were summarized and included in the proposed stipulation (R. 125). Additional information which the Government requested was also supplied.

As this summary shows, the cost study was an attempt to find out *the actual costs of sale and delivery on a store-by-store and customer-by-customer basis.* The cost study was not based on any pre-judgment about the proper way in which customers should be grouped or classified. The data placed in evidence through the cost study provided the means by which counsel for either party, or the expert witnesses called by either party, could check the propriety or reasonableness of any classification of customers, and could ascertain whether any Borden customer or group of customers was unfairly treated by Borden.

The cost study itself required an expenditure by Borden in excess of $50,000, without reference to the time spent by Borden personnel diverted from their regular duties (R. 220-1, 91).

The conclusions which Borden contends should be drawn from the cost study were set forth in Summary Schedules I, II, and III, included in Borden's brief to the District Court, which, with the necessary explanations as to the source of the data, appear in the record (R. 581-608).

3. The expert testimony offered by the Government

The Government presented the testimony of three outside expert witnesses, Herbert F. Taggart, professor of accounting at the University of Michigan, Albert E. Sawyer, an accountant and lawyer practicing in New York City, and Otto F. Taylor, an accountant also practicing in New

York City (R. 380, 383-5, 393-4). All were men well qualified in the field. The Government also presented the testimony of Elliott B. Wooley, an economist employed by the Antitrust Division (R. 399). The direct testimony of all four men was drafted in statement form and became part of a pre-trial order (R. 380-401). Cross-examination of these four witnesses was by depositions which form part of the record (R. 687-1198).

The Government's Brief does not contain a single reference to the testimony or opinions of the four expert witnesses on which the Government relied in the District Court. The criticism of the Borden cost study on which the Government relies in this Court is not based upon the opinions of the Government's chosen experts.

Professor Taggart was Chairman, and Messrs. Taylor and Sawyer were members, of the Advisory Committee to the Federal Trade Commission on Cost Justification under the Robinson-Patman Act. The Report of that Committee (hereinafter referred to as the "Cost Justification Report") was identified as an exhibit and forms part of the record in this case (R. 762-802). Taggart, Sawyer, and Taylor all reiterated on deposition their complete agreement with the opinions expressed in this Report (R. 637, 645-9, 655, 644-8, 671, 718, 829-37, 943-8).

The Government witnesses had before them as much of the cost study as Government counsel requested them to examine (R. 689-99, 732, 812, 814-8, 928-9, 1027-8). They did not, of course, have before them the Summary Schedules in which the conclusions which Borden sought to draw from the data were later expressed.

Not a single word of criticism of Borden's classification of customers appears in the statements of Taggart, Sawyer and Taylor (R. 380-99). Both Sawyer and Taylor approved the use of a classification of customers for purposes of

cost-justification (R. 389-91, 395-7). All three expressly reaffirmed their agreement with a passage in the Cost Justification Report which expressly stated that without the power to classify customers into groups for purposes of cost analysis, "cost-justification" would be "outside the realm of practicability" and that the denial of the right to classify "would tend to make price uniformity a necessity, regardless of economies of manufacture, sale and delivery" (R. 776-7, 671, 832, 943). Sawyer expressly stated that cost justification of Borden's discounts "requires an allocation of internal costs among various classes . . . of customers" (R. 391); and Sawyer and Taylor both recognized that there was nothing inherently improper in treating "chain stores" as a class (R. 392, 396-7).

The comments by the Government's experts, outside of generalizations about cost accounting methods (R. 390-1, 395-7), related to the propriety of including drivers' "commissions" in total driver wages (R. 383, 393, 397-9), to the allocation of all "transportation costs" on a volume basis (R. 382-3, 391, 396-7), and to the supposed omission of an analysis of executive time spent on solicitation of chain store business (R. 381-2, 392-3, 397).

The supposed "omission" (based on the fact that the final form of the stipulation covering the cost study was not shown the three experts) was made up by the furnishing of additional data (R. 516-8). The problem of how so-called "transportation costs" should be allocated became moot because Borden's Summary Schedule I shows that the challenged discounts were justified by direct costs alone, without the need of allocating any of the items constituting "transportation expense" (R. 585). Summary Schedule IV similarly shows that cost justification was demonstrated no matter how drivers' so-called "commissions" were treated (R. 617).

SUMMARY SCHEDULE NO. I

COST JUSTIFICATION BASED SOLELY ON DIRECT COSTS

		TOTAL COST	CHAIN STORES	TOTAL	INI 0%
DIRECT COSTS:					
1.	Routemen's direct labor costs	$17,065.24	$ 6,453.52	$ 9,266.86	$1,143.26
2.	Special delivery direct labor costs	72.59	36.66	18.20	1.29
3.	Branch office clerical salaries	2,355.51	649.79	1,274.55	325.66
4.	Billing department	466.15	356.38	42.29	12.54
5.	Credit department	60.72	1.30	9.37	2.78
6.	Accounting department	21.72	8.25	13.47	3.99
7.	Robert F. White & Company	140.83		140.83	41.76
8.	Tabulating department	57.20	12.12	45.08	
9.	Bad debt losses	31.58		31.42	9.32
10.	Loss on returned products	2,213.82	1,139.20	972.87	109.65
11.	Salesmen's and solicitors salaries	2,065.83		2,065.83	135.10
12.	Total direct costs	$24,551.19	$ 8,657.22	$13,880.77	$1,785.35
13.	SALES VOLUME		$195,262.07	$98,672.52	$6,554.77
14.	COST PER $100.00 OF SALES		$4.43	$14.07	$27.24

SUMMARY SCHEDULE NO. 1

COST JUSTIFICATION BASED SOLELY ON DIRECT COSTS

	TOTAL COST	CHAIN STORES	INDEPENDENT STORES					NON-STORE CUSTOMERS
			TOTAL	DISCOUNT SCHEDULE 0%	2%	3%	4%	
...	$17,065.24	$ 6,453.52	$ 9,266.86	$1,143.26	$ 3,543.24	$ 2,932.15	$ 1,648.21	$1,344.86
...	72.59	36.66	18.20	1.29	3.28	4.53	9.10	17.73
...	2,355.51	649.79	1,274.55	325.66	546.14	295.64	107.11	431.17
...	466.15	356.38	42.29	12.54	18.33	3.86	2.56	67.48
...	60.72	1.30	9.37	2.78	4.06	1.96	.57	50.05
...	21.72	8.25	13.47	3.99	5.84	2.82	.82	
...	140.83		140.83	41.76	61.04	29.51	8.52	
...	57.20	12.12	45.08		27.77	13.43	3.88	
...	31.58		31.42	9.32	13.62	6.58	1.90	.16
...	2,213.82	1,139.20	972.87	109.65	391.19	304.31	167.72	101.75
..	2,065.83		2,065.83	135.10	691.64	752.17	486.92	
...	$24,551.19	$ 8,657.22	$13,880.77	$1,785.35	$ 5,306.15	$ 4,351.96	$ 2,437.31	$2,013.20
...		$195,262.07	$98,672.52	$6,554.77	$33,051.13	$35,899.27	$23,167.35	
...		$4.43	$14.07	$27.24	$16.05	$12.12	$10.52	

Not one of these three criticisms of the Borden cost study is now being urged by the Government to this Court.

4. How Borden sought to demonstrate the cost-justification for its discounts

The Cost Justification Report, embodying the opinions of the Government's three outside experts, points out that, wherever joint or indirect costs are present, the possibility arises that several different methods of allocation are available (R. 801). A reasonable choice resulting in cost justification should not be set aside simply because another reasonable choice of an available allocation method would produce a different result (R. 801, 665, 756). Hence, as Sawyer pointed out, when it can be shown that price differentials are justified by more than one reasonable method of assigning costs, the validity of the cost-justification is greatly strengthened (R. 849-50).

In its Brief to the District Court, Borden submitted four "Summary Schedules," numbered I, II, III, and IV (R. 585, 597, 605, 617). These Summary Schedules set forth the results of *four different methods of assigning costs*, all based on the data provided by the cost study. *Under each of the four computations, Borden's discounts were fully cost-justified.*

Summary Schedule I is based primarily on *direct costs*, and does *not* depend upon debatable allocations. This schedule is, for convenience, copied on the sheet bound opposite this page in this Brief. The first eleven lines of this Schedule deal with the eleven cost elements of which the exact amount chargeable against A&P and Jewel on the one hand, and independent stores on the other, could be ascertained. These eleven cost elements were:

1. *Routemen's direct labor costs:* The cost of the minutes of the drivers spent in making deliveries at each

store individual. *This item was more than two-thirds of the ascertainable direct costs* (R. 183, 191, 582-3).

2. *Special delivery direct labor costs:* The cost of the drivers' time taken at the individual store locations in making special deliveries (R. 195, 583).

3. *Branch office clerical salaries.* The total cost of certain types of clerical activities was ascertained by the cost studies. Some of these activities (such as the checking of chain store tickets) related solely to A&P and Jewel; some (such as checking other tickets) related solely to the independents or to non-store customers. Sill other activities (such as the posting sales to the company ledgers and similar bookkeeping activities) were of the kind which the Government's experts agreed should be divided on the basis of the number of separate "sales" or "stops" made—the assumption "that it takes a uniform amount of time to prepare each invoice line, regardless of the article sold or the quantity of articles represented" (R. 778-9, 203, 587-8).

4. *Billing department expense.* The activities of this department were time-studied, and the time spent on matters related to A&P and Jewel, to independents, and to non-store customers ascertained. Only $42 of this expense was chargeable to independents, and because of the small amount involved was allocated between classes of independents on a location basis (R. 202-9, 588).

5. *Credit department expense.* The total expense of this department on wholesale functions was only $61, divisible on a time basis between chains, independents, and non-store customers. The small amount of expense incurred by independents ($9) was allocated between classes on a location basis (R. 209-10, 588-9).

6. *Accounting department expense.* The cost of supervising preparation of discount checks was divided between chains and independents on a direct time basis (R. 211, 589).

7 and 8. *Computing services and tabulating costs.* The costs of an outside computing service and of the tabulating department in compiling data necessary to the preparation of discount checks to independent stores was chargeable directly to independents, and allocated between discount classes on a location basis (R. 211-15, 589).

9. *Bad debt losses.* For six years all losses had been incurred by independents or non-store customers; the weekly average of charge-offs due to independents was allocated by classes on a location basis (R. 215, 589).

10. *Loss on returned products.* On the assumption that the amount of returned goods, store-by-store, was directly proportional to the time spent in collecting them, this cost was charged each store on the basis of this unit of measure (R. 216, 590).

11. *Salesmen's and solicitors' salaries.* These employees solicited the business of independents and did *not* solicit A&P and Jewel (R. 134). Their salaries were therefore directly chargeable to the independents as a class. On the assumption that time spent on customers was roughly proportional to the volume of the customer's business, this cost was allocated between independents on the basis of volume (R. 137, 590).

These cost elements were thus either directly chargeable to specific customers on a time basis, or were allocable on some basis universally accepted as equivalent to a direct charge.

Summary Schedule I showed that the *direct* costs of sale

and delivery per $100 of sales were $4.43 to A&P and Jewel, $14.07 to independents as a whole, $27.24 to the independents given no discount, $16.05 to the independents given a 2% discount, $12.12 to independents given a 3% discount, and $10.52 to the independents receiving a 4% discount.

In the face of these figures, *the Government in effect has admitted that the basic discount schedule has been fully cost-justified.* The only remaining issue is whether the discounts to A&P and Jewel were cost-justified. The following table, constructed from the data set forth in Summary Schedule No. I, demonstrates that in every relation the discount to A&P and Jewel was far more than cost-justified on the basis of direct costs alone (R. 592):

TABLE 1.

	Differences in costs per $100 of sales	Amount necessary to justify discount	Amount of over-justification
1. Between chain stores and independents getting no discount ($27.24 less $4.43)	$22.81	$8.50*	$14.31
2. Between chain stores and independents getting 2% discount ($16.05 less $4.43)	$11.62	$6.50	$ 5.12
3. Between chain stores and independents getting 3% discount ($12.12 less $4.43)	$ 7.69	$5.50	$ 2.19
4. Between chain stores and independents getting 4% discount ($10.52 less $4.43)	$ 6.09	$4.50	$ 1.59

* A discount of 8½% equals $8.50 on each $100 of sales.

Borden also submitted Summary Schedules II and III based upon alternative reasonable methods of allocating certain of the indirect costs of sale and delivery (R. 597, 605).

Summary Schedule II is based on the allocation of certain indirect costs having a close relation to direct costs in proportion to the distribution of direct costs (R. 597). This is a method of allocation which is frequently used by accountants and met with the approval of the Government's experts Taggart and Taylor (R. 662-3, 667-9, 801, 1037).* Summary Schedule II shows a cost-justification by a far wider margin than Summary Schedule I (cf. R. 585 with 597).

Summary Schedule III takes three items of indirect costs (routemen's indirect labor, special delivery indirect labor, and wholesale truck costs), and allocates them on the basis of number of "stops" or deliveries made (R. 605). Again, this Summary Schedule shows an even greater cost-justification than does Summary Schedule I (cf. R. 585 with 605).

Summary Schedule IV was prepared to meet the contention, founded on a misapprehension of the duties and activities of drivers, that that portion of the compensation designated under the labor contracts as "commissions" should

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* The Government notes that Borden's Malone testified that such a method of allocating numerous overhead expenses would be proper (R. 135), but adds that "in fact no such allocation was made in the original Borden cost study with respect to any of these categories (R. 132)" (Br. 15). The reference was to a statement that "the cost study as set forth in this Order does not show allocations to various classifications of store customers" of certain items of expense. As stated above, Borden's cost study, as embodied in the stipulated pre-trial order, made no pretense of computing allocations which were purely arithmetical in nature and which were therefore left for argument. The Government's Brief in several passages fails to distinguish between the cost study, consisting of the data collected, and the argumentative use to be made of this data which had no place in the stipulated pre-trial order.

be allocated on the basis of volume (R. 617). This contention has not been made by the Government before this Court, since Summary Schedule IV shows that, even if this part of drivers' compensation were eliminated from the computation of direct costs, the discounts were fully cost-justified.

The Government's Brief does not seriously attack any of the premises upon which these four Summary Schedules were constructed. The Government's Brief contents itself solely with attacking Borden's "classification" of its customers. Specifically, the sole issue raised by the Government's Brief is the propriety of giving A&P and Jewel a greater discount than was given to any of the eight independents identified on the Government's list of customers (R. 79-80).

5. What the District Court Held

The District Court adopted all of the stipulated facts set forth in the pre-trial orders as part of its findings.* From these evidentiary facts, the District Court made certain ultimate findings:

1. that Borden's and Bowman's cost studies were the "products of extensive investigations" (R. 569);
2. that these cost studies "reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers" (R. 569);
3. that classification of customers by these defendants

* The Government complains that "The court did not undertake any detailed analysis of the Borden cost study or of the government's objections thereto" (Br. 19). The fact, as shown above, that the objections made by the Government's experts had either been taken care of by later evidence or were demonstrated to be of such a nature that cost justification was established even if the objections were conceded made a "detailed analysis" unnecessary.

"is not wholly arbitrary," as the Government contends (R. 570);

4. that "defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers" (R. 570);

5. that "such cost allocation is the sole reason for the alleged price discrimination" (R. 570);

6. that "the cost studies provide an adequate justification for the difference in prices" (R. 570);

7. that "plaintiff has shown no need for the exercise of the Court's equitable powers" (R. 572).

The sole issue in this case is whether these findings are supported by substantial evidence.

SUMMARY OF ARGUMENT

The Government's prima facie case showed that Borden offered all grocer customers in the Chicago area discounts graduated by volume up to 4%. The Government selected thirteen store locations as the basis for its charge of price discrimination, four being A&P stores, one a Jewel store, and the eight others independents. A&P and Jewel by individual arrangements were receiving special discounts totaling 8½%; the three largest independents were receiving special discounts of 5½%; one was receiving the 4% scheduled discount, and the remaining four were receiving the scheduled 3% discount.

In order to justify these discounts, Borden had a comprehensive cost study made covering not only the stores selected by the Government, but all grocers served on Borden's 134 wholesale routes in the Chicago area. This study sought to ascertain to the greatest extent possible all the

direct and indirect costs of sale and delivery which could be assigned or allocated on a customer-by-customer basis.

From the data placed in the record through the cost study, Borden made numerous arithmetical computations, and presented the results in four alternative forms in its Summary Schedules I, II, III, and IV, each employing a different but recognized method of assigning costs. Each of the four schedules separately showed that the discounts to A&P and Jewel were more than cost-justified as against discounts to each class of independents. Schedule I, for example, shows that the discounts were more than cost-justified on the basis of direct costs alone, thus eliminating all argument over the choice of method of allocating indirect costs.

The Government does not now criticize the methods employed in making the cost study, nor does it point to any error in any of the computations in the Summary Schedules. The District Court found that the cost study was made in good faith and that the cost study justified the discounts under attack.

The Government's attack against the findings and judgment in the District Court is limited to a charge that the special discounts individually given to A&P and Jewel constitute a "classification" of customers which was improper under the cost-justification proviso of the Act.

I.

The first ground of attack—that the "classification" was arbitrary since it grouped "chain stores" together simply because they were "chain stores" or because of the "form of ownership"—is both unsupported by any evidence and is contrary to the undisputed facts. The record is devoid of evidence that Borden favored "chain stores as such";

the special discounts to A&P and Jewel were granted individually and not as a result of any policy of classification; and the very term "chain stores" crept into the case solely because of its use by the lawyers as a descriptive convenience. The record affirmatively showed that other considerations than "form of ownership" brought about the granting of these special discounts. A&P and Jewel together purchased twice as much as all "independents" combined; their total purchases were more than 190 times the purchases made by the largest independent.

II.

The second ground of attack—that no classification of customers is proper unless it is shown that every *individual* member of the class deserves no better treatment on the basis of *his* costs of sale and delivery—would completely frustrate the Congressional purpose in enacting the cost-justification proviso. The purpose of Congress was to leave sellers free to pass on to their customers, and eventually to the ultimate consumer, all the economies which the ingenuity of individual purchaser-customers could produce by their methods or quantities of buying and receiving goods. When a seller such as Borden is dealing with hundreds of purchasers, the only practicable way of passing on such economies is through the classification of customers having generally the same characteristics. The necessity for such classification has been recognized by the Federal Trade Commission, by the Courts of Appeal, and by the experts in the field of accounting called as witnesses by the Government.

III.

But in any event, the Government's contention has no relevance to the present case, since the Borden cost-justification study analyzes costs on a customer-by-customer basis

and thus provides the means of verifying the reasonableness and fairness of Borden's "classification."

The facts in the present record show that centralized buying by A&P and Jewel resulted in economies in solicitation costs in excess of 2% of sales as against any independent store. The facts also show that the economies realizable in centralized bookkeeping account for a further substantial differential in costs. These two economies alone total 2.68% of sales, which is nearly enough in itself to justify the 3% differential between the discounts given A&P and Jewel and the discounts given the three largest independents listed by the Government in its prima facie case.

In addition, the record shows that there were numerous general distinctions between A&P and Jewel stores and the 80 largest independents which produced substantial further economies. For example, three items of delivery expense alone were enough to show an additional 2.2% differential between the costs of delivery to A&P and Jewel stores and to the 80 largest independents.

These facts fully support the finding of the District Court that Borden's "classification" of customers was reasonable and proper.

IV.

The Government, without troubling to ascertain the facts, argues that, since one independent (Schubert) had a volume somewhat in excess of the *average* volume delivered to individual A&P and Jewel stores, there must have been many others in the same situation. The Government also asserts that the sales to independents, who purchased amounts equivalent to the *average* deliveries to A&P and Jewel, necessarily produced economies which entitled the independents to the same or approximately the same discounts.

Only two independents purchased in quantities in excess of the *average* deliveries to A&P and Jewel stores. Of these, Schubert was by far the largest, his volume being 25% in excess of the next largest independent.

Nevertheless, the facts revealed by the cost study show that the direct expense of sale and delivery to Schubert accounted for approximately the full difference between the discount he received and the discounts granted A&P and Jewel, and that on any of several reasonable allocations of indirect expenses the discount differential was far more than fully cost-justified.

Since these figures reflect the entire economies produced by Schubert's volume, this analysis shows *a fortiori* that the discounts to other independents, all of which purchased substantially lesser quantities than Schubert, were more than fully cost-justified on a customer-by-customer basis.

For all these reasons, the Government has failed to advance a single reason why the findings in the District Court and the judgment entered on those findings should be set aside.

ARGUMENT

I. CONTRARY TO THE BASIC ASSUMPTION OF THE GOVERNMENT, THE RECORD IS DEVOID OF EVIDENCE THAT BORDEN DISCRIMINATED AMONG ITS CUSTOMERS "ON THE BASIS OF FORM OF OWNERSHIP" AND FAVORED "CHAIN STORES AS SUCH."

The Government's statement of the "Question Presented" starts with these words:

> "Whether a seller who discriminates in price in favor of chain stores, as such, can cost-justify the discrimination . . ." (Br. 3).

The assumption that Borden discriminates in favor of "chain stores" *qua* chain stores is a recurrent theme throughout the Government's Brief. Borden is accused of having classified its customers "on the basis of form of ownership" (Br. 25), of making "a distinction between chain stores and independent stores, as such" (Br. 37-8), and of granting discounts "dependent upon form of ownership" (Br. 49).

Borden is also accused of having a "pricing system" or "discount policy" which was based "upon an initial classification of all its grocery store customers as either 'chain' or 'independent'" (Br. 8, 50). The final plea of the Government is for an injunction prohibiting Borden "from adopting any price or discount policies based upon a classification of its customers into chains and independents" (Br. 51).

It is noteworthy that in no instance does the Government cite the record to support these assertions. The record not only fails to support this basic assumption of the Government, but shows, to the contrary, that Borden's special discounts were based on the volume of purchases.

A. The record completely fails to support the Government's basic contention that Borden had a "policy" of classifying its customers as "chains" or "independents," and of favoring the former because of the "form of ownership."

Borden *never* adopted, published, or used a discount schedule, policy or plan in which customers were classified as "chain stores" or "independent stores." No document, statement, or utterance of any Borden official using the phrase "chain stores" appears in the record. Borden *never* adopted "discount policies based upon a classification of its customers into chains and independents." The record is devoid of any evidence whatsoever from which the existence of such a "policy" may be inferred.

The stipulated facts show that the only discount schedule ever formulated or published by Borden applied by its terms to all grocer customers based on volume of purchases (R. 82). The stipulated facts show that all the deviations from this schedule which appear in the record were made on an individual customer-by-customer basis—to A&P and Jewel by separate and independent letters (R. 83-4), and to Popik, Schubert, and Cartan by individual arrangements which were not spelled out in the evidence (R. 76).

A&P and Jewel are never once described as "chain stores" in the pre-trial order which sets forth the Government's prima facie case (R. 75-86). Furthermore, this order says nothing about any "discount policy" based upon the "form of ownership," and distinguishing between "chain stores" and "independents" as such.

The record shows that the term "chain stores" crept into the case through its use by the lawyers simply as a matter of descriptive convenience. The pre-trial order embodying the Borden cost study stated that "for purposes of the cost

study," the customers served by Borden's wholesale routes would be "divided into three main classifications," the first being "stores owned and operated" by A&P and Jewel, the second being "all other store wholesale customers," and the third being "all other wholesale customers." For convenience, the order provided also that the A&P and Jewel stores "will hereafter be called 'chain stores'" and other store customers "will hereafter be called 'independent stores'" (R. 142).

The record is devoid of any evidence that Borden ever adopted a "policy" of "favoring" customers owning and operating more than one grocery store. A&P and Jewel happened to be the *only* customers then served by Borden in the Chicago area which owned or operated more than a single store (R. 142). There is not a scrap of evidence to show that, had other "chain stores" offered to purchase milk from Borden, they would have been granted the same discount.

The only conclusion permissible from the record is that Borden had no "policy" other than to consider the situation of its largest customers, both "chain" and "independent," and to grant special discounts on an individual basis where warranted.

B. The undisputed facts show that Borden granted special discounts primarily because of the volume of the individual customer's purchases.

The Government's prima facie case showed that Borden granted special discounts over and above its regular volume discount schedule to five of the ten customers listed by the Government: A&P, Jewel, Schubert, Popik, and Cartan (R. 79-80). The customer lists showed on their face that these were the five customers making the largest purchases.

This is affirmative evidence that Borden granted its special discounts to its largest purchasers because of the quantity of their purchases.

The record also shows that A&P and Jewel, the two customers receiving the largest discounts, were also by far and away Borden's two largest customers. Thus, in the week covered by the cost study, A&P and Jewel together bought $195,262 of milk from Borden, while the combined purchases of all the 1,322 "independent" grocer customers amounted only to $98,672 (R. 217). This is affirmative evidence that A&P and Jewel were granted their special discounts primarily due to the total volume of their purchases.

The fact that Schubert, Popik, and Cartan received special discounts despite the fact that they were "independents" disproves any inference that Borden gave special discounts only to "chain stores."

The repeated charges made by the Government that the chain stores received a fixed discount "regardless of quantities or varieties purchased" (Br. 8), "regardless of quantities or points purchased" (Br. 9), "irrespective of volume" (Br. 10), and "not dependent upon their volumes of purchases" (Br. 21) are thus contradicted by the record.

II. THE GOVERNMENT'S CONCLUSION THAT CLASSIFICATION OF CUSTOMERS FOR COST JUSTIFICATION PURPOSES SHOULD NOT BE PERMITTED UNLESS VERIFIED ON A CUSTOMER-BY-CUSTOMER BASIS WOULD NULLIFY THE COST-JUSTIFICATION PROVISO AND FRUSTRATE THE INTENT OF CONGRESS.

The Government's Brief states that "the substance of the Government's argument" is that Borden violated the Act by "its use of a broad classification of chains and independent stores" (Br. 50), which is attacked on the ground that

every "*individual* purchaser is entitled to the same treatment by his seller as his competitor unless it can be shown that the volume of *his* purchases or *his* method of purchasing and accepting delivery" justifies a higher charge (Br. 36-7, emphasis added). In other words, the Government insists that cost justification must be made on a customer-by-customer basis.

The Government's arguments are wholly theoretical, unsupported by any precedent whatsoever, and based on assumptions which the record facts refute. We propose to show under this proposition that the Government's contentions, if adopted, would nullify the effectiveness of the cost-justification proviso of the Act, and frustrate the intent of Congress. Under the succeeding proposition, we shall show that, irrespective of the Government's theoretical arguments, the specific facts in the record completely establish the reasonableness of the customer classification which Borden made.

A. The cost-justification proviso of the Robinson-Patman Act should be liberally interpreted to accomplish the legislative intent that business be free to pass on to consumers the benefits of all economies resulting from efficient methods of production and distribution.

Congress adopted the cost-justification proviso because it desired to leave "trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution" (H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 9 (1936)). Congress believed that this proviso would benefit the consuming public because it would permit "the translation of appropriate shares of any savings so effected up and down the stream of distribution

to the original producer and to the ultimate consumer" (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5 (1936)). Congress repeatedly emphasized that it wanted to preserve to the fullest justified extent "the seller's freedom to give a part or all of the saving so effected to others with whom he deals . . . in lower prices to the customer, including the ultimate consumer who buys them" (H. R. Rep. No. 2287, p. 17).

Congress had no animus against "chain stores" or other mass distributors, and recognized that their methods of centralized buying might well produce economies of the kind contemplated by the proviso. The House Report expressly points out that the benefits to be passed on included all

> "that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail order house, department store, or from the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes" (H. R. Rep. No. 2287, p. 17).

Congressman Utterback, floor manager for the bill, explained the cost-justification proviso by saying:

> "It is through this clause that the bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution. . . ." (80 Cong. Rec. 9417, June 15, 1936).

Congress clearly intended that the efficiencies and economies resulting from the methods employed by mass distributors such as "chain stores" could be freely passed on to such purchasers.

Nor was Congress concerned with limiting the kind or character of the economies which could be reflected in price differences. As Congressman Utterback put it:

> "There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which these economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible" (80 Cong. Rec. 9417, June 15, 1936).

The sole problem is whether the price differential does no more than make "due allowance" for the economy achieved. Congress recognized that this phrase was no more than a generalization; both the Senate and House Reports noted that this phrase "does not require the differential, if granted, to be the arithmetical equivalent of the difference" in costs (S. Rep. No. 1502, p. 5; H. R. Rep. No. 2287, p. 10).

"Due allowance" requires an analysis of costs which, if carefully done, necessarily involves the use of accounting techniques. Here arises the need and place of the cost-justification study (R. 643-4).

Speaking of the phrase "due allowance" used in the proviso, the Cost Justification Report comments:

> "Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.
>
> "In view of the plus-or-minus leeway which must be granted to all cost figures . . . 'due allowance' should not be construed in every case to require full and complete cost justification of a price differential" (R. 773).

Commenting that the proviso "operates in a complex area" and many problems arising under it "are not given to ready solution," the Report further comments:

> "Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role" (R. 792).

The cost-justification proviso recognizes the economic fact that it costs more for a seller to deal with some customers than with others. It asserts the right of the manufacturer or seller to pass on to its customers, and hence on to the general public, the benefits of the lower costs which some customers make it possible for such manufacturer or seller to attain. Hence, the Act should be so interpreted and applied that it does not impede any "price variation reasonably related to economies in *any* of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions" (*ibid.*).

B. A broad classification of customers for cost-justification purposes is often necessary to effectuate the purposes of the proviso, and has consistently been upheld by the Federal Trade Commission and the Courts.

If the cost-justification proviso is to serve its legislative purpose, classification of customers, and cost-justification on the basis of such classification, is an absolute necessity in the case of a business enterprise, such as Borden, dealing with a multiplicity of customers. The necessity for such classification was succinctly summarized in the Cost Justification Report:

> "Classification or grouping of customers, orders, commodities and transactions has repeatedly been recog-

> nized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sales transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers" (R. 776-7).

Two of the experts relied on by the Government in this case, Sawyer and Taylor, reaffirmed their agreement with this passage of the Report (R. 832, 943), while Professor Taggart tated: "I think I probably wrote that" (R. 671).

The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) states flatly that

> "In our view, furthermore, any compulsory allocation of joint distribution costs among *individual* transactions or *individual* customers, or *individual* items in a seller's homogeneous product line, casts an unwarranted burden on businessmen" (Report at 175).

As the Cost Justification Report states, the Federal Trade Commission has repeatedly sustained cost justifications based on classification of customers and analysis of costs to each class (R. 776).

In *Bird & Son, Inc.*, 25 F.T.C. 548 (one of the first two complaints issued after the passage of the Act), the Commission sustained a cost defense based on the aggregate costs to all mail order customers, of whom Montgomery Ward was by far the largest. The defense was upheld despite the aggregating of costs to *all* mail order customers.

In *United States Rubber Company*, 46 F.T.C. 998, the Commission approved a classification of customers based upon volume of purchases, upholding cost justification with respect to 53 out of 57 classifications. Classification by discount brackets was also approved in *B. F. Goodrich Company*, 50 F.T.C. 622.

In *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, the Commission held that a discount schedule providing different discounts to seven classifications of customers grouped by volume of purchases could be cost justified on the basis of costs applicable to the different classes, and overruled an attack based on the fact that "respondent did not know the cost of selling and distributing to any particular customer within any one of the price brackets" (See brief of counsel quoted by Taggart, "Cost Justification," Michigan Business Studies, Vol. XIV, No. 3, 1959, at p. 282).

The propriety of classifying customers for discount and cost-justification purposes has also received judicial approval.

In *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951), the District Court had rejected a cost defense based on costs of selling groups of customers, asserting that the only way "actual costs" could be determined was on the basis of the "sales cost to individual customers and to individual plants of customers who operate more than one" (87 F. Supp. 484, 495, W.D. Ark. 1949). The Court of Appeals reversed, holding that the District Court had "applied too rigid a standard." The Appeals Court pointed out that if records had to be maintained sufficient to "record the expenses incurred in selling every individual customer, and all the data which the plaintiff deems essential, the burden, expense and assumption of

risk would seem to preclude the granting of quarterly discounts" (191 F. 2d at 59).

Reid v. *Harper & Brothers*, 235 F. 2d 420 (2nd Cir. 1956), took essentially the same position, rejecting the contentions that total costs to a group of customers could not be aggregated, and that cost differentials to each customer on each transaction had to be supplied. To the contrary, the Court held:

> "To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyer, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such a requirement might be to discourage *all* price differentials, even those actually justified by cost distinctions" (235 F. 2d at 422).

In dealing with more than 1,300 individual customers, as in the present case, cost justification must necessarily be based in large measure upon aggregation of costs by groups if the legislative purpose behind the cost-justification proviso is not to be completely frustrated.

C. The arguments of the Government in the present case would, if adopted, amount to legislative repeal of the cost-justification proviso.

In the District Court, the main thrust of the Government's attack upon Borden's cost study was that "cost differences between store customers can only be determined by comparing the costs of delivering various quantities of milk to individual stores" (Gov. Reply Br. 67; repeated 70-71).

The Government's Brief in this Court professes to abandon this contention, conceding,

> "As a matter of practical necessity, however, when a seller deals with a very large number of customers, he

> cannot be required to establish different cost-reflecting prices for each customer. The seller must be permitted to establish appropriately defined classes of customers and to promulgate prices for each class which reflect the cost savings necessarily involved in dealing with that class" (Br. 28).

Having thus given lip-service to a principle that courts, Commission, and commentators have all approved, the Government then proceeds to hedge on this concession by imposing conditions which in substance require customer-by-customer cost-justification.

The Government's first step in undercutting the conceded right to classify customers is to assert that the classification must not "result in substantial and unjustifiable discriminations against *individual* members of the disfavored classes" (Br. 29, emphasis added). After several pages of wholly theoretical assertions for which there is sanction neither in precedent or logic (Br. 29-36), the Government's Brief comes full circle with the following conclusion:

> "In short, it is the government's contention that only classifications of customers in terms of those differences in quantity or method of dealing which substantially account for the lower price to the *individual* members of a particular class can ever be the basis for a pricing policy or a cost justification" (Br. 37, emphasis added).

The Government contends

> "that an *individual purchaser* is entitled to the same treatment by a seller as his competitor unless it can be shown that the volume of *his* purchases or *his* methods of purchasing and accepting delivery from the seller differ from his competitor's to a degree warranting a given price differential" (Br. 36-7, emphasis added).

But this showing can only be made by a study of the actual costs of serving such individual customer. Nevertheless, the Government goes on to contend that if Borden wanted to recognize cost savings in dealing with different customers,

> "it had to do this with a price schedule which applied equally to every customer, regardless of form of ownership, and which determined *each individual customer's discount* in terms of the efficiencies and economies which give rise to Borden's cost savings" (Br. 49, emphasis added).

In other words, the Government argues that customers may be classified only when the costs to *each individual customer* are ascertained and found to be the same or similar to the other individual members of the class.

As a practical matter, this means customer-by-customer cost-justification, which is obviously wholly impracticable. Thus, the Government, giving lip service to the practical necessity of classification for cost-justification purposes, actually insists upon customer-by-customer cost-justification. This robs "classification" of any meaning and prevents it from accomplishing the very purpose which business realities make it necessary that it accomplish.

By these arguments, the Government is asking this Court to rule, as a matter of law, that cost-justification must be on the basis of an analysis of costs customer-by-customer, and that cost-justification by a study of aggregate costs to groups of customers is forbidden. Nothing in the language of the cost proviso compels this result; the Commission, the Courts, and the Government's own expert witnesses reject such a result as wholly impracticable; and the effect would be frustration of the legislative intent by making the cost-justification proviso useless.

III. BORDEN'S GRANT OF LARGER SPECIAL DISCOUNTS TO A&P AND JEWEL THAN TO INDEPENDENT STORES WAS, TO THE EXTENT THAT IT CONSTITUTED A CLASSIFICATION OF CUSTOMERS, REASONABLE IN THE LIGHT OF THE FACTS.

The finding of the District Court upholding Borden's "classification" of A&P and Jewel as the recipients of the largest special discounts, was supported by a multiplicity of evidentiary facts.

A. The vast differences between the total purchases of A&P and Jewel and those of the largest independent were sufficient in themselves to make the classification reasonable.

As has been previously pointed out, Borden's sales to A&P and Jewel were double the total sales to all independents combined, and were many times larger than Borden's sales to Schubert, who was in turn the largest "independent" customer. The weekly deliveries to the 254 A&P and Jewel stores averaged $768.74 per store, while those to the 80 largest "independents" averaged only $289.59 per store (R. 180-1, 217).

The "differing amounts" in which sales and deliveries were made to the two "classes" of customers was thus so extreme as to constitute, without more, a "showing" justifying the separate classification of these two customers in order to ascertain whether the discounts granted made only "due allowance" for differences in the cost of sale or delivery resulting in the quantities purchased.

The Government attacks this classification on the ground that the largest independent (Schubert) actually purchased more points per day than the *average* amount delivered to

chain store locations (Br. 39-40, 46), and on the additional ground that "there are almost certainly other large independents" in a similar position (Br. 46-7).

Had the Government checked Bulk Exhibits 4, 6, or 7, it would have discovered that Schubert was by far and away Borden's largest "independent" store customer. The Government would have discovered that Schubert's purchases for the week totaled 4801 points, and that the purchases of Schubert and the next five largest independents* compared as follows:

1.	Schubert	4801 points
2.		3607 points
3.		3429 points
4.		3324 points
5.		3293 points
6.		2502 points

The Government would also have discovered from Bulk Exhibits 4, 6 and 7 that Borden served 112 A&P stores, delivering a total of 379,511 points for an average of 3389 points per store, and that Borden served 142 Jewel stores, delivering 534,025 points for an average of 3761 points per store. The average points delivered to A&P and Jewel stores combined was 3596.

These facts show that Schubert was the only independent purchasing more points than the average Jewel store, that only Schubert and one other independent out of 1322 stores purchased more points than the average "chain" store; and that only Schubert and two independents purchased more than the average A&P store.

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* The five next largest independents after Schubert were not among those named in the Government's prima facie case.

These facts show that Borden's total sales to A&P and Jewel (913,536 points, R. 217) were 190 times the sales to the largest independent, Schubert; that Borden's sales to Jewel were 110 times the sales to Schubert; and that Borden's sales to A&P were more than 75 times Borden's sales to Schubert.

In other words, of the 80 largest independent stores, only three had purchases equal to the *average* purchases of A&P stores; and not a single independent had purchases equal to one-seventy-fifth of the total purchases by A&P.

These facts are sufficient in themselves to show that A&P and Jewel formed a homogeneous class of customer in that their purchases from Borden were of a magnitude roughly comparable to each other but of an entirely different order than the purchases by any of the independents.*

B. The Government's contention that classification by amount of total purchases rather than by amounts delivered to individual stores was unreasonable ignores the facts showing economies inherent in mass buying.

Stripped to its essentials, the sole ground on which the Government attacks Borden's classification of customers is based on the assumption, contrary to fact, that total volume of purchases, as distinct from volume of deliveries to a specific location, can never produce economies.

This wholly gratuitous assumption that total purchases has no meaning cost-wise when delivered to more than one location, and that volume produces economies only with respect to deliveries to single locations, is repeated throughout the Government's Brief (Br. 21, 23, 39, fn. 10, 46).

* This answers the Government's claim (Br. 47-8) that there was no showing that A&P and Jewel were sufficiently similar to be properly accorded the same discount.

This, for example, is the assumption that lies behind the argument that, since Schubert's purchases were "well above the chain average," this fact "meant that to the extent the discounts were based upon quantity savings Schubert should have received a substantially greater discount than either chain customer" (Br. 39).

The falsity of this assumption is easily demonstrated by facts in the record in the present case.

1. *Economies in solicitation of A&P and Jewel business*

Mass buying by a chain store at a single point obviously reduces the cost of selling the customer. Only one man needs to be called on instead of several hundred. In the case of A&P and Jewel, Borden was represented in 1955 by three of its officials. The stipulated facts show that the total weekly expense for these men and their staff applicable to the wholesale routes surveyed was only $358.69 (R. 517-8: 50.39% of $37,015.26 divided by 52). The stipulated facts also show that the time spent by these men on chain store matters was *less* than the time spent on independent store problems (R. 144). Since sales to A&P and Jewel were twice those to all independents, an allocation of executive time would tend to increase the margin of cost justification in favor of the chain stores.*

Sales to independents were solicited and serviced by "salesmen and solicitors," who do *not* solicit the business of chain stores (R. 134). The weekly average cost of the salaries of these men was $2,065.83 (R. 137). Dividing this weekly cost by total sales of $98,672.52 to independents (R.

* If we assume, contrary to the stipulated facts, that all executive time should be charged against A&P and Jewel, this would result in a sales solicitation and service cost of about $0.18 per $100 of sales ($358.69 divided by weekly sales to A&P and Jewel of $195,262; see R. 217).

217), produces a sales cost of slightly more than $2.09 per $100 of sales.

These figures demonstrate that the cost of solicitation of independent business was at least $2.09 per $100 of sales greater than the cost of soliciting chain store business. Thus, the total volume of chain store purchases resulted in a saving of 2.09% and in itself justified a discount to A&P and Jewel of 2.09% greater than that which *could* have been earned by *any* independent.

The Government tries to escape from these facts by asserting that, as to solicitation methods, "There is no showing of any necessity for this internal division of labor," and that "large independents could be serviced in precisely the same way as the chain stores" (Br. 43). A moment's reflection will demonstrate the palpable absurdity of these contentions. Does the Government suggest that it would be feasible for Borden's District Chairman to call on 80 independent store customers to secure a volume less than half that secured by calls on two customers, A&P and Jewel? Or does the Government suggest that the solicitors and salesmen call on the managers of the individual chain store units who have no authority to make purchases?

The other argument of the Government is that this expense differential "would account for only about two-fifths of the calculated difference between serving Borden's chain customers, as a class, and the 80 largest independents, as a class" and hence "could not properly be used as a basis for a classification" (Br. 43-4). The obvious answer is that this item alone accounts for approximately 2% out of the 3% discount difference between Schubert, the largest independent, and A&P and Jewel. It is therefor a substantial distinction, which clearly warrants the grouping of one type of customer apart from the other.

2. *Economies in centralized bookkeeping*

Another major economy resulting from mass-buying by A&P and Jewel arises from the fact that these companies paid for their purchases weekly on a centralized billing basis (R. 174, items 14 and 15). The dollar amount of purchases by item and in total did not have to be calculated by the drivers, but were checked and calculated by clerks in the branch offices, who naturally had the assistance of calculating machines (R. 202). However, the signature of the store manager had to be secured (R. 174-5, item 17). From the tickets extended and totaled at the branch office, clerks in the division main office prepared a single total invoice for each chain store customer each week (R. 205, 209).

This procedure was obviously impractical in the case of independents. The large majority, including Schubert, paid cash for each delivery, which payments necessarily had to be handled by the driver. This means that the driver had to extend and total the sales tickets (R. 174, items 14 and 15). Some independents had asked to be and are placed on a credit basis. Since centralized billing to such individual customers would have produced no economies, the collection of such accounts had to be handled by the drivers (R. 174, item 16). This means that the drivers had to extend and total the daily sales tickets, secure the customer's signature daily, and collect periodically when making a delivery (R. 174-5, item 16 and 17). Thus, there was little difference in the demands on the time of the driver whether the independent was a cash or credit customer.

The consequent differences in costs in collection were again appreciable, as the data in the cost study demonstrate. The various items of expense involved included central billing and credit expense and route activities identified in the pre-trial order as items 14, 15, 16, 17, 33, 38, 39,

and 40 (R. 174-7). Here is the comparison of these expenses between the two chain store customers and the 80 largest independents:

	A&P and Jewel	80 Largest Independents
Item 14	445.31	154.26
Item 15	0.00	106.07
Item 16	0.00	7.38
Item 17	406.98	15.05
Item 33	63.44	19.98
Item 38	163.49	0.00
Item 39	4.58	0.00
Item 40	0.00	.79
Billing Department	356.38	2.56
Credit Department	1.30	.57
	1441.48	306.66

(The first four items in the last column are from R. 187; the next four items are from R. 190; the first eight items in the middle column are from R. 183; and the last two lines from R. 585).

Now, these costs, divided by the total dollar sales to chain stores of $195,262.07 and to the 80 largest independent stores of $23,167.35 (R. 217) amount to $1.32 for every $100 of sales to the 80 largest independents, and only $0.73 per $100 of sales to the chain store customers. These items alone justify an additional discount advantage to the chain stores of more than .59%.

The Government attacks the validity of using for cost justification purposes the economies resulting from central billing as against collection by drivers on the ground that "no evidence was adduced to show: (i) that the latter method of collecting on credit accounts was inherently more

costly; (ii) if so, why the cheaper method was not also used with the independents; and (iii) what the extent of the difference was" (Br. 42). The record facts summarized above are a complete answer to objections (i) and (iii). As to why the cheaper method was not used with the independents, the obvious answer was that centralized billing was only cheaper because the sales to many stores could be handled collectively.

No successful business such as Borden is going to burden itself with a more costly method of doing business with some customers than is necessary simply to justify a greater discount to other customers.

3. *Other economies of mass buying*

The matters listed above do not exhaust the economies inherent in mass buying, such as the ability to calculate and prepare only two discount checks to chain stores as against 930 checks to independents (R. 181, 205, 210-1). All these are the type of economies realizable from the "mass buying" which the House Report on the bill which became the Robinson-Patman Act specifically listed as a source of economies which may properly be reflected in discounts (H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 17 (1936)).

The two specific economies resulting from centralized buying by A&P and Jewel themselves which are discussed above together justify the giving of these chain stores a 2.68% greater discount than that given the 80 largest independents. The difference between the discounts given these two chain customers and Schubert, the customer on which the Government relies, was only 3%.

When the Government asserts that there were no cost savings "involved" in selling A&P and Jewel "which could not have been realized in selling the largest customers clas-

sified as independents" (Br. 21), the Government was making an assertion which is plainly contrary to fact. The Government's bland assumption that the economies to be derived from the quantities in which goods are sold and delivered are limited to those obtained by delivering more to some single locations than to other single locations is completely erroneous.

C. The record shows many other facts supporting the reasonableness of Borden's classification of customers.

Since it is wholly impracticable to insist that a class be defined in terms of specific cost savings attained by each member, the reasonableness of a classification must obviously depend upon distinctive characteristics *generally* applicable to the class.

The record shows beyond question that there were numerous general distinctions between the A&P and Jewel stores on the one hand and the independents on the other:

First: It required a grand total of 11,538 minutes of drivers' time at a cost of $895.28 in the case of A&P and Jewel stores, to carry milk from the trucks to the designated point of delivery on the store premises, while it required 12,709 minutes, at a cost of $986.15, in the case of all independents, and 2,041 minutes, at a cost of $158.38, in the case of the 80 largest independents (R. 173, item 8, R. 183, 187). This shows that it took *less* time to carry milk into the chain stores than into the independents, although sales to the latter were only one-half the sales to the former. Furthermore, although sales to A&P and Jewel were 8.4 times as much as to the 80 largest independents, the time spent on this activity at the A&P and Jewel stores was only 5.6 times that spent at those 80 independent stores.

Second: Another difference is dramatically illustrated by the relative time spent on the driver activity of stocking

and packing merchandise in the store refrigerator (R. 173, item 11). While only 3,367 minutes, at a cost of $261.26, were spent in the aggregate on this activity in the A&P and Jewel stores, a total of 20,959 minutes, at a cost of $1,626.30, was spent performing this function with respect to half the same volume in the independent stores (R. 183). Here the 80 largest independents were remarkedly different from the A&P and Jewel stores, since this activity took 4,866 minutes in these stores, at a cost of $377.57 (R. 187).

Third: The quantities estimated as the day's requirements of the store were more easily assembled from the trucks in the case of A&P and Jewel than in the case of the independents. This activity (R. 172-3, item 7) required an aggregate of 17,856 minutes, at a cost of $1,385.53, in the case of A&P and Jewel, as contrasted with 23,600 minutes, at a cost of $1,831.23 in the case of all independents, and 3,635 minutes, at a cost of $282.06, in the case of the eighty largest independents (R. 183, 187). Although the sales to A&P and Jewel were 8.4 times as much as the total sales to the 80 largest independents, the time spent on this activity was only 4.9 times the time spent at those 80 largest independents.

Thus, three general characteristics of independent stores produced a substantial differential in costs of delivery.

	A&P and Jewel	80 Largest Independents
Item 8	$ 895.28	$158.38
Item 11	261.26	377.57
Item 7	1,385.53	282.06
	$2,542.07	$818.01

Thus, the cost of the three activities in connection with the 80 largest independents was $0.03535 per dollar of sales

($818.01 divided by $23,167), while the cost with respect to A&P and Jewel was only $0.01302 per dollar of sales ($2,542.07 divided by $195,262). A&P and Jewel were thus entitled to 2.2% greater discount than the 80 largest independents with respect to these three items alone.

There were other important distinctions. In the six years up to and including the cost study, all bad debt losses from store customers had been incurred by extension of credit to independents, and none by any chain store (R. 215). A greater proportion of the time spent by Borden executives and administrative employees on particular customer activities "is spent on problems of independent stores than the sales of such stores bear to the sales of chain stores" (R. 144-5). The stores operated by A&P and Jewel tended more than independent stores to be concentrated in areas with denser population, reducing truck time between store locations (R. 138). Drivers were required to spend considerably more time with the independents in listening to complaints or discussions of store problems than with A&P and Jewel stores (R. 175, item 23). A total of 481 minutes was spent in this activity at the 254 A&P and Jewel stores, and 280 minutes at the 80 largest independents—an average of 3½ minutes per store in the case of the independents and less than 2 minutes per store in the case of A&P and Jewel.

Not all of these factors are capable of exact measurement; no effort was made, for example, to charge administrative costs on the basis of time spent on independent as compared with chain problems. But all of these factors emphasize a consistent difference between the costs of sale and delivery to A&P and Jewel and to the independents.

The only answer of the Government is that "Borden does not claim that all independent stores" require each of these

added expenses "but only that this extra delivery expense is more characteristic of the independent stores as a group than of the chain stores" (Br. 41). This is nothing more than a different way of saying that costs to each independent store must be ascertained before it can be granted a lesser discount than the chain stores. This argument would make all use of classification useless, since discount differences would have to be justified on the impossible basis of a cost study, customer-by-customer.

The Government's attack on the Borden cost study boils down to this: unless costs are studied customer-by-customer, it is possible that some large independent *may* have been hurt. The Government, despite the fact that it had the data to prove such injury to individuals if any existed, asks this Court to *speculate* that some individual customer deserved better treatment.

This is the kind of attack on a cost study which the Federal Trade Commission will not accept:

> "It has been urged that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket. This argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. But there has been no such showing in this case. Any annual quantity system of pricing is vulnerable to this argument and it may be controlling where it has practical aspects. Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification." *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 394.

D. The Government's wholly unproved assumption that "cost saving factors" having a pre-determined value can be easily identified on a customer-by-customer basis is shown by the record to be false.

The Government spends six pages (Br. 30-6) in a theoretical discussion of hypothetical situations with respect to imaginary customers A through I. This discussion starts with the assumption that in a seller's dealings with his customers there are always identifiable "cost saving factors" which are present or absent (Br. 31, 34) and which, if present, invariably produce a saving within a fixed range (e.g., "7¢ to 9¢" and "2¢ to 4¢": Br. 34). Upon this unproved assumption a second unproved assumption is piled: that a store can elect whether to conduct its affairs so that factor #1 or factor #2 can be present or absent. Still a third assumption is made, and that is that a seller can compute a discount and classify his customers on the basis of such a pre-election by the customer to have a specific cost factor present or absent.

Every one of these assumptions is not only unproved, but is disproved by the record. The Borden cost study shows that there are more than 40 different activities which may affect differential costs. These "factors" in most instances are present in all cases. It takes time to carry goods into a store; it may take more time in one case than in another, due to factors entirely out of the control of the store operator, such as distance between the spot where the truck parks and the store entrance, and the physical layout of the store. The store operator cannot elect whether to take a particular service or not; the sole question is how much time the service will take. Neither a fixed range of savings nor the possibility of election exists.

Furthermore, to try to erect a pricing structure allowing

for the permutations of all possible combinations of 40 factors would be completely impracticable.

The whole argument is completely unrealistic. It involves a fourth and even more illogical assumption. It assumes, contrary to common sense, that Borden wilfully continues to provide specific costly "services" to specific independent customers when persuasion of its customers to abandon them would result in substantial economies to Borden.

The cold, hard reality is that the costs of delivery to independents are so much greater than to A&P and Jewel and that Borden makes a far greater profit *after discounts* on its sales to these two customers than it does on its sales to all classes of independents. On the basis of direct costs alone—the unchallengeable minimum—Summary Schedule I shows that it costs Borden $27.24 per $100 of sales to deliver milk to small grocers receiving no discount, $10.52 per $100 of sales to serve the 80 largest independents, and only $4.43 to serve A&P and Jewel (R. 585).

Borden has every interest to induce economies in delivery costs to its independent customers. Its inability to do so is established on this record. These were the business realities which the Government asks be ignored.

E. The Federal Trade Commission has not laid down any requirement as to classification of customers which is in any way inconsistent with Borden's cost study.

The Government asserts that

> "the Federal Trade Commission has, in a series of cases, established the requirement that the individual purchasers assigned to any one group for cost-justification purposes must be substantially related in terms of those factors which determine the cost of manufacture, delivery or sale" (Br. 29-30).

Whatever this supposed "requirement" means, it certainly is not spelled out in any of the four Commission decisions cited in support of the assertions.

In *Curtiss Candy Co.*, 44 F.T.C. 237, the Commission noted that respondent had attempted to cost justify by allocating selling costs on the basis of dollar sales without making any study which showed that this method of allocation was valid (44 F.T.C. at 267). Using this faulty method, the respondent sought to justify its prices on the 5% of its sales made to vending machine operators by comparing them with "all the rest of its various classes of customers," which included such diverse types as "chain grocery stores, syndicate stores, jobbers, and concessionaires." These various types of customers so grouped together "included those who received the benefits of the fall booking plan, discount deals, various discounts, free goods, and other price advantages," and the Commission pointed out that, as to them, "no attempt was made by the respondent to justify the special price discrimination or advantages" which various ones received. Since the charge covered all types of price discrimination, the Commission necessarily held that the attempted cost-justification had failed (44 F.T.C. at 267-8).

International Salt Co., 49 F.T.C. 138, is equally irrelevant. There, "a unit discount to purchasers classified as $50,000 purchasers" was sought to be justified without any attempt "to show any difference between the cost of handling a large order and that of handling a small order" (49 F.T.C. at 153). Instead, respondent arbitrarily took its total sales costs, divided by the number of individual sales transactions, and assumed that the resulting figure of $5.62 was the cost of filling a single order, "regardless of size and regardless of who the purchaser may be" (49 F.T.C. at 154). This was properly rejected because "the record does not

provide a basis supporting respondent's basic assumption" (*ibid.*).

In *Champion Spark Plug Co.*, 50 F.T.C. 30, respondent sold spark plugs to a number of oil companies operating service stations, including Atlas Supply Co. (acting for five Standard Oil Companies), Socony-Vacuum Oil Co., and Cities Service Co. The first two purchasers received a preference in price. Respondent sought to classify its customers for cost-justification purposes into two groups—the first consisting of Atlas and Socony and the second of City Service and respondent's 487 other distributors. No showing was made of *any* characteristic distinguishing Cities Service from the two favored oil companies. There was positive evidence that little sales effort was expended on Cities Service, but it was included in the group to which "respondent has allocated a major portion of its selling expenses." The cost defense was also defective in that there was insufficient basis in the record for some of the allocations used. The Commission concluded for all these reasons that "the evidence fails to establish" a justification for the price differentials (50 F.T.C. at 42-3).

Thompson Products, Inc., Trade Reg. Rep. (F.T.C. Complaints, Orders, Stipulations (1959-1960)) ¶ 27841, contains no criticism whatsoever of the classification of customers for purposes of cost justification. The major point of decision was that a lower price on auto parts sold to automobile manufacturers as a class created a competitive injury to the class of dealers purchasing directly who were in competition with the ultimate resellers of the parts. Inadequacies in cost justification as between the automobile companies amounting to 3%, 4%, and 7% were held to be more than *de minimis;* certain allocations in the cost justification study were held to be unsupported; and a cost justification based on an averaging of various prices paid

by various distributors for various parts was held to be, on the basis of the specific facts of that case, an improper method of cost justification.

By citing these four Commission cases as authority for an ambiguously worded "requirement" which none of them either expressed or applied, and by ignoring the cases we have cited in which the Commission has upheld customer classification, the Government is ignoring what the *expertise* and the experience of the Commission can teach us as to the practicabilities of cost justification.

There is no easy or practicable way to analyze costs on a customer-by-customer basis, as the record in this case fully demonstrates. The fact that in the present case Borden went to the expense of a cost study which analyzed costs of delivery on a store-by-store and customer-by-customer basis is no proof that discount schedules can as a practical matter be constructed on such a basis.

The Borden study in this case costs more than $50,000 (R. 220-1, 91). Such studies are valid only for a reasonable time before and after they are made. Neither Borden nor any other business enterprise could afford to make such studies, even in a greatly abbreviated form, each time a new discount schedule was called for by competitive and other circumstances.

Any business enterprise selling a multitude of customers must be permitted to make broad classifications of its customers on the basis of the general factors involved in selling and delivery to such customers. The requirement that such classifications be tested on the customer-by-customer basis which the Government demands would destroy the usefulness of the cost-justification proviso.

Summary as to Reasonableness of Borden's Classification of Customers

Borden's selection of A&P and Jewel as the recipients of larger discounts than any independent was a reasonable classification based upon numerous evidentiary facts.

In the first place, the total volume of purchases by these two customers was more than 190 times the volume purchased by the largest independent, and twice the total purchases by all independents combined. The economies resulting from mass-buying by these two customers in solicitation and bookkeeping costs were substantial and were almost sufficient in themselves to cost-justify the entire difference between the discounts to A&P and Jewel and those to the three largest independents named in the Government's prima facie case.

In the second place, the average volume of deliveries to each A&P and Jewel store was more than 2½ times the average volume delivered to the 80 largest independents. This average volume was greater than the volume purchased by all but *two* independents out of a total of 1322 independent stores. This volume of deliveries was a further source of economies.

In the third place, the time spent on deliveries to the A&P and Jewel stores was in many respects far less per dollar of products delivered than the time spent in deliveries to the independents, including deliveries to the 80 largest independents.

In the fourth place, Borden's dealings with A&P and Jewel entailed further demonstrable economies as against dealings with the independents. These economies were incapable of exact determination, but were pertinent to the reasonableness of the classification.

Finally, the direct costs incurred by Borden in making sales to A&P and Jewel were only $4.43 per $100 of sales, as compared with $10.52 per $100 of sales to the 80 largest independents and $14.07 per $100 of sales to all independents.

With these facts before it, the District Court was not only justified, but in fact compelled, to hold as it did hold that Borden's classification of customers was reasonable and proper.

IV. THE REASONABLENESS OF BORDEN'S CLASSIFICATION OF CUSTOMERS IS DEMONSTRATED BY THE FACT THAT THE COSTS OF SALE AND DELIVERY TO SCHUBERT, THE LARGEST INDEPENDENT, EXCEEDED THE COSTS OF SALE AND DELIVERY TO A&P AND JEWEL BY AN AMOUNT MUCH GREATER THAN THE DIFFERENCE IN DISCOUNTS.

The Government several times refers to the Schubert store as its example of the large volume independent who should have received as large or a larger discount as A&P and Jewel (Br. 39-40, fn. 12; 44, fn. 15; 46). The Government correctly asserts that this store had a volume 3¼ times the average of the 80 largest independents, and had daily purchases somewhat in excess of the *average* deliveries to A&P and Jewel alone (Br. 39).

Upon the sole foundation of these facts, the Government makes the following series of assertions: (1) "that to the extent the discounts were based upon quantity savings Schubert should have received a substantially greater discount than either chain customer" (Br. 39) or "at least the same 8½% discount" (Br. 40, fn. 12); (2) that "Schubert's greater volume than the average chain store would result

in cost savings that would outweigh the cost differential resulting from the differential in solicitation costs" (Br. 44, fn. 15); (3) that, by Borden's classification, "a large independent such as Schubert was forced, regardless of its own operational techniques, to bear a substantial share of the extra costs Borden incurred in dealing with much smaller independents whose methods of dealing were more costly" (Br. 46).

The facts about Schubert were all in the Bulk Exhibits in the record below. Government counsel at the trial in the District Court presumably knew that every one of these assertions is contradicted by the record.

In order to put an end once for all to the myths about the economies resulting from the quantity of Schubert's purchase, we have included as an appendix to this Brief a reproduction of the forms prepared by the time study men showing the time of the route driver spent in providing service to Schubert. On the first page, lines 41, 42 and 43 combined cover the activity identified as item 6, referred to in the pre-trial order (R. 172). Similarly, lines 43 through 63 cover the activities identified as items 7 through 23 of the pre-trial order (lines 59, 60 and 61 combined constituting the activity identified as item 23). The forms thus reproduced constituted a part of Bulk Exhibit No. 4.

On the basis of this information contained in these forms, together with similar information as to special deliveries contained in Bulk Exhibit 8, the direct costs of serving Schubert can be computed. The results, compared with those set forth in Summary Schedule I for A&P and Jewel and for the 80 largest independents (R. 585), are set forth in the attached tabulation headed "Application of Summary Schedule I to Schubert." This tabulation copies columns 2 and 7 of the figures set forth in Summary Schedule I, and

Application of Summary Schedule No. I to Schubert.
Cost Justification Based Solely on Direct Costs.

Direct Costs	A&P and Jewel	Independent LS 4%	Henry Schubert
1. Routemen's direct labor costs	$ 6,453.52	$ 1,648.21	$ 47.02
2. Special delivery direct labor costs	36.66	9.10	2.45
3. Branch office clerical salaries	649.79	107.11	1.34
4. Billing department	356.38	2.56	—
5. Credit department	1.30	.57	—
6. Accounting department	8.25	.82	.01
7. Robert F. White & Company	—	8.52	.11
8. Tabulating department	12.12	3.88	.05
9. Bad debt losses	—	1.90	—
10. Loss on returned products	1,139.20	167.72	2.32
11. Salesmen's and solicitors' salaries	—	486.92	21.38
12. Total direct costs	$ 8,657.22	$ 2,437.31	$ 74.68
13. Sales Volume	$195,262.07	$23,167.35	$1,017.13
14. Cost Per $100 of Sales	$ 4.43	$ 10.52	$ 7.34

adds a third column setting forth the direct costs of selling Schubert.

This tabulation shows that the *direct* costs of sale and delivery to A&P and Jewel totaled $4.43 per $100 of sales; that the *direct* costs of sale and delivery to the 80 largest independents (the 4% "class") was $10.52 per $100 of sales; and that the *direct* costs of sale and delivery to Schubert was $7.34 per $100 of sales.

This tabulation shows that, *on the basis of direct costs alone*, a discount differential of 2.91% between Schubert and A&P and Jewel was cost-justified. The difference between this figure and 3% was thus only nine one-hundredths of one per cent. This amount was only one-tenth of the unjustified amount held by the Federal Trade Commission to be within the rule of *de minimis*. *United States Rubber Co.*, 46 F.T.C. 998, 1012.

But *direct* costs necessarily reflect only part of the actual cost differentials. Tabulations based on three alternative but well-recognized methods of allocation of *some* of the indirect costs are therefore submitted with this section of the Brief.

The first of these alternative tabulations is that headed "Application of Summary Schedule II to Schubert." Here the first two columns are identical with columns 2 and 7 in Summary Schedule II, while the third column is a computation of Schubert's costs based on the same method of allocating indirect and overhead costs (R. 597).

Summary Schedule No. II is based on the use of the common and approved method of permitting those indirect and overhead costs which are related to the assignable direct costs to be allocated in the same proportion as the direct costs are chargeable or assigned. This accounting method was approved as reasonable by the Government's

Application of Summary Schedule No. II to Schubert. Cost Justification Based on Allocation of Major Indirect and Overhead Costs on Basis of Direct Cost.

		A&P and Jewel	Independent LS 4%	Henry Schubert
	Direct Costs			
1.	Routemen's direct labor	$ 6,453.52	$1,648.21	$ 47.02
2.	Special delivery direct labor	36.66	9.10	2.45
3.	Branch office clerical	649.79	107.11	1.34
4.	Billing department	356.38	2.56	—
5.	Credit department	1.30	.57	—
6.	Accounting department	8.25	.82	.01
7.	Robert F. White & Company	—	8.52	.11
8.	Tabulating department	12.12	3.88	.05
9.	Bad debt losses	—	1.90	—
10.	Loss on returned products	1,139.20	167.72	2.32
11.	Salesmen and solicitors	—	486.92	21.38
12.	Total direct costs	$ 8,657.22	$2,437.31	$ 74.68
	Indirect Costs			
13.	Routemen's indirect labor	4,293.70	1,209.02	37.04
14.	Special delivery indirect labor	95.80	26.97	.83
15.	Wholesale truck costs	2,647.63	745.51	22.84
16.	Total indirect delivery costs	$ 7,037.13	$1,981.50	$ 60.71
17.	Total direct and indirect sales and delivery costs	15,694.35	4,418.81	135.39
	Overhead Expense			
18.	Advertising allowance	1,303.74	158.26	6.83
19.	Branch overhead expense	7,317.66	2,060.49	63.13
20.	Soda straws, etc.	—	—	—
21.	General and administrative expenses	1,525.91	429.66	13.16
22.	Total overhead expense	$10,147.31	$2,648.41	$ 83.12
23.	*Grand Total Costs*	$25,841.66	$7,067.22	$218.51
24.	Costs Per $100.00 of Sales	$ 13.23	$ 30.51	$ 21.48

experts (R. 662, 667-9, 1037) and justified by Malone (R. 135, 177).

This tabulation shows that costs incurred by A&P and Jewel were $13.23 per $100 of sales, by the 80 largest independents $30.51 per $100 of sales, and by Schubert $21.48 per $100 of sales. By this analysis, Borden cost-justified a discount to A&P and Jewel 8¼% *greater* than that given Schubert, whereas the actual difference was only 3%.

The second of these alternative tabulations is that headed "Application of Summary Schedule No. III to Schubert." Here the first two columns are copied from columns 2 and 7 of Summary Schedule No. III, while the third column is a computation of Schubert's costs based on the same method of allocating indirect delivery costs as that used in Summary Schedule III (R. 605).

The method of allocation employed in Summary Schedule III was to take the indirect costs of delivery (routeman's indirect labor, special delivery indirect labor, and wholesale truck costs), and allocate this on the basis of the number of "stops" or individual deliveries made to the surveyed customers. The use of "stops," "deliveries," or "orders" as the units for allocation purposes is a common and approved accounting practice.

The sense of this will be understood by taking the activity listed in the cost study as item 26: "Driving time on route," which accounted for 50,933 minutes out of the total 156,935 minutes of total indirect route time. This item covers the time required to drive from the edge of the route area to the first customer location, and from one customer location to another. Since 1576 store locations were surveyed, it may be safely assumed that the average time it takes to drive from one store to another is the same without distinction as to class of customer. On this assumption, the

Application of Summary Schedule No. III to Schubert. Cost Justification on the Basis of Direct Costs Plus Indirect Delivery Costs Allocated on the Basis of Number of Deliveries.

		A&P and Jewel	Independent LS 4%	Henry Schubert
	Direct Costs			
1.	Routemen's direct labor	$ 6,453.52	$1,648.21	$ 47.02
2.	Special delivery direct labor	36.66	9.10	2.45
3.	Branch office clerical	649.79	107.11	1.34
4.	Billing department	356.38	2.56	—
5.	Credit department	1.30	.57	—
6.	Accounting department	8.25	.82	.01
7.	Robert F. White & Company	—	8.52	.11
8.	Tabulating department	12.12	3.88	.05
9.	Bad debt losses	—	1.90	—
10.	Loss on returned products	1,139.20	167.72	2.32
11.	Salesmen and solicitors	—	486.92	21.38
12.	Total direct costs	$ 8,657.22	$2,437.31	$ 74.68
	Indirect Costs			
13.	Routemen's indirect labor	2,292.98	674.39	10.46
14.	Special delivery indirect labor	137.94	37.61	6.96
15.	Wholesale truck costs	1,449.93	425.56	9.24
16.	Total indirect delivery costs	$ 3,880.85	$1,137.56	$ 26.66
17.	Total direct and indirect sales and delivery cost	$12,538.07	$3,574.87	$101.34
18.	Cost Per $100.00 of Sales	$ 6.42	$ 15.43	$ 9.96

"stop" basis of allocation is the practical equivalent of a mileage basis in measuring the distance and the time between delivery stops.

Furthermore, each "stop" represents a "sale" or "order," which in turn is equivalent to an "invoice line." Therefore, a "stop" for allocation purposes is the equivalent of "truck mile," "order," or "invoice line," all of which were recognized by Taggart as proper "service units" for allocation of delivery expense (R. 676).

Using this unit of measure to allocate indirect delivery expense, the tabulation shows that costs of $6.42 per $100 of sales were incurred in selling and delivering to A&P and Jewel, $15.43 per $100 of sales in selling and delivering to the 80 largest independent stores, and $9.96 in selling and delivering to Schubert. These figures show that a discount to A&P and Jewel 3.54% greater than that given Schubert would have been fully cost-justified, whereas the actual difference was only 3%.

A final demonstration of cost-justification as to Schubert is contained in Summary Schedule V, attached to this Brief, which is based on direct costs of sale and delivery plus an allocation of indirect delivery costs on the basis of direct delivery labor costs. The reasonableness of such an allocation method has been already pointed out with respect to the computation based on Summary Schedule II.

In Summary Schedule V, the *direct* costs are the same as those appearing in the tabulation applying the principles of Summary Schedule I to Schubert. Three additional items are added, routeman's indirect labor, special delivery indirect labor, and wholesale truck costs. The first is allocated in proportion to routeman's direct labor; the second is allocated in proportion to special delivery direct labor;

Summary Schedule No. V

Cost Justification Based on Total Delivery Costs and Other Direct Costs.

Item	Delivery Costs	A&P and Jewel	Independent 128 4% Class	Henry Schubert
	Direct Labor			
1.	Routemen's direct labor	$ 6,453.52	$ 1,648.21	$ 47.02
2.	Special Delivery direct labor	36.66	9.10	2.45
3.	*Sub-Total, Direct Labor Costs*	$ 6,490.18	1,657.31	49.47
	Indirect Labor and Wholesale Truck Cost			
4.	Routemen's indirect labor (Allocated in proportion to Item 1 above)	4,605.04	1,176.11	33.55
5.	Special Delivery indirect labor (Allocated in proportion to Item 2 above)	137.21	34.06	9.17
6.	Wholesale Truck Cost (Allocated in proportion to Items 1 and 2 above)	2,843.65	726.15	21.68
7.	*Sub-Total Delivery Costs*	$ 7,585.90	1,936.32	64.40
8.	*Total of Delivery Costs*	$ 14,076.08	$ 3,593.63	$ 113.87
9.	*Sales Value*	$195,262.07	$23,167.35	$1,017.13
10.	*Delivery Cost, Per $100 of Sales*	$ 7.21	$ 15.51	$ 11.20
	Other Direct Costs			
11.	Branch Office Clerical Salaries	649.79	107.11	1.34
12.	Billing Department	356.38	2.56	—
13.	Credit Department	1.30	.57	—
14.	Accounting Department	8.25	.82	.01
15.	Robert F. White & Company	—	8.52	.11
16.	Tabulating Department	12.12	3.88	.05
17.	Bad Debt losses	—	1.90	—
18.	Loss on returned products	1,139.20	167.72	2.32
19.	Salesmen's and solicitors' salaries	—	486.92	21.38
20.	*Sub-Total Other Direct Costs*	$ 2,167.04	$ 780.00	$ 25.21
21.	*Grand Total*	$ 16,243.12	$ 4,373.63	$ 139.08
22.	*Cost Per $100 of Sales*	$ 8.32	$ 18.88	$ 13.67

and the third is allocated on the basis of the routemen's and special delivery direct labor.

Summary Schedule V shows costs per $100 of serving A&P and Jewel of $8.32, costs per $100 of serving the 80 largest independents of $18.88, and costs per $100 of serving Schubert of $13.67.

Based on this analysis, Borden would have been justified on the basis of direct costs and total delivery costs alone to have given A&P and Jewel 5.35% greater discount than was given to Schubert, whereas the actual difference was only 3%.

These facts show that even the largest independent customer could not produce savings which entitled him on any basis of cost analysis to more of a discount than he in fact received. Actually, had Schubert received no more than a 4% discount, the differential would have been more than cost-justified.

In a footnote (Br. 40, fn. 12), the Government argues that the special discounts of 1½ per cent given Schubert, Popik and Cartan should be disregarded for cost-justification purposes because "This extra discount was given the three stores by Borden to meet competition," citing a statement in the Government's Post Trial Brief to the District Court. This statement is as inaccurate as it is irrelevant. Borden did *not* introduce any evidence that the special discounts to Schubert, Popik and Cartan were granted to meet competition because the Government stipulated that these discounts would not be treated as "evidences of a violation of Section 2(a)" (R. 222-3).

But even if Borden had relied in part on an alternative defense of a bona fide meeting of competition, the raising of such a defense does not in any way preclude reliance on a cost-justification defense. The Robinson-Patman Act is

not concerned with why a discount is given, but deals only with the question whether it can be justified on any ground which the Act recognizes.

Since Schubert received a 5½ per cent discount, the differential in favor of A&P and Jewel was only 3 per cent—and that is the only differential which Borden is called upon to justify.

The Government's Brief, as we have seen, makes many assertions as to the costs of delivery to "large independents." (*e.g.*, Br. 21, 22, 24, 25, 29, 46). But the burden is upon the Government to prove that the stipulated facts failed to support the judgment and findings of the District Court; and this the Government cannot do by making assertions which are contrary to the facts collected by the cost study and presented by the bulk exhibits.

Borden, in its Motion to Affirm, pointed out that "It was a simple matter of mathematical computation for the Government to find out . . . whether any one or more large independents produced lower costs of sale and delivery than A&P or Jewel" (p. 28). The Government's Brief seeks to escape the thrust of this argument by charging that Borden is attempting "to surmount . . . deficiencies in its proof of its cost justification defense" (Br. 47, fn. 16). Borden's "cost justification defense" consists of *all* the evidence produced by its cost study. To refer the Government to the evidence produced by Borden in its cost justification defense, and ask that the Government show that the evidence is defective, is *not* an attempt to "surmount deficiencies" in Borden's evidence.

The foregoing analysis of Borden's costs of sale and delivery to Schubert, the largest independent of all, is the complete answer to the Government's repeated assertions that the volume of Schubert's purchases must have

produced economies entitling Schubert to discounts as great as those given A&P and Jewel (See Br. 39-40, 44, fn. 15, and 46).

The analysis of costs in serving Schubert, coupled with the fact that Schubert's volume was by far the largest of the independents, is also the complete answer to the Government's repeated suggestion that other independents were entitled by the volume of their purchases to discounts equal to those of A&P and Jewel (See Br. 24, 25-26, 45, 46-47). The next largest independent had weekly purchases more than 25% lower than Schubert's purchases (*supra*, p. 38). The logical assumption is that it cost Borden proportionally more to sell and deliver to independents purchasing a substantially lesser volume than Schubert. Since the costs of serving Schubert greatly exceeded the per unit costs of serving A&P and Jewel, the inevitable conclusion is that the cost differentials between the other independents and A&P and Jewel were substantially greater.

Thus, the facts about the costs of serving Schubert demonstrate the wholly mythical nature of the Government's contention that the largest independents must have produced economies entitling them to discounts equivalent to those received by A&P and Jewel.

If the Government desired to contend that somehow Borden treated its independent customers unfairly, the Government should have gone to the cost study and produced at least one example to prove the point. This the Government failed to do.

The Borden cost study demonstrated on a customer-by-customer basis that Borden's discounts were in every instance more than justified by substantial cost differences.

CONCLUSION

The District Court expressly found that the Borden cost studies were made "in good faith" and provide an adequate justification for the difference in prices" charged by Borden (R. 570). The District Court also expressly found that Borden's "classification" of its customers was reasonable, although its finding to that effect was stated as an answer to a Government attack and is expressed in a negative form (*ibid.*).

Under Rule 52(a), Federal Rules of Civil Procedure, the burden is upon the Government to show that these findings are "clearly erroneous." As this Court has commented,

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341.

The burden is upon the Government to show either that the record fails to contain facts sufficient to support the findings, or that the record contains facts which destroy the validity of the findings. The Government cannot ignore, as it has done, what the cost study, with its customer-by-customer analysis of the facts, clearly demonstrated.

The Federal Trade Commission, the Courts, and the experts in the field have all agreed that, when detailed cost studies are made in good faith, follow approved accounting methods and principles, and show a justification for the challenged price differentials, they must be accorded "great weight"; *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 394; *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38, 59 (8th Cir. 1951); *Reid* v. *Harper and Brothers*, 235 F.2d 420, 422 (2nd Cir. 1956); Cost Justification Report (R. 773). Such studies should be accepted

unless it is clearly demonstrated that "the principles relied on are not sound." Cost Justification Report (*ibid*).

In the present case, every one of the price differentials is over-justified on the basis of direct costs as well as on the basis of several alternative and approved methods of cost allocation. The amount of over-justification in every instance is very large.

The only attack on the cost study made in this Court relates to the "classification" of A&P and Jewel resulting from the fact that these customers received a greater discount than the independents. But the cost study itself produced a plethora of evidence showing a tremendous difference between the total volume of the purchases of these two customers and all other customers and showing that this difference had to produce and did produce substantial economies which fully justified the granting of the special discounts.

The Government has tried to suggest that this Court should speculate on the facts and conclude that Borden *may* have treated some of its largest independent customers unfairly. Such speculative and unsupported arguments are insufficient to show that the findings below were "clearly erroneous." Borden has not been content to rest its case on this ground. Borden has taken the example upon which the Government bases its arguments—the Schubert store—and has demonstrated that even the unique volume of Schubert's purchases did not produce economies of the magnitude of those produced by A&P and Jewel. Borden demonstrated that the price differences between what Schubert paid and A&P and Jewel paid were far less than the differences in costs of sale and delivery.

We submit once again that the sole issue in this case is one of fact. No issue of statutory interpretation or of legal

principle is present in any form whatsoever. Every argument advanced by the Government finds its answer in the facts of the case.

We submit once again that this appeal presents no substantial issue warranting extensive consideration by this Court and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CECIL I. CROUSE,
JOSEPH A. GREAVES,
H. BLAIR WHITE,

Counsel for Appellee,
The Borden Company.

Week Starting 7/11/53 Ending 7/17/53

Prepared By E. E. Wilson

Routeman's Name T. A. Berg

Truck No. 3221 30.

WHOLESALE ROUTE DELIVERY TIME ANALYSIS
CHICAGO MILK DIVISION

Exhibit II
Page 1 of 2

	Check One
31. Independent Store (Single Store whose Management does not Control Another Similar Store)	☒
32. Chain Store (1 of 2 or more Stores Under Same Management)	☐
33. Miscellaneous (Single Estab. Other than a Store such as Club, Restaurant or Bulk Stop)	☐

Name Henry Schubert (Certified Park Food)

Address 2610 - 71st St.

Cust. No. 261

Description of Operations — Insert Date →	Time in Minutes 1	2	3	4	5	6	7	Total
34. Time to Drive From Branch to Edge of Route Area								
35. Mileage From Branch to Edge of Route Area (Show in Tenths, i.e. 1.7)								
36. Time to Drive from Edge of Route Area to 1st Stop (If this is 1st Stop)								
37. Mileage From Edge of Route Area to 1st Stop (If this is 1st Stop)								
38. Time to Drive From Previous Customer Stop (If this is Not 1st Stop) (16)	10	9 (6)	11 (8)	8 (5)	9	6 (1)	✓	151
39. Mileage From Previous Customer Stop (If this is Not 1st Stop) (5.3)	2.7	2.7 (6)	1.5 (2)	2.2 (3)	1.5	3.2 (1.4)		29.4
Time Waiting (40) To Park (41) For Store to Open (42) For Loading Platform (Insert appropriate number in small block)	40 (5)	40 (2)	41 (1)					7 1 —
43. Time Assembling Misc. to be Delivered to Store	1 (2)	12 (9)	4 (6)	12 (9)	14	15 (11)		89
44. Time Delivering Misc. to Store	2 (3)	8 (9)	4 (5)	7 (10)	11	7 (5)		55
45. Time Assembling Additional Misc. to be Delivered to Store	7 (1)							10
46. Time Delivering Additional Misc. to Store	5 (1)							6
47. Time to Stack & Pack Misc. in Store Ice Box	9 (6)	11 (10)	8 (18)	9 (24)	26	13 (27)		171
48. No. of Trips from Truck to Ice Box to Complete Delivery Re. in 44 & 46	4 (3)	3 (3)	3 (3)	5 (2)	7	7 (6)		45
49. Time to Collect and Verify Returned Misc. in Store	3	(1)	(1)					5
50. Time to Collect and Verify Empty Bottle Returns	(6)	(4)	(3)	(5)	3	(8)		25
51. Time to Prepare Sales Ticket	1 (4)	2 (1)	1 (6)	2 (9)	17	2 (3)		50
Time to (52) Secure COD (53) Collect Credit Pay't. (54) Customers Signature (Insert Appropriate Number in small block)	6 52 (16)	2 52 (14)	5 52 (6)	3 52 (10)	20 52	3 52 (4)		52 53 54 —
55. Time to Remove Returned Misc. from Store to Truck								
56. Time to Stack Returned Misc. in Truck								
57. Time to Remove Empty Bottles from Store to Truck	5 (4)	(6)	(2)	1	2	(3)		28
58. Time to Stack Returned Bottles in Truck	2 (4)	(1) (4)	(4)	(3)	2	(3)		25
Time to Further Service Cust. (59) Sales Promotion (60) Complaints (61) Gen. Conv. (Insert appropriate number in small block)					61 1			57 — 60 1
62. Time to Enter Delivery in Route Book	1 (1)	(1)	2 (3)	3 (1)	6	2 (1)		22
63. Time for Other Purposes (Specify Reason) Call Head Office with	(4)	(3)	(5)	(4)		(6)		22
64. Time from Last Stop to Branch (If this is Last Stop)								
65. Mileage from Last Stop to Edge of Route Area (If this is Last Stop)								
66. Mileage from Edge of Route Area to Branch (If this is Last Stop)								
Grand Totals - All Lines	138.9	150.7	126.4	137.8	119.5	158.1	✓	831.4
Total Minutes-Lines 34,36,38,40 through 47,49 through 64	127	138	115	124	111	142	✓	757
Total Mileage-Lines 35,37,39,65, & 66	4.9	6.7	4.4	6.8	1.5	3.1		29.4
Total Trips, Line 48	7	6	5	7	7	13		45
Total Minutes, Miles & Trips (Must Agree with Grand Totals Above)	138.9	150.7	126.4	137.8	119.5	158.1		831.4

67. Number of Stops (No. of Times within Week that Routeman Called on Store) 11
68. Days Served (No. of Days within Week that Routeman Called on Store 6

Miscellaneous (Place check mark of figure where appropriate. ANSWER ALL ITEMS)

Item Wall Display Installed 69 Yes ☐ 70 No ☒

Neon Sign Installed 71 Yes ☐ 72 No ☒

Window Display Installed 73 Yes ☐ 74 No ☒

75. Number of Feet From Truck Unloading Point to Store Entrance Used 15 Feet
76. Number of Feet From Store Entrance used to Ice Box 20 + 50 Feet

Floor Level on which Store is Located 77 Basement ☐ 78 Ground Floor ☒ 79 Second Floor ☐

Type of Ice Box Used 80 Display Case ☒ 81 Walk in Cooler ☒ 82 Regular Ice Box ☐

Is this a Split Stop (Also Served by Another Milk Co.) 83 Yes ☒ 84 No ☐

85. Distance to Nearest A & P Store (If this is not an A & P Store) 7 City Blocks
86. Distance to Nearest Jewel Store (If this is not a Jewel Store) 10 City Blocks
87. Distance to Nearest Chain Store Other Than A & P or Jewel 5 City Blocks 88 Name of Chain Natl

How is Mdse. Delivered to This Store Handled:

89. Manually
90. Hand Truck
91. Dolly
92. Other (Specify)

Indicate on the Diagram Below the Locations of the Entrance to this Store, and that of the Ice Box. Use an "E" (93) for Entrance Location and an "X" (94) for Box Location.

F	E 1	2	3	4	5	6	7	8	9	10	11	~~12~~
R	13	14	15	16	17 X	18	19	20	21	22	23	24
O	25	26	27	28	29	30	31	32	33	34	35	36
N	37	38	39	40	41	42	43	44	45	46	47	48
T	49	50	51	52	53	54	55	56	57	58	59	60

95. What is the greatest width at any Point in the Aisle or Aisles used Proceeding from the Store Entrance to Ice Box 6 Feet

96. What is the Narrowest Width at any Point in the Aisle or Aisles Used Proceeding from the Store Entrance to Ice Box 3 Feet

Instructions: The above data is to be recorded for each store on each route each day. If delivery is made to more than one store without moving the vehicle, record the time elements under description of operations for each store separately.

If more than one stop is made at one store in one day enter the time elements for each stop separately under description of operations and circle the figures covering the second stop.

Exhibit III
Page 1 of 2

DAILY SALES RECORD

Relative to Wholesale Route Survey - Chicago Milk Division

Branch Englewood
Week Starting 7/11 Ending 7/16
Prepared By E. E. Wilson
97. Route Number 181
Routeman Name L. A. Evans
Name Henry Schubert (Park Ford) [Canfield]
Address 2613 W. 71st St
98. Customer Number 261

Check One

99. Independent Store (A single store whose Management does not control another similar store) [X]
100. Chain Store (1 of 2 or more stores under same Management) [ ]
101. Miscellaneous (single establishment other than a store such as Club, Restaurant or Bulk Stop) [ ]

Product	Size	Sales Sun. Gl	Sales Sun. Pts	Sales Mon. Gl	Sales Mon. Pts	Sales Tues. Gl	Sales Tues. Pts	Sales Wed. Gl	Sales Wed. Pts	Sales Thur. Gl	Sales Thur. Pts	Sales Fri. Gl	Sales Fri. Pts	Sales Sat. Gl	Sales Sat. Pts	Sales Total Gl	Sales Total Pts	Returns Sun. Gl	Returns Sun. Pts	Returns Mon. Gl	Returns Mon. Pts	Returns Tues. Gl	Returns Tues. Pts	Returns Wed. Gl	Returns Wed. Pts	Returns Thur. Gl	Returns Thur. Pts	Returns Fri. Gl	Returns Fri. Pts	Returns Sat. Gl	Returns Sat. Pts	Returns Total Gl	Returns Total Pts
102. Homo. or V.D.	Qts.																			4		2											
103. " "	½ Gal.																																
104. " "	Gal.																			1												1	
105. " "	Pts.																																
106. " "	1/3 Qts.																																
107. " "	½ Pts.																																
108. Fortified Skim	½ Gals																																
109. " "	Qts.																																
110. Half & Half	Pts.																																
111. " "	Gal.																																
112. Triple Whip	Gal.																																
113. Super Whip																																	
115. Ice Cream	Qts.																																
116. " "	½ Pts.																																
117. Cream	Gal.																																
118. "	Qts.																																
119. "	Pts.																																
120. "	½ Pts.																																
121. Sour Cream	12 Oz.																																
122. " "	8 Oz.																																
123. Chocolate	Qts.																																
124. "	1/3 Qts.																																
125. "	½ Pts.																																
126. Buttermilk	Qts.																																
127. "	1/3 Qts.																																
128. "	½ Pts.																																
129. Cottage Cheese	16 Oz.																																
130. " "	12 Oz.																																
131. " "	8 Oz.																																
132. " "	9 Oz.																																

Product	Size	Sales														Returns													
		Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total		Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total	
		Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.	Cl.	Pa.
133. Dry Curd Cheese	12 Oz.										4		3			7															
134. Cottage Cheese	3 Lb.																														
135.	5 Lb.																														
136. Ricotta Cheese	5 Lb.																														
137. Sour Cream	Qts.																														
138. Butter	Lbs.																														
139. Eggs	Doz.																														
140. Cream Whip																															
Empire				2		2								2		4															
Hoffmanach		[redacted]		28		12		6		49		2		15		112															
SB										8	12		4			16	8														
142. Dollar Totals				7.61		13.48		1.03		50.87		19.90		14.72		106.21															
143. Point Value				330		704		52		2464		870		1013		3901															

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 439

UNITED STATES OF AMERICA,
Appellant,

v.

BOWMAN DAIRY COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR BOWMAN DAIRY COMPANY.

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THE DONNELLEY-WARREN PRINTING COMPANY, CHICAGO

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BRIEF FOR BOWMAN DAIRY COMPANY.

QUESTION PRESENTED.

Where the Government selects nine stores for the purpose of testing the validity of a seller's discount system, and the seller proves that the differences in the prices charged to those stores were cost justified, does the seller's cost defense fail because of the suggested possibility that some other unidentified store may have paid a discriminatory price which the seller might not be able to justify?

STATEMENT.

Although embraced within the same record, the Government's cases against The Borden Company and Bowman Dairy Company, respectively, involve different facts and different issues. Pursuant to the order of this Court entered on January 15, 1962, this separate brief deals only with the appeal as to Bowman Dairy Company.

The Nature of Bowman's Business.

The Bowman Dairy Company operates in the "Chicago area", as defined in the complaint (R. 4), as well as in various outlying areas. The record does not indicate Bowman's relative position in the market,[1] but does show a material decline in its chain store business. Thus, in March, 1955, Bowman was serving 49 Kroger stores and 43 A&P stores in the Chicago area (R. 335-36)[2]. In January, 1956, the number of Kroger stores had declined to 47 and A&P to 41 (R. 369). Later that year, Kroger closed the store which the Government had used as a sample in its *prima facie* case (R. 554, 62). The following year, Bowman lost the business of the Goldblatt stores (R. 540), and, effective November 1, 1958, it lost the entire A&P account (R. 540).

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1. The assertion on page 6 of the Government brief that Bowman accounts for 38% of the sales is based solely on an allegation in the complaint (R. 6) which Bowman denied (R. 23). This allegation referred to the year 1950.

2. The Government's reference to 163 chain stores (Br. 6) includes stores located in outlying areas as well as those located in the Chicago area, and also includes 79 stores which Bowman no longer serves (R. 335-36, 369, 540, 554).

Bowman's Discount Structure.

Effective January 19, 1953, Bowman introduced a new type of discount structure (R. 311). This "graduated discount schedule" was based on cost curves developed by independent management engineers with extensive experience in the dairy industry (R. 244-45). The cost curves indicated that different net prices were warranted by "differences in costs resulting from combinations of volume purchased and delivery services rendered" (R. 271). Under the graduated discount schedule, price changes followed the curve, and consequently an increase or decrease of as little as a quart a day produced a change in the discount rate. Thus, to take examples from plaintiff's *prima facie* case, customers purchasing an average of 108.3, 111.7 and 118.3 points per day respectively, received discounts of 6.16%, 6.22% and 6.36% (R. 62-63).

The graduated discount system is thus basically different from the bracket system. Under the bracket system, a few classes are defined and everyone in the same bracket receives the same price. Under the graduated system, however, a different net price is charged to every individual purchaser—except in those rare instances where two customers purchase precisely the same number of points per day.

The record identifies three customers whose purchases exceeded the maximum on the graduated schedule. In March, 1955, the top discount on the schedule was 8% (R. 67-68). These three customers all received even higher discounts: Goldblatt's received 8¼%; Kroger, 11%; and A&P, 11% (R. 62-63).

Plaintiff's Prima Facie Case.

For its *prima facie* case against Bowman, the Government selected nine sample stores, five on delivery Route 129 and four on Route 1471 (R. 59-63). Route 129 included an A&P, a Kroger and three independents (R. 62). The largest independent was located within a mile of the two chain stores (R. 72). Route 1471 included an A&P, a Goldblatt and two independents, the larger of which was less than a mile from the A&P and a little more than a mile from Goldblatt's (R. 63, 73-74).

Schedules showed the volume of purchases by each of the sample stores during March, 1955, and the differences in discounts paid to them (R. 62-63). The prices at which these stores resold dairy products were not shown.

In addition, plaintiff's evidence showed a series of price changes in September, 1955, during which period Kroger and A&P paid Bowman different prices and Bowman used a bracket system for a short time (R. 60-61).[3]

With respect to the competitive injury element of plaintiff's *prima facie* case, Bowman introduced extensive evidence showing the character of the markets in which the sample stores operated. Chicago is composed of a number of so-called "community areas" separated by physical and ethnic boundaries, which delimit relatively isolated neighborhood markets (R. 236-42). The evidence showed that the sample independent stores were located in different community areas from the sample chain stores, and were separated by natural boundaries (R. 240-42, 262-63, 269-

3. The price changes in September, 1955, occurred promptly after Borden lost the Jewel Tea account to the Dean Milk Company, and also promptly after Dean reduced its prices and Dean and Hawthorn Mellody promulgated new bracket discount schedules which Bowman temporarily adopted (R. 121, 257-58).

70).[4] Each of these areas was highly congested and contained a large number of grocery stores.[5] A market survey showed that competition between the sample chain and independent stores was, at most, negligible (R. 269-70, 521, 262-63). There was no evidence that any sample store lost any business to any other sample store, or suffered any actual "injury".[6]

None of the sample chain stores was being served by Bowman when the record was closed (R. 540, 554).

Bowman's Cost Defense.

Bowman's cost defense included: (1) a justification on an individual store-by-store basis of each price differential identified in the plaintiff's *prima facie* case (R. 328-33, 343-44); (2) a justification of the discount to the entire Kroger chain, and also a separate justification of the discount to the entire A & P chain, based on an analysis of the cost of serving each unit in each chain (R. 333-36, 345-69); and (3) an explanation of the basic cost studies which were made

---

4. Thus, the area known as "Brighton Park" was surrounded by these boundaries: "* * * on the west by the Atchison, Topeka and Santa Fe Railroad, on the north by the Illinois-Michigan Canal, on the east by the Pittsburgh, Chicago, Cleveland and St. Louis Railroad and by Western Avenue, and on the south by the Chicago River and the Indiana Railroad." (R. 241.)

5. Each of the areas covered roughly two square miles, had 200 or more retail grocery stores (with one exception in which there were 121 stores) and had populations varying between 30,149 and 94,134 (R. 240-42).

6. Bowman did not deny that the sales of dairy products to the sample stores were "in commerce" within the meaning of Section 2(a) of the Robinson-Patman Act. Bowman did point out that the Government had failed to prove that its bulk business (*i.e.*, sales to restaurants and hotels), which was operated by a separate division of the company, was in interstate commerce. Possibly for this reason, the Government abandoned its appeal insofar as it related to the bulk phase of the case (Jurisdictional Statement, page 2, footnote 1).

before the graduated discount schedules were introduced in 1953 (R. 245-50, 271-310).

1. The Government rested its affirmative case on the different discounts paid to nine stores on Routes 129 and 1471 during March, 1955. In its cost defense, Bowman analyzed the actual purchases made by each store on these two routes during the week of March 14, 1955. The actual delivery tickets were used to compute the number of units and the number of cases delivered to each customer, the proportion of units represented by glass containers and the proportion represented by fiber containers (R. 329-33). From this data the cost of delivery to each customer on both routes was determined. The cost of serving each independent was compared with the cost of serving the specific chain store units on the same routes. Referring to the specific discount differentials on which the plaintiff based its case, the study concluded:

> "The cost calculations show that the lower net prices (higher discounts) to the chain store outlets on Routes 129 and 1471, when compared individually to the other stores on those routes, do not exceed the effect of cost differences resulting from greater volume and fewer delivery services." (R. 329.)

2. As a separate study, Bowman also tested the entire Kroger discount and the entire A & P discount against the graduated discount schedule. The discount schedule was established on the basis of a curve which ensured that Bowman's gross margin on sales to a customer receiving a lower net price would be at least as high as the gross margin earned on sales to a customer paying a higher price (R. 279). In testing the amount of discount that could be paid to a chain store, it was determined that the gross margin on a chain store transaction should be at least as high as the gross margin on a transaction with an independent store at the same volume level (R. 333-34).

The actual volume of purchases by each unit in the

Kroger chain was computed for the week of March 14, 1955 (R. 335). From that data, and the minimum gross margin for each volume level, the discount that could have been justified for each unit in the chain was calculated on a store-by-store basis (R. 335). The sum of discount payments that could have been justified for each of the 49 Kroger stores in the Chicago area exceeded the amount they were in fact paid at the 11% rate (R. 335). If the 49 stores had been billed individually, 47 of them would have received a discount of 11% or more, and only two of them would have received less (R. 335).

The same procedure was followed for the A&P stores. If billed individually on their actual purchases, 42 of the 43 A&P stores in the Chicago area, which Bowman was serving in March, 1955, would have received a discount of 11% or more (R. 336). The discount actually paid to A&P was less than the sum of the discounts that could have been justified on a store-by-store basis (R. 336).

The cost studies also included a justification of the bracket system which was in effect in September, 1955 (R. 349-56), and exhibits showing that Bowman had returned to a graduated discount schedule in January, 1956 (R. 357-369). Even though the plaintiff had not included January, 1956 prices in its *prima facie* case, the Bowman exhibits contained the cost curves on which those discounts were based. The exhibits showed that Bowman's product costs, and also its delivery costs, had risen between March, 1955, and January, 1956, but that its prices had declined (R. 345, 364-65).

These exhibits indicated that the differentials between the cost of delivery to chains and independents was slightly larger than indicated by previous tests.[7] This in-

7. The statement on page 16 of the Government brief that there was a change of 25¢ per point in the cost of delivery to chain stores is, of course, erroneous. The reference should be to 25/100ths of a cent.

crease was a reflection of the fact that chain stores use a relatively small percentage of glass containers which require more handling than fiber containers. This so-called "glass *vs.* fiber issue" was the subject of repeated discussion in the trial court (R. 105, 107, 108, 252, 437, 1218, 481, 482). The Government vigorously challenged Bowman's position on this issue, but the Government's rebuttal exhibits confirmed the fact that only 18% of the containers sold to chains were glass as compared with almost 25% of those sold to independents (R. 481-82).

3. In addition to the justification of the discounts on Routes 129 and 1471 and the store-by-store analysis of the Kroger and A&P discounts, Bowman's cost defense included a description of the basic cost studies which were made before the first graduated discount schedule was introduced in 1953 (R. 245-50, 271-310, 328-69). The studies took into account a wide variety of elements affecting the cost of delivery. They repeatedly point out that differences in volume and differences in methods of delivery both materially affect delivery costs.[8]

In developing time standards, the management engineers drew upon their experience in studying 107 different dairies

8. "Delivery is a complex function, principally due to the wide variations in quantity delivered and services performed at each store" (R. 272).

"The combinations of varying cost rates, order quantities, and delivery services were considered in the careful preparation and analysis of cost data to formulate an equitable discount plan" (R. 274).

"The cost calculations show that the lower net prices (higher discounts) to the chain store outlets on Routes 129 and 1471, when compared individually to other stores on those routes do not exceed the effect of cost differences resulting from *greater volume and fewer delivery services*" (R. 329. Emphasis added).

"As long as the store receiving the lower net price returns an equal or greater gross margin than the store receiving the higher net price, the cost savings passed on to the former have not exceeded those accruing from greater volume and/or fewer regular delivery services to the chains" (R. 333-34).

involving 2,893 time studies on milk routes in different sections of the country (R. 245), conducted time and motion tests on 33 routes operated by Bowman out of its Elston division, re-studied 22 of those routes a second time, and compared the results of those 55 studies with additional time studies of routes in Bowman's Forest, Englewood and South divisions (R. 247, 252-53, 437, 476).

The studies showed that a relatively minor portion of the driver's time was spent at the plant, in transportation from the plant to the route and in travelling between customers on the route. About 80% of the time of the driver was "service time" spent at various customers' establishments (R. 476). The availability of the driver's time, rather than the capacity of his vehicle, limited the quantity of business which any route could handle, and provided the only common denominator for measuring the many factors that comprise a customer transaction (R. 623-35, 667-68, 1290-95).

Based on the time studies and their experience, the cost experts determined the standard time required to perform each of the various components of the delivery function (R. 286; see also R. 287-98). The way in which service time was spent varied widely among the hundreds of stores served by Bowman (R. 272). Variables to be taken into account included the number of cases, the number of containers, the mixture of glass, fiber and different sized containers, the over-all volume purchased, and the different service requirements of the various stores. The service time included 18 different cost elements, one of which was referred to as "customer services" (R. 286).

In the category of "customer services", the cost studies grouped a number of different activities which were performed with varying frequency depending on the needs or desires of the specific customers. Thus, some of the customer services might be needed only on certain days of the

week,[9] others at the specific request of the customer,[10] others only in certain stores presenting peculiar delivery problems,[11] and others as a routine matter for most stores.[12] Although only about two-thirds of Bowman's customers required such services on a daily basis, the studies concluded that they were a standard part of the delivery function, and that the expense of providing customer service should be included as an element in the cost studies (R. 272, 330).[13]

The calculation of the standard time required for customer services took into account the fact that these services were performed with varying frequency. This was done by dividing the aggregate amount of time required for these services by the total number of units delivered to all stores (R. 528).[14] A standard time per unit was derived which

9. For example, on high-volume days such as Saturdays (R. 556), some stores require: "Call back later in the day to deliver more merchandise if the refrigerated equipment cannot accommodate the entire order at once" (R. 275).

10. "Drive additional distance if store owner requires delivery at a specified time and disrupts regular route schedule" or "Cash checks for store owner, etc." (R. 275).

11. "Leave some merchandise at a refrigerated showcase and deliver remainder of the order to a storeroom" (R. 275).

12. "Rearrange merchandise in showcase so that the earliest dated containers are sold first" or "Check showcase as to quantity of merchandise remaining from previous delivery and advise store owner" or "Remove containers from Bowman's wooden cases and place on shelves in walk-in cooler or arrange in refrigerated showcase" or "Advise and assist owner in arranging dairy products' display" or "Receive daily cash payment for quantity delivered" (R. 275).

13. A Government expert witness acknowledged that such expenses should not be disregarded even though they were optional and not uniformly performed (R. 920).

14. In dividing the aggregate time required for these services by the total units delivered, the units delivered to chain stores were included. Since chain stores do not receive these services and were not charged for them, the units delivered to the chains could have been omitted which would have increased the standard time per unit, and thus increased the cost of these services to independent stores.

permitted the cost of these services to be averaged throughout the entire group of store customers.

Standard time allowances were similarly derived for each of the other elements of the cost of delivery to store customers (R. 286-98). These standard time allowances were then used in establishing the graduated discount schedules (R. 299-310). The validity of the Bowman discount schedules, and the studies on which they were based, have never been challenged insofar as they apply to independent stores (R. 900). No contention has been made by the Government that the graduated discounts were not fully justified by cost savings.

The same standard time allowances and cost studies were also applied to chain stores. However, the cost studies recognized that three Bowman customers (Goldblatt's, A&P and Kroger) did not require customer services or daily cash collections. In calculating the discounts which could be justified at any volume level on a "chain store transaction (or a transaction with any other group of stores receiving similar limited service)", the cost studies excluded the cost elements that did not apply to such transactions (R. 333).

Although the problem of justification which was posed by the Government's *prima facie* case involved a comparison of sample chain stores with sample independents, the Bowman cost studies repeatedly pointed out that chain stores were merely an example of a broader category. Any store, or group of stores, purchasing in comparable volume and requiring the same limited services, would be in the same cost category.[15] The record, however, does not identify any other such stores.

15. "At various volume levels, calculate the maximum available margin for an independent store (*or any other group receiving*

Plaintiff's Objections to the Bowman Cost Studies.

Prior to the entry of the pre-trial order containing Bowman's cost defense, the cost studies, together with the underlying data on which they were based, were submitted to the Government for review and analysis (R. 97). The parties then identified their areas of disagreement with respect to the studies (R. 250-52) and introduced detailed material pertaining to the areas of dispute (R. 252-57, 522-40, 623-35, 414-40, 469-518).

By identifying plaintiff's objections to the cost studies, the parties were able to avoid encumbering the record with the voluminous underlying data which might otherwise have been required to establish the admissibility of the exhibits placed in the record, or to prove the statements and calculations set forth in those exhibits. The parties also agreed that the ultimate conclusion of whether or not the cost defense should be sustained would depend on the resolution of the areas of disagreement which were identified by stipulation (R. 111, 114-16, 250-52). This agreement made it unnecessary for Bowman to develop any additional evidence, except to the extent necessary to rebut the plaintiff's specific objections.

At the pre-trial conference on March 7, 1957, after the plaintiff's objections had been identified, the following colloquy took place:

> "Mr. Stevens: Your Honor, if I may make this observation? As I understand it, those three objections, they are not to the admissibility of the cost.

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equally extensive delivery services) and a chain store (or any other group receiving equally limited delivery services)" (R. 284).

"With maximum available margin determined for chain stores *or other limited service groups* • • •" (R. 278).

"At any volume point along that line, the gross margin on the chain store transaction (*or transaction with any other group of stores receiving similar limited service*) is the same as the gross margin on an independent store transaction" (R. 333) (Emphasis added throughout this footnote).

The Court: They go more to the weight.

Mr. Stevens: They go to the ultimate conclusion of whether or not this is a sound cost analysis and I think if we prevail in this case—

The Court: As to admissibility.

Mr. Stevens: Of course. As I understand the Government's position if we prevail on the issues which separate us now they would accept the fact that our defense should be sustained. I think it went that far and I think we made the contrary agreement if we failed on those issues that this defense would not be sustained.

Mr. Long: I think that is right and fairly well stated.

The Court: Let it be so understood and you argue on those three points in the briefs. If you prevail then this pretty well sustains your defense.

Mr. Stevens: That was my understanding.

The Court: Very good. Is that yours?

Mr. Long: Yes.

The Court: It is so understood then" (R. 111; see also R. 114-16).

Paragraph 28 of the pre-trial order, which was thereafter entered, stated that the plaintiff made three objections to Bowman's cost studies: (1) that only Elston division routes were used for the time studies; (2) that certain division expenses should not have been apportioned on the basis of drivers' time; and (3) that the cost studies omitted an analysis of central office overhead (R. 250-51). Except for these three objections, and one additional point based on the "glass vs. fiber" issue, it was expressly agreed that:

> "* * * Plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case" (R. 252).

Immediately prior to the entry of the pre-trial order, Government counsel expressed concern about the language

of paragraphs 28, 29 and 31, stating that he felt that the order should merely identify the Government's three "principal" objections to the studies (R. 227-28). Bowman objected to this suggested change on the ground that it might then have to come forward with additional evidence (R. 229; see also R. 231). It was then explained that the Government desired to support these objections with detailed exhibits as a part of its rebuttal, and wanted "to reserve the right to raise the *legal question* as to whether or not Bowman's cost studies are within the scope of the meaning of the section of the Clayton Act" (R. 229-32. Emphasis supplied).

The Court described the Government's reservation as "purely argumentative" (R. 230), stated that he wanted to "hold the record as low as I can" (R. 230) and added that "we had agreed on [paragraph 28] heretofore * * *" (R. 231). At the conclusion of the colloquy, the order was entered without inserting the word "principal" which the Government had requested.

Thereafter the parties submitted voluminous additional data on the specific objections to the cost defense reserved by the Government in paragraphs 28, 29 and 31 of the pre-trial order (R. 252-57, 522-40, 623-35, 414-40, 469-513). The reserved "legal question" was identified in the Government's post-trial reply brief. The question there argued was whether or not customer services are a "method of sale or delivery" within the meaning of the cost proviso. This question is not raised on this appeal.

One of the rebuttal exhibits offered in connection with the "glass vs. fiber" issue indicated that the average chain store purchased over 500 points per day while the average independent purchased 56 points per day (R. 481-82).[16] This same exhibit indicates that Bowman served

16. The A&P stores which Bowman was serving in 1955 were approximately the same size as the Kroger stores (R. 335-36).

four independent customers purchasing over 400 points per day. The Government relies heavily on these large independents in its argument in this appeal (Br. 32-35). But the record does not show whether these stores are in the "Chicago area", as defined in the complaint (R. 481). Nor does the record indicate what discounts were paid to these stores.

The Government's rebuttal data, offered in connection with the objection concerning apportionment of certain expenses on the basis of drivers' time, included an exhibit which refers to the frequency of the receipt of customer services by independent stores at various volume levels (R. 480). This exhibit shows that customer services were provided to large independents on a daily basis, but were provided less frequently to small independents. The Government contended, and offered further exhibits to show, that Bowman had not correctly calculated the charge for customer service time (R. 437, 463-65, 477-79). Thereafter, in its sur-rebuttal, Bowman pointed out that the Government had failed to take into account the varying frequency of the performance of customer services, particularly for the small independents, and that with the irregular frequency taken into consideration, a proper charge for this cost element had been calculated (R. 524-28).

The Government asserts that Bowman has conceded that some independents did not take customer services (Br. 13, 31). This is not correct. It is true that some independents do not take customer services *every day*. However, neither Bowman nor the Government ever identified a single independent store which did not take these services at all (R. 526). The performance of customer services for the sample independents identified in the plaintiff's *prima facie* case has never been disputed.

SUMMARY OF ARGUMENT.

In the introduction to its argument, the Government identifies the one so-called "undisputed fact" on which its entire appeal is predicated. This "undisputed fact" is the assumption that Bowman sells to certain independents who are exactly like chain store units "in every way relevant to costs" (Br. 21-22). Far from being an "undisputed fact", the assumption is completely without basis in fact. The record shows differences in both quantity and method of delivery which are significant. The *largest* independent store identified in the record is about half the size of the *average* chain store. Moreover, the evidence affirmatively shows that the method of delivery to *all large independents* is different from, and more costly than, the method of delivery to chains. In short, the Government's entire argument against Bowman is based on a false assumption.

I. Plaintiff's *prima facie* case of price discrimination rested on evidence of price differentials among nine selected sample stores. Bowman met the *prima facie* case "thus made" by proving that the price differentials among all of the sample stores were fully justified by cost savings on a store-by-store basis. Under the statute, this was a sufficient defense to the plaintiff's case.

II. The Government claims that the question of law raised by the record is whether Bowman can cost justify greater discounts to chain stores than to independent stores where the stores operate identically in every cost saving respect. To support this question, the Government suggests that a handful of large unidentified independents referred to in its rebuttal data may have used the same method of delivery as chain stores. However, the rec-

ord affirmatively shows that all large independents received a different and more costly method of delivery than chain stores. Moreover, the Government never proved any of the requirements for a *prima facie* case of discrimination against any of these unidentified stores.

III. The Government's objections to the Bowman cost studies were limited by pretrial order. The question now argued by the Government was not preserved in that order.

IV. The different prices charged by Bowman to its customers reflected cost savings resulting from differences in quantities purchased and also from differences in methods of delivery. Both cost factors were real and significant, and fully justified the classification of Bowman's customers. There is no evidence that any Bowman customer was improperly classified in terms of these cost factors.

V. Under the cost proviso to Section 2(a) of the Robinson-Patman Act, a seller may classify customers on the basis of *actual* cost differences. The proviso does not require the seller to prove that these actual cost differences were "necessary" as to every individual purchaser in each class.

VI. An appraisal of the entire case shows that the entry of the injunctive relief requested by the Government is unwarranted.

ARGUMENT.

I. BOWMAN COST JUSTIFIED ALL OF THE PRICE DIFFERENTIALS IN THE GOVERNMENT'S PRIMA FACIE CASE.

Under Section 2(b) of the Robinson-Patman Act, a seller charged with price discrimination has the burden of rebutting "the *prima facie* case thus made" by the plaintiff. In *Automatic Canteen Co.* v. *F. T. C.*, this Court concluded that this statutory language makes "it clear that ordinary rules of evidence [are] to apply."[17] 346 U. S. 61, 78 (1953). The statutory burden of rebutting the case "thus made" is consistent with the ordinary rule of evidence that a defendant's rebuttal need be no broader than the scope of the *prima facie* case established by the plaintiff.

Plaintiff's *prima facie* case was confined to nine carefully selected grocery stores. The selected stores included exceptionally large independent stores and exceptionally small chain store units.[18] Presumably the plaintiff selected examples of price differentials which it believed would fairly test the validity of Bowman's discounts. For no

17. The Court noted the following comment of Congressman Patman in describing the Section 2(b) rule as to the burden of proof: "'It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there.' 80 Cong. Rec. 8231." 346 U. S. at 78, n. 20.

18. The average independent store purchases 56 points per day, and over 98% of the independents purchase less than 200 points per day (R. 481, 529). The selected independent stores relied upon by the Government in its *prima facie* case purchased over 200 points per day (R. 61-63, 72-74). In contrast, the average chain purchased over 500 points per day, but none of the selected chain stores purchased over 360 points per day (R. 482, 62-63).

evidence was offered to establish a *prima facie* case as to any other stores served by Bowman.

Without resorting to any classification of store customers, Bowman tested the cost of serving each selected independent store against the cost of serving each selected chain store outlet (R. 328-48). These tests showed that the price differentials to these stores when compared on an individual store-by-store basis were fully justified by cost savings (R. 329).

In addition, Bowman tested the cost of serving each store in the Kroger chain (and also in the A & P chain) against the cost of serving independent stores purchasing at all volume levels (R. 333-36). These additional tests disclosed that the discounts granted to the entire Kroger chain and to the entire A & P chain did not exceed the sum of the discounts that would have been allowable to the individual chain store units (R. 335-36).

Bowman's cost defense unquestionably rebutted the "*prima facie* case thus made" by the Government. For if the nine stores selected by the Government were sufficiently representative to make out a *prima facie* case under the statute, then Bowman's justification of prices to those stores was equally sufficient to rebut that case.[19] Significantly, the Government's brief comments at length concerning nine admittedly *hypothetical* stores (Br. 27-30), but makes no reference at all to the facts concerning the nine *actual* stores which constituted the subject matter of its *prima facie* case.

19. See *F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 553 (1960); *F. T. C.* v. *Standard Brands, Inc.*, 189 F. 2d 510, 515 (2d Cir. 1951); *Samuel H. Moss, Inc.* v. *F. T. C.*, 148 F. 2d 378, 379, 380 (2d Cir.), *cert. denied*, 326 U. S. 734 (1945).

II. THE QUESTION OF LAW RAISED BY THE GOVERNMENT ASSUMES A PRIMA FACIE CASE NEVER PRESENTED.

The question of law which the Government now seeks to raise "is whether the * * * greater discount to a chain store operating identically to an independent can be 'cost-justified' by treating the chain store and the independent as members of different classes of customers although they are individually alike in every way relevant to costs" (Br. 22). It is thus assumed that one or more independent stores operated identically to the chain stores in relevant cost saving respects and that the Government made out a *prima facie* case as to these stores. There is no record support for this assumption.

At the trial, the Government's rebuttal exhibits on the "glass *vs.* fiber" issue indicated that chain stores served by Bowman purchased an average of over 500 points per day in contrast to the average independent purchase of 56 points per day (R. 481-82). One of these exhibits indicated, however, that Bowman served four independents which purchased over 400 points per day (R. 481). Apparently it is these large independent stores that the Government assumes operated "identically" to the chain stores served by Bowman.

No proof was offered to show that these independent stores in fact operate identically to chain stores in cost saving respects. The record affirmatively shows that all independents of that size received daily customer services, which chain stores did not receive (R. 480, 526, 1197). Indeed, the uncontradicted evidence shows that every independent purchasing 180 points or more per day received customer services (R. 480).

Moreover, the Government never proved a *prima facie* case as to any of the large independents referred to in

its rebuttal exhibits.[20] None of these stores was identified in the record. The record does not even disclose whether any of them were located in the "Chicago area", as defined in the complaint (R. 4).[20] There is no evidence to show whether the net prices paid by these stores were higher, lower or the same as the net prices paid by chain stores served by Bowman. Nor does it appear whether any of these stores were competing with, or even located near, a chain store unit served by Bowman.

The burden imposed by the Government's *prima facie* case cannot be enlarged by rebuttal data which does not satisfy any of the requirements for a *prima facie* case. Nor can it be contended that a *prima facie* case as to nine selected stores imposed a burden upon Bowman to justify hypothetical cases of price discrimination that might or might not exist, and might or might not have competitive significance (Br. 38). As this Court has pointed out, "price differences constitute but one element of a § 2(a) violation." *F. T. C.* v. *Anheuser Busch, Inc.*, 363 U. S. 536, 553 (1960).

The Federal Trade Commission provided a complete answer to the Government's theoretical argument in *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948), *rev'd in part on other grounds*, 191 F. 2d 786 (7th Cir. 1951), *cert. denied*, 344 U. S. 206 (1952). The Commission there stated:

> "It has been urged that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket. *This*

20. The rebuttal exhibits referring to these stores were taken from data compiled from all of Bowman's store divisions (R. 181), which serve the various outlying areas as well as the Chicago Area itself (see e.g. R. 335-6).

argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. But there has been no such showing in this case. Any annual quantity system of pricing is vulnerable to this argument and it may be controlling where it has practical aspects. *Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.*" (44 F. T. C. at 394. Emphasis added.)

III. THE QUESTION OF LAW NOW RAISED BY THE GOVERNMENT WAS NOT PRESERVED IN THE TRIAL COURT.

In the trial court, the Government stipulated that the validity of Bowman's cost defense should turn on the evidence submitted on specific objections made by the Government against the cost studies (Statement at 12-14). This stipulation, incorporated in a pre-trial order, was made after the Bowman cost studies and the underlying bulk data supporting the conclusions therein had been subject to intensive review and analysis by the Government for a period of several months (R. 97, 250-52). Because of this stipulation, most of the underlying data supporting the basic cost studies was not placed in evidence, and the additional evidence developed by Bowman was limited to these issues (R. 328-69).[21]

The trial court, and the parties, thus followed the procedure recommended by the Judicial Conference as set forth in the Handbook For Procedure in Antitrust and Other Protracted Cases (1951).

"Whatever may be the objections and difficulties to

21. This restriction on the submission of underlying bulk data to evidence relating to disputed matters is consistent with the recommended procedure for protracted cases set forth in the Handbook for Procedure in Antitrust and Other Protracted Cases, 13 F. R. D. 62, 78 (1951).

> the specification of issues in ordinary actions, the necessity for such specification in the cases with which this report is concerned is so great as to require that it be done no matter what the objection or difficulty. Unless it is done, the hearing cannot be confined to its proper limits, counsel are at a loss as to their position, and the judge is unable to relate the evidence to issues which are in dispute or to limit it to that which is relevant."
>
> * * * * *
>
> "Pleadings will not serve to particularize issues sufficiently in these cases, and motions for particulars will not serve that purpose. Such particularization must be achieved by informal conferences between judge and counsel well in advance of a possible trial date." 13 F. R. D. at 66-67.

The issues having been framed by pre-trial order, it is clear that the terms of that order controlled subsequent proceedings in the litigation. Thus, the Handbook states:

> "The issues as determined and framed in informal conference should be incorporated in an order of the court which should control the proceedings thereafter, as Rule 16 provides." *Id.* at 68.

And, Rule 16 of the Federal Rules of Civil Procedure provides in part that:

> "The court shall make an order which recites the action taken at the conference * * * and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. * * *"

The pre-trial order limiting the issues was never modified. The arguments now urged by the Government are

admittedly predicated on objections other than those preserved by the pretrial order.[22]

The federal courts have held that a pre-trial order framing the issues may not be disregarded on appeal.[23] Unless pre-trial orders limiting the issues in protracted litigation are honored in subsequent phases of the litigation, the salutary purposes of Rule 16, as implemented by the recommended procedures in the Handbook, will be substantially frustrated.

IV. BOWMAN CLASSIFIED ITS CUSTOMERS SOLELY ON THE BASIS OF COST FACTORS WHICH WERE SUBSTANTIAL AND REAL.

The Government repeatedly asserts that Bowman arbitrarily classified its customers as chains or independents rather than on the basis of substantial cost factors involved in dealing with store customers. Because of this asserted classification, the Government argues that no independent store could ever qualify for the higher discounts granted to Kroger and A&P.

The record demonstrates and the District Court found, however, that Bowman established separate classes of purchasers solely on the basis of substantial and real cost

22. The Government contends that it reserved the right to argue the basic invalidity of the cost defense by the general reservation applicable to all pre-trial orders that "the introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff * * * that the evidence sought to be introduced is immaterial or irrelevant" (Br. 41-42). This general reservation only reserved the right of the Government to argue weight, materiality and relevancy of evidence offered on these specific objections. It certainly did not reserve the objections to the cost studies which are now raised by the Government.

23. *Fowler* v. *Crown Zellerbach Corp.*, 163 F. 2d 733 (9th Cir. 1947); *Washington* v. *General Motors Acceptance Corp.*, 23 Fed. Rules Serv. 16.32, Case 2 (S. D. Fla. 1956); *cf. Meadow Gold Products Co.* v. *Wright*, 278 F .2d 867 (D. C. Cir. 1960).

saving factors (R. 570). Although the only stores identified in the record which qualified for the higher discounts were chain purchasers, there is no evidence to support the contention that independent stores could not have qualified for these higher discounts.

Bowman's cost studies repeatedly explain that cost savings result from a combination of "greater volume and fewer delivery services" (R. 333-34, 272, 274, 329).[24] In the case of Kroger and A&P, both cost saving factors were present and significant, and justified placing these purchasers in a higher discount group (R. 276-79).

The difference in purchase volume between these chain purchasers and the independent stores was *in itself* sufficient to justify placing nearly all of the independents in a lower discount group. The chain stores purchased an average of over 500 points per store on a daily basis (R. 482).[25] In contrast, the average independent purchased only 56 points per day (R. 481).[26] Because of the substantial cost savings resulting from large quantity pur-

24. The Government acknowledges that a "combination" of factors can be used to support separate classes (Br. 31).

25. The letter to A&P granting its discount in 1954 discloses that the discount was based on a comparison of the purchases of its stores and their required delivery services with those applicable to other stores (R. 69). Since the discount was clearly based on anticipated sales and agreed delivery services and since the cost studies confirmed that the chain discounts were in fact fully cost justified on the basis of subsequent purchases, the fact that the letter did not in terms require specific volume purchases is irrelevant under the cost proviso.

26. The Government states that the "Question Presented" is whether a seller "can cost-justify * * * discrimination simply by showing that the average cost of sales and delivery to all chain stores is lower than the average cost of sales and delivery to all independent stores" (Br. 3). Bowman did not base its prices, or justify its differentials, on the basis of any such averaging of the costs of serving independents. If it had, a *differential* of 12%, or 1% greater than the total chain *discount*, could have been sustained solely on the basis of volume (R. 346).

chases of these chain stores, Bowman could have justified its lower discounts to at least 96% of the independent stores *solely* on the basis of the volume of each independent store, without giving any consideration to the costs incurred in providing customer services and making daily cash collections.[27]

These additional cost factors were significant, however, in determining the discount group in which the large independents should be placed. It is undisputed that all large independents in fact took customer service (R. 526, 480), and that chain stores did not take such services (R. 1197). The combination of differences in volume and method of delivery justified all of the price differentials between the groups.[28]

Even though such services were not performed for all small independent stores on a daily basis, Bowman's cost experts concluded that they were required by independent stores, and thus represented a cost factor which should be taken into account along with volume in establishing the basic discount schedule (R. 272-75, 330). The soundness of this conclusion cannot be doubted; and indeed, the Government has not questioned the legality of the schedule insofar as it applies among the independent stores at

27. See R. 347 which shows the actual differential between independent stores at various volume levels and the average chain store of over 500 points and R. 346 which shows the available margin for chain stores at all volume levels. The difference between the available margin for the average chain and the margin for chain stores at lower volume levels represents the discount differential which could have been allowed between the chain purchasers and independent stores at each volume level solely on the basis of volume. See also R. 481 which can be used to compute the percent of independent stores operating at each volume level.

28. Bowman's cost studies revealed that the chain discounts were fully justified on a store by store basis when compared with the costs of serving independents at various volume levels (Statement, 5-8).

different volume levels (R. 900).[29] Nor does the Government question that these cost factors justify the creation of separate classes of customers.

The Government argues, instead, that Bowman's classification was not made in terms of these cost factors but rather in terms of store ownership. This is not true. The record clearly shows that Bowman's cost experts established and defined customer groups in terms which would permit any store to qualify for the higher discounts.

Bowman's cost experts expressly stated in their basic manual that the chain store category should include "any other group receiving equally limited delivery services" (R. 284; see also R. 278, 333). The higher discount group was frequently referred to in the studies as the chain store category for the reason that the only examples of that group which were identified were chain stores. If there were any independent super markets in the Chicago area whose purchase volume and method of delivery were comparable to Kroger's,[30] then presumably these stores would also receive the higher discounts. Whether there are in fact any such stores in the Chicago area is not revealed by the record, and there is no claim that any sample store identified in the *prima facie* case was improperly classified.

Since Bowman's customer classes were in terms based solely on real and significant cost saving factors, and since the record does not identify a single store customer that was improperly classified, the Government's argument that Bowman arbitrarily placed its independent customers in a lower discount group on the basis of store ownership is without merit.

29. In fact, a Government expert acknowledged that such expenses should not be disregarded even though they were optional and not uniformly performed (R. 929).

30. The record reveals that Bowman lost both the A&P and Goldblatt accounts several years ago (R. 540).

V. THE COST PROVISO TO SECTION 2(a) DOES NOT REQUIRE THAT CLASSIFICATION OF PURCHASERS BE BASED SOLELY ON "NECESSARY" DIFFERENCES IN DELIVERY COSTS.

In portions of its brief the Government acknowledges that Bowman's lower prices to the three chain purchasers were in fact based on actual cost saving factors (Br. 31, 36). It makes the ingenious contention, however, that these cost saving factors do not justify placing different purchasers in different discount classes unless the higher costs of serving the lower discount class were shown to be "necessary"[31]

The Government would thus re-write the cost proviso to read as follows:

> "Provided, That nothing herein contained shall prevent differentials which make only due allowance for *necessary* differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." (Italicized language added.)

There are many sound reasons why this Court should not be asked, in effect, to re-write what Congress has written. Although it may not be proper to refer to the "plain meaning" of any part of the Robinson-Patman Act, the cost proviso in terms contemplates actual cost differences without any qualification, and the legislative history is consistent with this view.[32] Moreover, this Court has already stated that a discount differential "can be justified by a seller who proves that the full amount of the discount

31. The Government does not appear to rely upon this argument in its case against The Borden Company (Compare the Government's brief herein, p. 31 with its brief against Borden, p. 36).

32. See H. Rep. No. 2287, 74th Cong., 2d Sess. at 9-10; S. Rep. No. 1502, 74th Cong., 2d Sess. at 5.

is based on his actual savings in cost." *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 48 (1948).

By what standard does the Government ask the courts to determine whether or not a method of delivery is a "necessary" difference between customers? The fact that one method may be employed for a few customers, and a different method for hundreds of others, would seem to indicate that the seller has done what is "necessary" to secure the patronage of the different types of customers with whom he deals. Since the wants of the buyers determine what services must be supplied, the mere fact that costs are actually incurred on a widespread basis establishes their "necessity".

Even though a combination of fewer delivery services and greater volume justified placing chains in a higher discount group, the Government asserts that neither cost factor *in itself* was a "necessary" difference between independents and chains. It is argued that Bowman could only show that the higher prices charged to the independents were necessary by affirmatively justifying the chain discounts against every single independent store.

Such a requirement would rob classification of its value, particularly in cases in which price differentials are based on a combination of cost factors. It is indeed the antithesis of the Congressionally-approved concept of classification,[33] and is directly inconsistent with prior court and Federal Trade Commission decisions,[34] and with the recom-

33. The legislative history of the Robinson-Patman Act affirmatively indicates that Congress intended to permit price differences based on cost savings between different classes of customers. See H. R. Rep. No. 2287, 74th Cong., 2d Sess. at 10; Hearings on H. R. 8442, H. R. 4995 and H. R. 5062 Before the Committee on the Judiciary of the House of Representatives, 74th Cong., 1st Sess. at 106.

34. See *Reid* v. *Harper and Brothers*, 235 F. 2d 420, 422 (2d Cir. 1956); *American Can Co.* v. *Russellville Canning Co.*, 191 F.

mendations of the Federal Trade Commission's Advisory Committee on Cost Justification under the Robinson-Patman Act. The Committee's *Cost Justification Report* (1956) states:

> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale or delivery in dealing with certain customers." (at 11.)[35]

The dangers inherent in an unduly restrictive interpretation of the cost proviso have frequently been identified.[36] These dangers should persuade the Court that a seller's right to pass cost savings on to his customers in the form of lower prices should not be confined any more narrowly than is required by a literal reading of the cost proviso. Interpolation of the word "necessary" would effectively destroy the usefulness of classification and

2d 38, 59 (8th Cir. 1951); *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948), *rev'd in part on other grounds*, 191 F. 2d 786 (7th Cir. 1951) *cert. denied*, 344 U. S. 206 (1952).

35. The Government's three cost experts employed in the trial court were members of this Advisory Committee and signed the Report. Each of these experts reaffirmed his agreement with this quoted statement in this proceeding (R. 671, 832, 943-44).

36. *Automatic Canteen* v. *F. T. C.*, 346 U. S. 61, 68 (1953); Report of The Attorney General's National Committee to Study The Anti-Trust Laws, 71-74 (1955); Handler, Recent Anti-Trust Developments, 71 Yale L. J. 77, 103-04 (1961); Rowe, Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman, 60 Yale L. J. 929, 962-64.

would therefore be inconsistent with the broad construction indicated by the words "due allowance."

The Government further argues that even a showing of actual cost differences for every single price differential is not sufficient to prove that cost differences are "necessary". It is said that the seller must also prove the cost saving factors were equally available to all buyers (Br. 35). Interpolation of the word "necessary" is thus a device for incorporating into the cost proviso of Section 2(a) the "proportionally equal" requirements of Sections 2(d) and (e). This Court has held, however, that the requirements of these Sections are not to be commingled. *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55 (1959). The competitive injury requirement of Section 2(a) is not included in Section 2(d) or (e), and cost justification provides no defense for violation of these sections. *Id.* at 70-71. Thus, if Bowman, or any other seller, were charged with a violation of the proportionally equal requirement of Section 2(d) or (e), cost justification would be entirely irrelevant to the charge. No such complaint has been made against Bowman, and no evidence has been offered by either party on the issue of availability of lower prices to large volume independents who might decide not to take the more extensive delivery services.[37]

Without evidence either way on this question, it is manifestly unfair for the Government to assume that no independent could ever qualify for the same discount as a chain. Bowman's customer groups are expressly defined

37. Necessarily the question of availability of lower prices would arise only where the rejection of the more extensive delivery services would require a lower price in order to justify a differential with respect to a competing higher discount store. For it is clear from the statute and its legislative history that cost savings are not required to be passed on to purchasers. See Hearings on H. R. 8442, H. R. 4995 and H. R. 5062 Before the Committee on the Judiciary of the House of Representatives, 74th Cong., 1st Sess. at 106.

to permit this possibility. Moreover, every customer who was shown by the record to take only limited services received a discount properly reflecting the lower cost of delivery. These customers included not merely Kroger and A&P, each of which received an 11% discount, but also Goldblatt's which received 8½% (R. 62-63). There is no reason to make the arbitrary assumption that Bowman would refuse to recognize cost saving factors which would justify a special price for a giant supermarket operated by an independent.[38] Nor can it be assumed, without support in the record, that Bowman foisted services on customers who did not want them, or that Bowman charged customers for services they did not receive.

Whether such evidence was omitted because it is unavailable, or because the theory of the Government's case changed after the appeal was taken, is of no importance. In either event, the record does not support the Government's position and no violation of Section 2(d) or (e) of the Robinson-Patman Act was alleged. Had such a violation been alleged, the Government would have had the burden of proving its charge. Without making any such charge, the Government in effect is arguing that Bowman had the burden of disproving it. Since the entire cost defense would have been irrelevant in connection with issues raised by a charge under Section 2(d) or (e), arguments relevant to such unalleged charge are not appropriately made in connection with Bowman's cost defense.[39]

38. Such a price, like the Goldblatt, Kroger and A&P prices, would have to be paid on the basis of the graduated discount schedule in the sense that it should be no lower than would be justified by comparison with that schedule.

39. See Haslett, Price Discriminations and Their Justifications Under The Robinson-Patman Act of 1936, 46 Mich. L. Rev. 450, 473 (1948).

VI. NO NEED FOR EQUITABLE RELIEF HAS BEEN SHOWN.

The Government has failed to prove that Bowman granted a discount to any store which was not cost justified. As is pointed out in earlier sections of this brief, the Government does not dispute the fact that Bowman justified the discount differentials between each of the selected stores in the *prima facie* case. Nor does the Government contend that the graduated discount schedule is not based on demonstrated cost savings, insofar as it applies to all independent stores. Instead, the Government rests its case on an unwarranted claim that Bowman based its discounts on store ownership, and on hypothetical instances of possible discrimination which *might* not be fully justified by cost savings.

Even assuming that there might be a few examples of discount differentials that are not fully cost justified among the 3,270 customers allegedly served by Bowman in the Chicago area, this possibility is not a sufficient ground for equitable relief. There is no reason to believe that the unjustified portion of these possible differentials could reasonably be expected to cause any injury to competition.[40]

40. The Cost Justification Report of the Federal Trade Commission Advisary Committee specifically recommended that the words "due allowance" in the cost proviso be flexibly interpreted as requiring only a "reasonable allowance for cost differences based on sound accounting and pricing principles" and "should not be construed in every case to require full and complete cost justification of a price differential" (at 6).

Similarly, the Report of the Attorney General's National Committee to Study the Antitrust Laws recommended:

> "We advise a liberal interpretation of the statute's 'due allowance' criterion as enacting a reasonable de minimis concept to exonerate a challenged price even if an attempted cost defense falls short of 'justifying' it by a fractional amount. Similarly, *realistic adaptation of this concept should validate only partially 'justified' price concessions whenever the 'unjustified' portion of the differential alone could not reasonably cause 'injury' sufficient to bring the Act into play.*" (at 174-75. Emphasis added.)

No such showing has been made. Indeed, in Bowman's view the Government did not make out a *prima facie* case because the competition between the sample stores was, at most, negligible (Statement, 4-5). Certainly there has been no showing of any adverse effect on competition among Bowman's customers. Moreover, the fact that Bowman has lost the business of the A&P and Goldblatt chains suggests that Bowman's discounts were not high enough to keep it competitive on the primary level.

Great weight should be given to the Chancellor's conclusion that equitable relief is not warranted on the basis of the evidence presented. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The trial court found that Bowman's discounts were adequately justified and were based solely upon a good faith effort to reflect cost differences in dealing with its customers (R. 570)[41]. After some 11 years of litigation, the Government offers no more than a mere possibility that a few unidentified differentials may not have been fully justified among all of the discounts granted to Bowman's customers. This possibility is not sufficient to justify equitable relief.

The decree suggested by the Government, in itself, shows the absence of any need for relief. The Government suggests that effective relief would consist of a simple decree enjoining Bowman from giving effect to any discount policy "based upon a classification of its customers into chain stores or independent stores" (Br. 44). It would seem that a classification which gave appropriate recognition to vol-

41. Price differences which are based on such good faith efforts to reflect cost differences should be given great weight, as the courts, Federal Trade Commission and commentators have uniformly recognized. See, *e.g.*, *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 59 (8th Cir. 1951); *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 394 (1948), *rev'd in part on other grounds*, 191 F. 2d 786 (7th Cir. 1951), *cert. denied*, 344 U. S. 206 (1952); Cost Justification Report, at 11, 22 (1956); Report of the Attorney General's National Committee to Study the Antitrust Laws, at 174-75 (1955).

ume differences, and which permitted stores receiving equally limited delivery services to be placed in the same category as chains, would comply completely with the proposed decree. The Bowman cost studies already establish precisely this type of classification (R. 278, 284, 333). Since there is no evidence and no reason to assume that Bowman has not followed its own cost studies, there is certainly no basis for granting the injunctive relief requested by the Government.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that this litigation should at long last be terminated by an affirmance of the judgment of the District Court.

Respectfully submitted,

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